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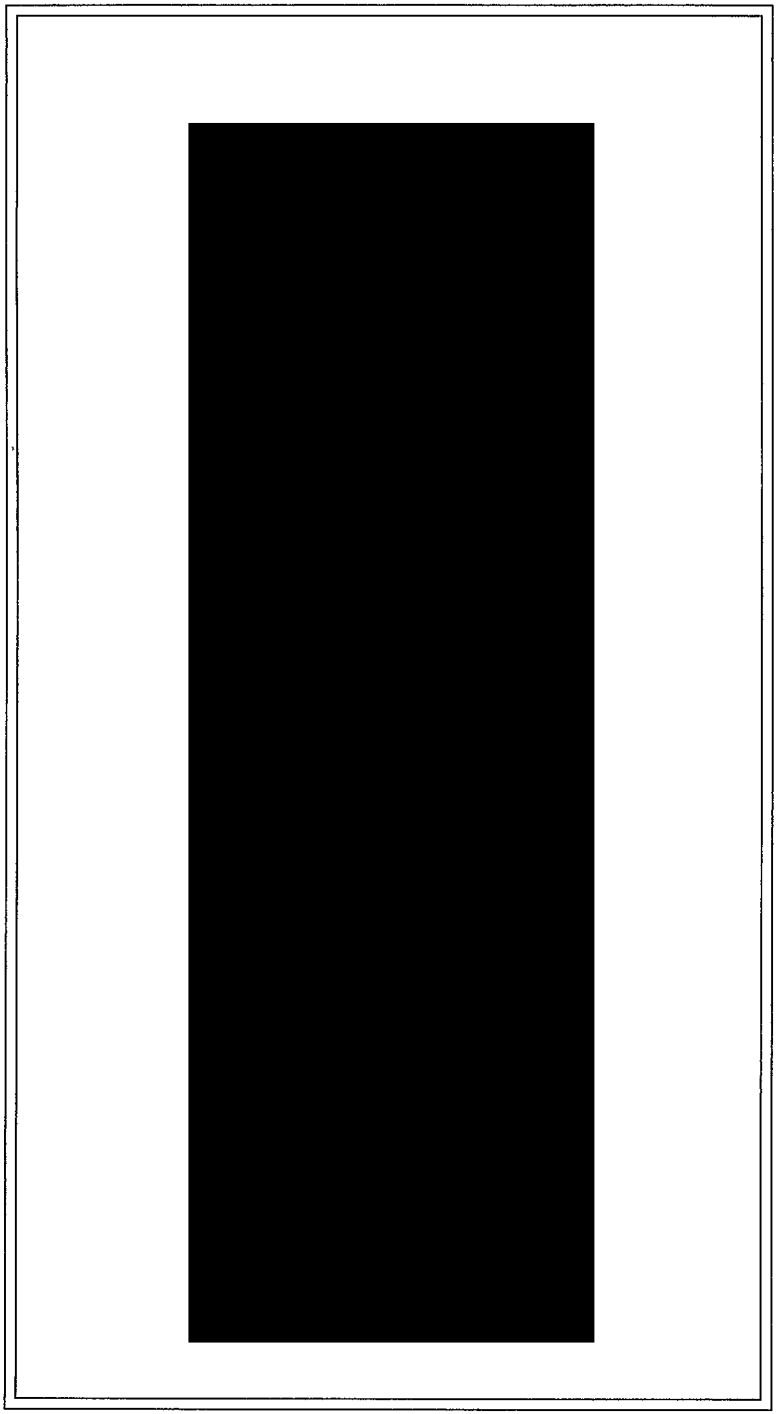

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FORREST CONSTRUCTION, INC. *v.*
John and Claudia MILAM, *et al.*

00-830 43 S.W.3d 140

Supreme Court of Arkansas
Opinion delivered May 17, 2001

Phillip J. Taylor, for appellant.

Robertson, Beasley, Cowan & Ketcham, PLC, by: *Kenneth W. Cowan*, for appellees.

W.H. "DUB" ARNOLD, Chief Justice. This appeal comes from a chancery decree enjoining appellant from subdividing certain lots and from selling certain lots that had already been subdivided in the Meadowbrook South Addition in the city of Greenwood. The chancellor also refused to enforce a sewer easement over land owned by appellees Donnie and Carol Whitson, and awarded appellees $23,579.65 in attorney fees. Appellant contends on appeal that the chancellor's rulings were erroneous; appellees ask that we dismiss the appeal on the grounds of mootness and lack of standing. We affirm the trial court as to the easement issue but reverse the trial court's interpretation of the restrictive covenants; as such, the court of appeals is affirmed in part and reversed in part.

The appeal was originally heard by the Arkansas Court of Appeals, which denied the motion to dismiss and reversed and remanded the case. *See Forrest Construction, Inc. v. Milam, et al.*, 70 Ark. App. 466, 20 S.W.3d 440 (2000). Appellees then petitioned this Court for review, asserting that the decision rendered by the court of appeals was arguably in conflict with prior holdings of this Court. We granted petition for review pursuant to Ark. Sup. Ct. R. 1-2(e)(ii). When we grant review following a decision by the court of appeals, we review the case as though it had been originally filed with this court. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, ___ S.W.3d ___ (2001); *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999).

In 1993, Forrest Griffith and his wife Gloria acquired title to over 100 acres of land in Sebastian County. The land was later

annexed to the city of Greenwood. In 1994, Griffith began developing the majority of the land into a subdivision called Meadowbrook South. He planned to divide the property into thirty-nine lots. However, before he could plat the subdivision, he sold two tracts by metes and bounds description. One tract was sold to appellees John and Claudia Milam; the other was sold to Melissa and Nelson Brock. Thereafter, Griffith platted the subdivision into lots. On May 4, 1994, he filed a plat with the circuit clerk reflecting thirty-seven lots[1] ranging in size from 1.05 acres to 5.52 acres. The plat was signed by the Griffiths, Milams, and Brocks.

On May 9, 1994, five days after the plat was filed, Forrest Griffith filed a document containing ten restrictive covenants pertaining to the subdivision. The covenants provided, *inter alia*, that all lots were to be used for residential purposes only, that all residences were to have a minimum of 1,600 square feet of living area, and that all lots were to be used for single family dwellings. The document was signed only by Forrest Griffith.

After filing the plat and covenants, Griffith began to market the subdivision as one having estate-sized lots and offering "country living in the city." A few lots were sold in the summer of 1994 by Forrest and Gloria Griffith to various buyers, including appellees John and Claudia Milam and appellees Bill and Donna Dennis. In August 1994, the remaining property in the subdivision was transferred from the Griffiths to appellant Forrest Construction, Inc. After that time, the remaining appellees Maverick and Wendy Trozzi, Rush and Marcia West, Dean and Lena King, Rod and Sherry Hower, Ed and Andria Hawkins, Chris and Debra Honaker, Kenneth and Ann Hamilton, Donnie and Carol Whitson, and Charles and Kathryn O'Brien, purchased various lots in the subdivision.

In June 1996, Forrest Griffith, as president of Forrest Construction, Inc., decided to replat the subdivision by splitting nine of the unsold lots into twenty-two smaller lots. Lot 19 was split into eight lots approximately one-half acre in size, Lots 21 and 22 into three lots approximately three-quarters of an acre in size, Lots 31 and 32 into three lots approximately one and one-half acres in size, and Lots 34, 35, 36, and 37 into eight lots ranging in size from .63 acres to 1.2 acres. The Greenwood City Council approved the

[1] The lots were numbered one through thirty-nine, but the plat contained no lot twenty or twenty-nine.

replatting in September 1996. Thereafter, appellant began making improvements on the lots.

Griffith did not inform the appellee homeowners of his plan to split lots. However, they discovered his intention to do so; and, on February 18, 1997, a number of homeowners, including many of the appellees in this case, filed suit in Sebastian County Chancery Court to enjoin the splitting of lots. Within a few days thereafter, the Greenwood City Council withdrew its approval of the replatting. As a result, the homeowners voluntarily dismissed their chancery action without prejudice. Griffith, meanwhile, pursued judicial review of the city council's withdrawal of its approval. He ultimately obtained relief on May 8, 1998, when the Sebastian County Circuit Court found that the city council's withdrawal of approval had been wrongful.

Following the circuit court's ruling, Griffith began to sell the replatted lots. On August 19, 1998, appellees filed the suit that is the subject of this appeal. They alleged that appellant had split the lots in violation of the restrictive covenants filed in 1994, and they asked that appellant be enjoined from further violations. Appellant defended primarily on the grounds that none of the restrictive covenants expressly prohibited splitting the lots and that appellees' request for relief should be barred by the equitable doctrines of laches, waiver, estoppel, and unclean hands. The case went to trial, and the chancellor found that the restrictive covenant which stated that "all lots are to be used for single family dwellings" prohibited appellant from splitting the originally platted lots. He also found that there was no basis for the application of appellant's equitable defenses. Appellant was permanently restrained from any further splitting of the originally platted lots and from allowing any of the lots already split to be sold unless the lots already had substantial construction on them. It is from this ruling that appellant now appeals.

I. Appellees' Motion to Dismiss

We must first address an issue originally presented by appellees in a motion to dismiss the appeal. The motion concerns events that occurred after the notice of appeal was filed in this case. On September 14, 1999, a decree of foreclosure was entered as the result of a complaint filed by Farmers Bank of Greenwood against appellant. The decree ordered the sale of certain secured property owned by appellant in order to repay over $1,000,000 owed to the bank.

Among the properties that had been pledged as security were Lot 23 in the Meadowbrook South subdivision and seventeen of the twenty-two split lots in the subdivision. On or about October 26, 1999, those lots were in fact sold to Farmers Bank. Appellees argue that, because of the foreclosure sale, the issues in this case are now moot, and appellant has no standing to prosecute this appeal. We disagree.

A. Mootness

We have held that a case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *Dillon v. Twin City Bank*, 325 Ark. 309, 924 S.W.2d 802 (1996). As a general rule, an appellate court will not address moot issues. *Id.* However, we may elect to address moot issues when they raise considerations of public interest or when addressing them will prevent future litigation. *See Stair v. Phillips*, 315 Ark. 429, 867 S.W.2d 453 (1993).

Obviously, this case involves considerations of public interest in that the case involves the use of property in a large subdivision, and the rights of a substantial number of persons will be affected. A ruling on the merits will have the practical legal effect of determining what actions may or may not be taken with respect to the subdivision lots. Additionally, although appellant has purportedly filed a lawsuit in federal court against the City of Greenwood and the Whitson appellees and, according to him, that case has been stayed pending our resolution of this appeal, there is no evidence in the record as to foreclosure by any bank against Forrest Construction nor of the federal lawsuit. As such, we deny the motion to dismiss on mootness grounds.

B. Standing

The appellees further assert that appellant's appeal should be dismissed for lack of standing to prosecute this appeal. We have held that a party has no standing to raise an issue regarding property in which he has no interest. *Nash v. Estate of Swaffar*, 336 Ark. 235, 983 S.W.2d 942 (1999). However, we have also held that a party is an aggrieved party and thus has standing to appeal if the trial court's order has impaired his economic interests. *Sebastian Lake Pub. Util. Co. v. Sebastian Lake Realty*, 325 Ark. 85, 923 S.W.2d 860 (1996).

Even though appellant may have no present property interest in the lots that were replatted, he remains aggrieved by virtue of his liability for attorney fees in the amount of $23,579.65. The chancellor awarded those fees because he found that appellees were the prevailing party below. A reversal of that finding will necessarily entail a reversal of the attorney fee award against appellant. Therefore, we hold that appellant does have standing to prosecute the instant appeal.

II. Merits of the Appeal

A. Interpretation of Restrictive Covenant

Appellant raises several points of error regarding the chancellor's finding that the subdivision covenants prohibit the splitting of the originally platted lots. Chancery cases are reviewed *de novo* on appeal. *Holaday v. Fraker*, 323 Ark. 522, 915 S.W.2d 280 (1996). We do not reverse a chancellor's findings of fact unless they are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Id.*

The chancellor in this case found that the subdivision's general plan of development, the plat showing oversized lots, the marketing of the subdivision by appellant, and the covenant which read, "all lots are to be used for single family dwellings," prohibited the splitting of the subdivision's lots. We disagree and hold that the covenant was neither valid nor effective as executed.

Arkansas Code Annotated § 18-12-103 (1987) states:

> No restrictive or protective covenants affecting the use of real property nor any instrument purporting to restrict the use of real property shall be valid or effective against a subsequent purchaser or owner of real property unless the restrictive or protective covenants or instrument purporting to restrict the use of the real property is executed by the *owners* of the real property and recorded in the office of the recorder of the county in which the property is located.

(Emphasis added.) Here, only Forrest Griffith signed the restrictive covenants document, although he was not the sole owner. As such,

we hold that the covenants are not valid pursuant to Ark. Code Ann. § 18-12-103, as all of the parties did not sign the covenants.

Notwithstanding, even if we had found the restrictive covenants to be valid, we do not find them to be prohibitive of lot-splitting in this case. We have held that we do not favor restrictions upon the use of land, and if there is a restriction on the land, it must be clearly apparent. *Holaday v. Fraker, supra.* Restrictive covenants are to be strictly construed against limitations on the free use of property. *Casebeer v. Beacon*, 248 Ark. 22, 449 S.W.2d 701 (1970). All doubts are resolved in favor of the unfettered use of land. *Id.* However, this rule of strict construction is limited by the basic doctrine of taking the plain meaning of the language employed. *Holaday v. Fraker, supra.* The general rule governing interpretation, application, and enforcement of restrictive covenants is that the intention of the parties as shown by the covenant governs. *Id.*

The covenant primarily at issue in this case, which is covenant number nine, provides simply that all lots are to be used for single-family dwellings. The court of appeals held, and we agree, that, as written, the covenant is directed more toward the type of *use* to which a lot is put rather than to the *size* of a lot. If there had been any intention to restrict the division of lots, such intention could have been clearly and unambiguously expressed in a covenant. *See Shermer v. Haynes*, 248 Ark. 255, 451 S.W.2d 445 (1970). There, in fact, was evidence at trial that, prior to the filing of the ten covenants that now govern the subdivision, a set of twelve covenants was drafted, one of which contained an *express* restriction on the splitting of lots. However, those covenants were not filed. The ten covenants filed, including covenant number nine, contain nothing to make it clearly apparent that the splitting of lots is prohibited.

In addition to basing his decision on the language contained in covenant number nine, the chancellor considered three additional factors: the size of the lots as originally platted, the fact that Griffith advertised the subdivision as having "estate-sized" lots, and the existence of a general plan of development. We hold that the chancellor was in error in finding that these factors impose a restriction against lot-splitting. First, it is generally recognized that no restriction on subdividing lots is implied by the mere filing of a map depicting the lots. *See* Milton Friedman, *Contracts and Conveyances of Real Property*, § 4.13(b) (4th ed. 1984). *See also* 20 AM. JUR. 2d *Covenants*, § 158 (2d ed. 1995); *Hickson v. Noroton Manor, Inc.*,

118 Conn. 180, 171 A. 31 (1934); *Bersos v. Cape George Colony Club*, 4 Wash. App. 663, 484 P.2d 485 (1971).

Second, the fact that the lots in the subdivision were marketed as being estate-sized does not, in and of itself, imply a restrictive covenant against splitting lots. Appellees cite us to no case, and our research has revealed none, in which the representations in an advertisement were used to create a restrictive covenant. In any event, the split lots were still sizeable, ranging from .5 to 1.2 acres.

Third, the fact that a general plan of development existed in the subdivision is, also, not evidence of a restrictive covenant against lot-splitting. The importance of a general plan of development is that, in its absence, a restrictive covenant cannot be enforced. *See Constant v. Hodges*, 292 Ark. 439, 730 S.W.2d 892 (1987). A general plan of development cannot *create* a restriction. *See Ray v. Miller*, 323 Ark. 578, 916 S.W.2d 117 (1996).

The chancellor relied upon the case of *Constant v. Hodges, supra,* in making his decision. While *Constant* has many similarities to the case at bar, it is distinguishable. In *Constant*, a property owner in the Robinwood subdivision in Little Rock wanted to divide his lot. The subdivision's restrictive covenants contained no express restriction against lot-splitting. Nevertheless, this Court held that lot-splitting was prohibited based upon the *existence* of a general plan of development but, more importantly, the language of all of the instruments and the intent gathered therefrom. Two of those instruments recited that "only one detached single-family residence . . . shall be erected." It is this language that distinguishes *Constant* from the case before us. It avails itself of the interpretation that property use is restricted to "only one" house per originally-platted lot. By contrast, the restriction in this case that "all lots are to be used for single family dwellings" is not susceptible to such an interpretation. Nothing in the latter language evidences an intent to prohibit the splitting of lots.

In short, we hold that the chancellor erred in his interpretation of the restrictive covenant. As such, we reverse his order enjoining the further splitting of lots and the sale of lots that are already split. Our holding necessitates that we also reverse the chancellor's attorney fee award to appellees because appellees are no

longer the prevailing party. *See* Ark. Code Ann. § 16-22-308 (Repl. 1999).[2]

B. Easement

The next issue to be addressed concerns the chancellor's decision not to enforce a fifteen-foot sewer easement over the lot owned by appellees Donnie and Carol Whitson. The easement was sought by appellant in late 1996 for the purpose of connecting sewer lines to some of the split lots. Donnie Whitson (unaware that the sewer lines would service split lots, which he opposed) executed the easement in December 1996 in favor of the city of Greenwood. In conjunction therewith, he executed an agreement with appellant that, as compensation for the easement, appellant would clean up two ditches on the Whitsons' lot, clean out a creek on the lot, repair any ground disturbed by the laying of the sewer lines, and hook the Whitsons' house up to the sewer line at no charge. Both the easement and the agreement were signed by Donnie Whitson but not by his wife, Carol Whitson. In reliance on these instruments, appellant laid the sewer line across the Whitsons' property. According to Forrest Griffith, he was unaware that the easement might not be valid in the absence of Mrs. Whitson's signature.

Following the trial, the court initially declared that the city of Greenwood was granted an easement by estoppel across the Whitsons' lot. However, upon appellees' motion, he set that ruling aside on the ground that the city of Greenwood was not a party to the action and appellant was not the real party in interest with regard to whether the easement should be granted. Appellant contends that the chancellor's initial ruling should not have been set aside. We disagree and hold that the trial court should be affirmed on this issue.

Arkansas law provides that every action is to be prosecuted in the name of the real party in interest. Ark. R. Civ. P. 17(a). A real party in interest is considered to be the person or corporation who can discharge the claim on which the allegation is based, not necessarily the person ultimately entitled to the benefit of any recovery. *Smith v. National Cashflow Systems, Inc.*, 309 Ark.

[2] We need not reach the issue of whether attorney fees are recoverable under § 16-22-308 in an action for breach of a restrictive covenant.

101, 827 S.W.2d 146 (1992). Here, although appellant was a party to the easement agreement, the easement ran in favor of the City.

Further, although the Whitsons hooked into the sewer line and saw it being set, the record is clear that the Whitsons were opposed to lot-splitting and that they did not know that the sewer line was servicing split lots; moreover, as Mrs. Whitson refused to sign the easement agreement, it was neither valid nor enforceable. If the line had been servicing regular lots, the Whitsons would arguably be estopped from contesting the easement; however, because both Mr. *and* Mrs. Whitson, who did not sign, were opposed to lot-splitting, we hold that the easement cannot be enforced against them. Arkansas Code Annotated § 18-12-403 (Supp. 1999) states as follows:

> No conveyance, mortgage, or *other instrument* affecting the homestead of any married person shall be of any validity, except for taxes, laborers' and mechanics' liens, and purchase money, unless his or her spouse *joins* in the execution of the instrument, or conveys by separate document, and acknowledges it.

(Emphasis added.) As such, we affirm the trial court in regard to this issue.

Affirmed in part; reversed in part. Court of Appeals affirmed in part; reversed in part.

Joshua SUTTER *v.* Mary Lou SUTTER

00-552 43 S.W.3d 736

Supreme Court of Arkansas
Opinion delivered May 17, 2001

[redacted]

[redacted]

James F. Lane, P.A., for appellant.

Boyett & Morgan, P.A., by: *Comer Boyett, Jr.*, for appellees.

Hartsfield, Almand & Grisham, LLP, by: *William G. Almand*, for appellee Clayla Hicks.

TOM GLAZE, Justice. This case was previously before us concerning procedural issues. *See Sutter v. Payne*, 337 Ark. 330, 989 S.W.2d 887 (1999). In that appeal, the chancellor had stricken Joshua Sutter's untimely answer to a petition for declaratory judgment, which was filed against Joshua and other co-defendants, seeking to determine the validity of an *inter vivos* trust established by the defendants' grandfather, Luther S. Sutter. Joshua challenged that ruling on appeal, asserting the chancellor had erred because Joshua was entitled under the common-defense doctrine to benefit from the timely answer filed by his co-defendant, Luther O'Neal Sutter II. We held the chancellor erred, and we remanded the case for further proceedings. On June 28, 1999, the chancellor heard the case on its merits and held (1) the court had jurisdiction of the persons and subject matter, and (2) Luther's *inter vivos* trust was valid. Joshua disagrees with the chancellor's decisions and brings this second appeal. Before addressing Joshua's points for reversal, we first set out the relevant facts necessary for a full understanding of his arguments.

Luther had three children — Mary Lou Sutter Payne, Cora Sue Sutter West, and Luther O'Neal Sutter, Sr. On June 1, 1994, Luther, as settlor, executed a declaration of trust wherein he named himself trustee to hold the trust estate for his own benefit. He specifically reserved the right during his life to amend or revoke his declaration-of-trust agreement without the consent of any beneficiary. Luther further provided that, upon his death, his son, Luther O'Neal, Sr. should be successor trustee and, as successor trustee, Luther O'Neal, Sr. was directed forthwith to transfer the trust estate to Luther's three children, Mary Lou, Cora Sue, Luther O'Neal, Sr., and a grandson, William Howard Payne. After Luther O'Neal met an untimely death in November 1995, Luther named Mary

Lou to serve as the successor trustee. At the same time, Luther also added his granddaughter, Clayla Hicks, as a beneficiary, but specifically provided Luther O'Neal's lineal descendants "would receive only one dollar"; this provision essentially excluded Luther's grandchildren, Joshua, Luther O'Neal Sutter II and De'Shawn Robinson, from having an interest in the trust estate.[1]

Luther's trust estate was comprised of nine tracts of real estate described in separate quitclaim deeds that were attached as exhibits to the trust instrument and made part of the schedule of assets of the trust estate. Each deed reflects Luther as both grantor and grantee. In addition, Luther's trust instrument specified which named beneficiary would be distributed an interest in which tract of land at the closing of the trust.

Luther died on August 16, 1996, and on December 26, 1996, his daughters, Mary Lou and Cora Sue, as executrixes of Luther's last will and testament, filed a petition for declaratory judgment in chancery court, requesting the court to declare the rights of the parties under Luther's *inter vivos* trust and will.[2] As already noted, Joshua, Luther O'Neal II, and De'Shawn were included as defendants in this action, but only Joshua continued as a party both at trial and on appeal.

As previously mentioned, the chancellor ruled Luther's *inter vivos* trust was valid, but Joshua disagrees and, at least initially, raises the following three reasons why the chancellor's decision should be overturned: (1) The chancellor had no subject-matter jurisdiction of the case; (2) the *inter vivos* trust was invalid because the property had not been properly transferred to the trust; and (3) the chancellor failed to void the trust because the disposition of personal property under the terms of the trust violated the rule against perpetuities. We disagree with Joshua's contentions and affirm.

Regarding Joshua's first issue, he now concedes in his reply brief that the chancery court had jurisdiction to construe and interpret the validity of Luther's trust agreement. This court has long written that the construction, interpretation, and operation of trusts are matters within the jurisdiction of the courts of equity. *In Re: Long Trust v. Holk*, 315 Ark. 112, 864 S.W.2d 869 (1993); *see*

[1] Luther O'Neal II settled his claim in this matter for the sum of $20,000.00. Why De'Shawn is no longer involved in this dispute is not clear from the record.

[2] We note that Clayla Hicks also filed a brief in this matter, and largely takes the same position as Mary Lou and Cora Sue in opposing Joshua's argument in this appeal.

also Spradling v. Spradling, 101 Ark. 451, 455, 142 S.W. 848, 850 (1911). Having established the chancery court had jurisdiction in considering the construction and validity of Luther's *inter vivos* trust, we now address Joshua's second argument.

In his second point, Joshua argues Luther's status as a settlor or trustee is not mentioned in the deeds to the nine tracts of land that he listed as assets to his declaration of trust. Joshua contends that because Luther's deeds conveyed his tracts to himself, not to the trust, the tracts were never made a part of the trust. He further submits that, even if Luther had conveyed the land to "Luther S. Sutter, trustee, grantee," the land would not have been considered conveyed to the trust, but would have remained in Luther's name only. In support of this proposition, Joshua cites Ark. Code Ann. § 18-12-604 (1987), which in relevant part provides that the words "trustee" or "as trustees" following the names of grantee in any deed, without other language showing a trust, shall not be deemed to give notice to any person dealing with the land that a trust exists or that there are other beneficiaries of the conveyance except the named grantee.

The chancellor rejected Joshua's argument, and concluded that Luther, as a property owner, was able to create a trust by acting as a settlor and trustee and hold the property for his own benefit. The chancellor further held that Luther's trust document was a valid *inter vivos* trust established for Luther's use and benefit, and which named beneficiaries to take the property upon Luther's death. The chancellor found that the trust document, the amendments thereto, and the exhibits and deeds attached to the document, constituted the corpus of the trust, described the land which Luther made a part of the trust, and named the five beneficiaries who were to receive those described tracts of land. The chancellor's judgment found that these trust documents and the deposition of Howard Wygall[3] sustained the burden of proof that a valid trust was created by Luther; that the quitclaim deeds, attached as exhibits to the declaration of trust, properly identified the property to be transferred to the trust; and showed that the clear intention of Luther was to create a valid trust. We believe the chancellor reached the right result.

[3] Mr. Wygall is a registered public accountant who assisted in filling in the blanks of a printed declaration of trust "kit" obtained by Luther.

The ultimate issue to be decided in this appeal is whether Luther's declarations, exhibits, and other acts created a valid *inter vivos* trust. While not controlling, we believe the federal district court case of *United Bldg. & Loan Ass'n v. Garrett*, 64 F. Supp. 460 (W.D. Ark. 1946), is instructional and suggests the validity of Luther's trust. There, Presley G. Garrett owned certain stock certificates that he made the subject of separate declarations of trusts. Each certificate was attached to a trust document. In each trust, Garrett was named trustee for the use and benefit of nine beneficiaries, and, in the event of Garrett's death, a successor trustee was designated. The trust involving one certificate was to terminate one year after Garrett's death, and the trust estate was to be transferred to the named beneficiaries according to their described interests in the trust agreement. Garrett, however, expressly reserved the right and power to enjoy the use and benefit of the certificates, or parts thereof, for himself, and that the exercise of the power reserved to him would be conclusive on the named beneficiaries. Garrett died intestate and his widow filed suit, claiming Garrett's trusts were invalid. The widow urged that the certificates should be distributed in accordance with Arkansas's intestacy laws.

In upholding Garrett's trust as valid, the federal district court considered and applied trust principles we believe are applicable to the situation now before us. Citing *Griffith v. Maxfield*, 66 Ark. 513, 51 S.W. 832 (1899), the *Garrett* court stated that it is beyond question that it is permissible for the settlor to act also as trustee and that a trust will be created without transfer of legal title to the property. *Garrett*, 64 F. Supp. at 463. The federal court further referred to the well-established rule that the settlor may reserve to himself a beneficial interest in the proceeds from the property for his life and the power to revoke the trust in whole or in part at any time. *Id.* at 464 (citing *Gall v. Union Nat'l Bank of Little Rock*, 203 Ark. 1000, 159 S.W.2d 757 (1942); *Cribbs v. Walker*, 74 Ark. 104, 85 S.W. 244 (1905)). In finding Garrett's trust valid, the federal court held that Garrett's reservation of dominion and control over the *res* did not negate his intention to create a present trust. *Id.*

In considering the one trust wherein Garrett fixed the termination date to be one year after the death of the settlor, the federal court further ruled such provision did not make the trust instrument testamentary, since the trust terms had passed an interest in the *res* to the beneficiaries during the life of the settlor, even though possession or enjoyment thereof was postponed until the death of the settlor. *Id.* at 465. The court further recognized that

the policy of the law favors the vesting of interests and, where possible, will construe a provision as a condition subsequent in preference to a condition precedent. *Id.*; *see also Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955), where the Illinois Supreme Court, relying on the *Garrett* case, wrote as follows:.

> So long as the trust continues, the cestuis have equitable interests, no matter who acts for them in protecting those interests, whether it be trustee or settlor. If the exercise of these powers by the settlor involves the total or partial destruction of the trust, as where the settlor has power to sell the res and keep the proceeds, the power seems to be treated as practically that of revocation of the trust. It leaves an equitable interest in the cestuis till revocation. *It shows a vested interest, subject to divestment, and not the lack of any interest at all.*

Id. at 608 (emphasis added).

In addition to the settled trust principles set out above, the *Garrett* court further emphasized that, in determining whether the reserved powers are so great as to negate an intent to create any present interest, one of the factors to be considered is the formality of the transaction. 64 F. Supp. at 465. There, the court pointed out that Garrett had executed and acknowledged each declaration of trust and the certificates were shown subject to a declaration of trust. The court found and held as follows:

> The settlor, by the declarations in question, intended and effected the transfer of a present beneficial interest to the named beneficiaries, retaining in himself the legal title in trust and an equitable interest for life in the proceeds of the funds. The powers reserved by the settlor were in the nature of conditions subsequent, which, if exercised by positive action on his part, would have divested the interest of the beneficiaries and denied them the possession and enjoyment of the res. *Since the settlor never chose to exercise the powers reserved by him, the interest of the beneficiaries was present and subsisting at his death, and they are now entitled to have the trust administered according to its terms.*

Id. at 466 (emphasis added).

In the instant case, and as touched on earlier above, the chancellor found that Luther executed a declaration of trust and amendments thereto, all of which were formally acknowledged. Luther specifically included in an attached "schedule of trust assets" deeds describing the nine tracts of land and directives as to how and

to whom those property interests were to be distributed. Also significant, Luther's last will and testament dated November 7, 1995, devised and bequeathed his entire estate to his June 1, 1994, *inter vivos* trust to be disposed of in accordance with those trust provisions. In this respect, we note the Uniform Testamentary Addition to Trusts Act, Ark. Code Ann. § 28-27-101 -105 (1987),[4] which in relevant part provides as follows:

> *Unless the testator's will provides otherwise, the property so devised or bequeathed shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given*; and shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments made before the death of the testator, regardless of whether made before or after the execution of the testator's will, and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

Ark. Code Ann. § 28-27-101 (emphasis added). From the foregoing, we cannot say the chancellor was clearly erroneous in holding Luther's trust to be valid.

In his final point, Joshua submits the chancellor erred in failing to void the trust because the disposition of personal property in Luther's trust violates the rule against perpetuities. He recites the common-law rule which voids any trust whose assets will not necessarily vest within some life in being at the time of its creation plus twenty-one years. *See Cotham v. First Nat'l Bank*, 287 Ark. 167, 697 S.W.2d 101 (1985). Joshua asserts the trust failed to dispose of the personalty and thus the trust was perpetual, and because the trust failed at its inception, the successor trustees hold the personalty upon a resulting trust for Luther's estate. This argument is meritless.

When entering into his June 1, 1994, trust, Luther executed a bill of sale that describes all of his tangible personal property, and he gave, sold, and conveyed that personalty to himself, as trustee. Luther, as trustee, acknowledged receipt of the personal property. Moreover, Luther's declaration of trust stated, "Upon my

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[4] The Uniform Act has been modified by Act 751 of 1995. *See* Ark. Code Ann. § 28-27-106 (Supp. 1999).

death, the successor trustee is hereby *directed forthwith to transfer the trust estate* and all right, title, and interest in the trust estate to the named contingent beneficiaries." (Emphasis added.) In short, the rule against perpetuities was not violated in these circumstances since Luther's personalty was given to the trustee by way of a bill of sale and thereby made a part of a present trust for a subsequent and immediate transfer to the designated beneficiaries upon Luther's death.

For the reasons set out above, we affirm.

Lance Alan BRANSCUM *v.* STATE of Arkansas

CR 00-782 43 S.W.3d 148

Supreme Court of Arkansas
Opinion delivered May 17, 2001

Robert L. Herzfeld, Jr., for appellant.

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

DONALD. L. CORBIN, Justice. Appellant Lance Alan Branscum appeals the order of the Pulaski County Circuit Court convicting him of capital murder in the death of Julie Irmer. On appeal, Appellant argues that the trial court erred by: (1) denying his motion for a directed verdict; (2) admitting his custodial statement, because it was not given voluntarily; and (3) admitting certain photographs of the victim, because their prejudicial effect outweighed their probative value. Appellant was sentenced to a term of life imprisonment; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We find no error and affirm.

The evidence presented in this case reveals that Appellant had been friends with the victim and her husband, Mark Irmer, for several years. The Irmers had allowed Appellant to move a travel trailer onto their property and live there prior to the murder of Mrs. Irmer. During the early morning hours of January 7, 1999, Mr. Irmer returned home from work to find Appellant standing in his driveway, smoking a cigarette. According to Mr. Irmer, Appellant offered to help him fix a headlight that was out on his truck. Mr. Irmer responded that he just wanted to go inside and get something to eat. Appellant then told Mr. Irmer that he wanted to have a talk with him; he eventually asked him to help replace a tire on his travel trailer. While Mr. Irmer was placing a jack under the trailer, Appellant grabbed him from behind and put a knife to his neck. Mr. Irmer jerked away and grabbed the knife from Appellant. He then ran to the back of his home and banged on a window while calling out his wife's name.

Appellant again tried to persuade Mr. Irmer to sit down and talk with him. He told Mr. Irmer that he and Mrs. Irmer had been planning to get rid of him, and that Mrs. Irmer never wanted to see him again. Appellant also told Mr. Irmer that he was having an affair with his wife. According to Mr. Irmer, Appellant suddenly went inside the Irmer's home and locked the door. Mr. Irmer then went to a neighbor's house for help and returned with his neighbor, Terry Hilliard. Mr. Irmer confronted Appellant on the home's front porch and told him that he just wanted to come in and get some of his things and then would leave. Appellant refused to allow Mr. Irmer to enter the home, again telling him that Mrs. Irmer did not want to see him. Mr. Irmer then went to the home of George Mitchell, another neighbor, and placed a 911 call.

Officers from the Pulaski County Sheriff's Office responded to the call. When they entered the Irmers' home, they discovered the body of Mrs. Irmer on the bathroom floor. Mrs. Irmer had on no clothing and her head was covered with a bloody laundry bag. The bag's drawstring was pulled tightly around her neck, and a jump rope was tied around her wrists. Authorities questioned Mr. Irmer, who told them about his altercation with Appellant. Police were unable to locate Appellant until several days after the murder. On January 12, 1999, authorities in Shawnee, Oklahoma, contacted the Pulaski County Sheriff's Office and reported that they had arrested Appellant.

The following day, Sergeant Terry Ward and Investigator Kerry Daulton traveled to Shawnee to take custody of Appellant and return him to Pulaski County. They first made contact with Appellant on the morning of January 14 in the Shawnee Police Department. Initially, Appellant denied having any knowledge of the murder of Mrs. Irmer. According to Ward, they sent Appellant back to his cell so that he could have lunch before the trip back to Arkansas. After lunch, Daulton went to Appellant's cell to outfit him in a Pulaski County Jail jumpsuit and body chains before transporting him back to Little Rock. According to Daulton, when he entered the cell, Appellant stated that he wanted to tell him two things. The first was that he wanted his wife to have the travel trailer. Secondly, he stated that he wanted to be interviewed again so that he could tell the truth about what had happened to Julie Irmer.

Ward and Daulton subsequently advised Appellant of his *Miranda* rights and then took a taped statement from him concerning the events surrounding the death of Mrs. Irmer. According to Appellant's statement, he had been having an affair with Mrs. Irmer for some time. On the night of her death, they were engaging in "rough sex," he claimed. Appellant stated that Mrs. Irmer wanted to find some handcuffs she had used before, but that Appellant suggested that they use a jump rope that was on the floor in the bedroom. Appellant then claimed that he tied Mrs. Irmer to the bedpost and while they were engaging in intercourse, she fell off the bed and hit her head on a nearby night stand. Appellant stated that he put a pair of panties and a plastic bag up to her head to try and stop the bleeding. When that did not work, Appellant claimed that he then put the laundry bag over her head to stop the blood flow. Appellant admitted that when he left the Irmers' home, Mrs. Irmer was dead. Ward and Daulton transported Appellant back to Little Rock, where he was charged with capital murder.

An omnibus hearing was held on October 19, 1999. The first matter considered by the trial court was Appellant's motion to suppress the statement he made to Ward and Daulton while in Oklahoma. Appellant claimed that he had not made the statement knowingly or voluntarily. In support of his contention, Appellant argued that he had gone for days without eating, was suffering from a headache at the time of the confession, and was threatened by Ward and Daulton. Appellant asserted that Ward and Daulton told him that he would receive the death penalty within a week. According to Appellant, Daulton also told Appellant that he worked for the district attorney's office and that if he gave a statement, the death penalty would be dropped. Appellant admitted, however, that he signed a form waiving his *Miranda* rights and did not ask for an attorney prior to giving his statement. After hearing the testimony of the officers and Appellant, the trial court determined that Appellant's statement was made voluntarily, and thus, denied his motion to suppress.

The trial court also heard arguments regarding the admission of photographs of the victim and the crime scene. Appellant argued that all of the State's photographs should be excluded because they were gruesome and inflammatory. Alternatively, Appellant requested that any pictures the State was allowed to introduce should be in black and white. The trial court reserved its ruling on the admissibility of the photographs until the point that they were offered into evidence. The trial court also denied Appellant's request that the State be required to submit only black and white photographs, noting that color pictures were used all the time. The trial court did state, however, that any color photograph that was unduly prejudicial would not be admitted into evidence. A jury trial was held on November 30 and December 1, 1999, and Appellant was convicted of capital murder and sentenced to life imprisonment. This appeal followed.

Sufficiency of the Evidence

For his first point on appeal, Appellant asserts that the trial court erred in denying his motion for a directed verdict. We treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. *Burmingham v. State*, 342 Ark. 95, 27 S.W.3d 351 (2000). This court has repeatedly held that in reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Id.*; *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805

(1998). We affirm a conviction if substantial evidence exists to support it. *Carmichael v. State*, 340 Ark. 598, 12 S.W.3d 225 (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 having to resort to speculation or conjecture. *Id.* Circumstantial evidence may provide the basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999).

Appellant contends that the State failed to prove that he caused Mrs. Irmer's death deliberately or in a premeditated manner. 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." This court has held that premeditation is not required to exist for any particular length of time. *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899, *cert. denied*, 528 U.S. 933 (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. *Bangs*, 338 Ark. 515, 998 S.W.2d 738; *Green v. State*, 330 Ark. 458, 956 S.W.2d 849 (1997). 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. *Sanders v. State*, 340 Ark. 163, 8 S.W.3d 520 (2000). One can infer premeditation from the method of death itself, where the cause of death is strangulation. *Carmichael*, 340 Ark. 598, 12 S.W.3d 225; *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997).

Here, Dr. Frank Peretti, an associate medical examiner with the State Crime Laboratory, testified that the victim's death was the result of "asphyxia due to obstruction of her air passages and strangulation and a blunt force injury." Dr. Peretti testified that the victim sustained numerous injuries to her hands, arms, and feet, and that her injuries were consistent with someone being "hogtied." Dr. Peretti also testified that petechial hemorrhages, a type of hemorrhage associated with asphyxia, were present on the victim's eyes. According to Dr. Peretti, the victim's neck would had to have been compressed for at least forty to sixty seconds to cause such hemorrhages. Dr. Peretti further testified that Mrs. Irmer was subjected to two different types of strangulation. First, there were injuries caused by ligature strangulation as a result of the drawstring being tied around her neck. Secondly, Mrs. Irmer was placed in a choke hold and strangled. Appellant admitted that he placed the laundry bag

over head, but claimed that it was an attempt to stop the bleeding. According to Dr. Peretti, however, the injuries on Mrs. Irmer's neck were not the result of someone simply putting the laundry bag over her head, but rather were caused by someone actually tying the bag around her neck.

Dr. Peretti also stated that it took significant force to cause the head injuries sustained by Mrs. Irmer. Dr. Peretti opined that a person could not fall out of bed and hit their head hard enough to cause the type of injuries suffered by Mrs. Irmer. Moreover, Dr. Peretti stated that there were no lacerations or cuts on the victim's head consistent with her banging her head on a piece of furniture. Thus, the medical evidence presented by the State proved that Mrs. Irmer's death was not the result of an accident, as Appellant claimed. This court has held that a jury is not required to 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 Terrell v. State*, 342 Ark. 208, 27 S.W.3d 423 (2000); *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997).

In addition, there was testimony from Mr. Irmer that Appellant attacked him with a knife and prevented him from entering his home on the night of the murder. Appellant admitted that when he left the Irmers' house, Mrs. Irmer was dead. Finally, Appellant not only fled the scene of the crime, but also the state. This court has held that flight from the place where a crime has been committed may be considered as evidence of guilt. *Dawan v. State*, 303 Ark. 217, 795 S.W.2d 50 (1990); *Jones v. State*, 282 Ark. 56, 665 S.W.2d 876 (1984). In sum, there was ample evidence to support Appellant's conviction of capital murder; thus, it was not error for the trial court to deny Appellant's motion for a directed verdict.

Voluntariness of Statement

For his second point on appeal, Appellant asserts that the trial court erred in denying his motion to suppress the custodial statement he made while in Oklahoma. Appellant argues that his statement was given involuntarily because at the time of the statement he was sleep-deprived; suffered from a migraine headache, had eaten very little, and was subjected to various forms of police coercion. We disagree.

A statement made while the accused is in custody is presumptively involuntary, and the burden is on the State to prove, by a preponderance of the evidence, that a custodial statement was given voluntarily and was knowingly and intelligently made. *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427 (1998); *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997). When determining voluntariness, the issue on appeal is whether the statement was the product of a free and deliberate choice, rather than intimidation, coercion, or deception. *Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999); *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998). In considering this issue, we make an independent determination based on the totality of the circumstances, and reverse the trial court only if its decision was clearly erroneous. *Id.* Relevant factors to be considered include the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of mental or physical punishment. *Boone v. State*, 334 Ark. 452, 976 S.W.2d 921 (1998); *Sanford*, 331 Ark. 334, 962 S.W.2d 335.

Appellant claims that the circumstances surrounding his statement were coercive in nature, thus rendering his statement involuntary. His claims that he was tired, hungry, and had a headache are not supported by any evidence other than his own testimony. In fact, the transcript of his statement includes a question by Smith asking Appellant if he had had lunch, to which Appellant responded in the affirmative. There is nothing in the transcript of the statement to indicate that Appellant was anything other than alert and oriented. Appellant, who has a high school education, signed a waiver of his rights, and makes no challenge to the validity of that waiver on appeal. Indeed, the State introduced the waiver form signed by Appellant, and the transcript of his statement reflects that Ward went over his rights with Appellant before any questioning took place. This court has held that issues regarding the credibility of witnesses testifying at a suppression hearing are within the province of the trial court. *Wright v. State*, 335 Ark. 395, 983 S.W.2d 397 (1998); *see also Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999). "Conflicts in the testimony are for the trial judge to resolve, and the judge is not required to believe the testimony of any witness, especially that of the accused since he or she is the person most interested in the outcome of the proceedings." *Wright*, 335 Ark. at 404, 983 S.W.2d at 401. Therefore, we cannot say that the trial court erred in finding the testimony of the two officers to be more credible than that of the Appellant.

Appellant also claims that he was enticed by the promise of Daulton that the death penalty would be dropped if he gave a statement. This court has recognized that a statement induced by a false promise of reward or leniency is not a voluntary statement. *See Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999); *Clark v. State*, 328 Ark. 501, 944 S.W.2d 533 (1997). Here, however, the only evidence that Daulton made any promises to Appellant was Appellant's own self-serving testimony at the omnibus hearing. Daulton and Ward both testified that Appellant was never promised anything or threatened in order to obtain a statement. Again, the matter of weighing the credibility of witnesses is left to the trial court. *Wright*, 335 Ark. 395, 983 S.W.2d 397. Accordingly, we cannot say that the trial court erred in finding that Appellant's statement was voluntary, and thus, admissible.

Admission of Photographs

Appellant's final point on appeal is that the trial court erred in admitting into evidence certain photographs of the victim because their prejudicial effect substantially outweighed their probative value. Specifically, Appellant alleges that certain photographs admitted into evidence were cumulative, overly graphic, and calculated to inflame the jury. This argument is without merit.

This court discussed the admission of photographs in *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997):

> Although highly deferential to the trial court's discretion in these matters, this court has rejected a *carte blanche* approach to admission of photographs. *Berry v. State*, 290 Ark. 223, 227, 718 S.W.2d 447, 450 (1986). 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." *Id.* at 228, 781 S.W.2d at 450. 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. *Id.* at 228-29, 781 S.W.2d at 450. 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. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403.

Id. at 637, 940 S.W.2d at 467.

We first address Appellant's allegation that the challenged photographs were cumulative. With regard to pictures that depicted the victim of the body as discovered at the crime scene, the trial court overruled Appellant's objection to their admission on the basis that their probative value outweighed any prejudicial effect. The trial court found that they rebutted Appellant's claim that the victim had fallen off the bed and hit her head on the night stand. Specifically, the trial court noted that the pictures demonstrated that there were no open wounds on the victim or any excessive blood present. A close-up photograph of the victim's head and torso taken at the crime laboratory was needed to show the jurors the manner in which the bag's drawstring was knotted around the victim's neck. Appellant has asserted that he did not kill Mrs. Irmer with premeditation and deliberation. The photographs used to depict her many injuries establish that this crime was not accidental, but rather, was brutal and prolonged. This court has held that 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. *Sanders*, 340 Ark. 163, 8 S.W.3d 520.

Next, Appellant challenges several photographs that are close-up shots of the injuries inflicted on the victim's head and neck. The trial court allowed the photographs in because Dr. Peretti used them during his testimony to explain the numerous injuries suffered by Mrs. Irmer. Two final photographs challenged by Appellant depict the neck injuries caused by strangulation. This court has held that the need to show the condition of a victim's body, the probable type or location of the injuries, and the position in which the body was discovered is an acceptable purpose for admitting photographs. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999). Thus, it was not error for the trial court to admit these photographs.

Finally, we consider Appellant's argument that the color photographs were somehow more prejudicial than black and white photographs would have been. Appellant does not argue which photographs should have been submitted in color, nor does he submit any photographs in black and white, thereby demonstrating how they are less gruesome. He simply asserts that this court, by implication, has previously stated that color photographs are more inflammatory. Appellant cites no authority for this proposition, nor

did he raise this argument below. It is well settled that this court does not consider an argument raised for the first time on appeal. *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999).

4-3(h) Review

The record in this case has been reviewed for other reversible error in accordance with Ark. Sup. Ct. R. 4-3(h), and none has been found. For the aforementioned reasons, the judgment of conviction is affirmed.

CITY of LOWELL, Arkansas *v.* CITY of ROGERS, Arkansas; Horace Obern Nations, *Trustee* of the Obern Nations Trust; Frances B. Williams; Gilert and Eileen Brooks, *Husband* and *Wife*; Fadil Bayyari, *Trustee* of the Fadil Bayyari Trust; George H. Mills and Frances M. Mills, *Trustee* of the Amended and Restated George Henry Mills Trust; and Don Mills

00-991 43 S.W.3d 742

Supreme Court of Arkansas
Opinion delivered May 17, 2001

Lisle Law Firm, P.A., by: *Stephen Lisle*, for appellants.

Office of Rogers City Attorney, by: *Jim Clark* and *Ben Lipscomb*; *Watkins & Scott, P.L.L.C.*, by: *William P. Watkins*; and *Ronald L. Boyer*, for appellees.

ANNABELLE CLINTON IMBER, Justice. This appeal stems from the second of a pair of cases involving the annexation by the City of Rogers of land located in an adjoining municipality pursuant to Ark. Code Ann. §§ 14-40-2001—2002 (Supp. 1999).[1] In the first case, *City of Cave Springs v. City of Rogers*, 343 Ark. 652, 37 S.W.3d 607 (2001), the City of Cave Springs contended that Act 779 of 1999 is unconstitutionally vague under due-process standards and that the Act is an unconstitutional delegation of legislative authority. It also argued that the landowners failed to properly file a statement with the municipality as required under the Act. We declined to address the vagueness argument because a municipal corporation is not a "person" for purposes of challenging Act 779 on procedural due-process grounds. We also concluded that the Act was not an unlawful delegation of legislative authority. With regard to the notice requirement of Act 779, we held that the landowners

[1] The Arkansas General Assembly has recently amended section 14-40-2002 and added sections 14-40-2003—2005. *See* Act 1525 of 2001.

properly filed a statement with the municipality by serving notice on the mayor of the city instead of the city's planning commission.[2] *Id.*

In the instant case, certain landowners[3] within the City of Lowell sent a petition and notice to the mayor of Lowell, pursuant to Act 779, requesting that the City of Lowell "make a commitment [in writing, within 30 days] to take substantial steps within 90 calender days after this petition is filed toward making water and sewer services available, and within each 30-day period thereafter, to continue to take steps demonstrating a consistent commitment to provide the services within a reasonable time." The mayor of Lowell responded by letter that the city could provide water to the property and that the city had a contract with an engineering firm to perform a sewer study. The mayor's letter further stated that the city was "committed to providing sewer service to the area as soon as feasibly possible." Apparently dissatisfied with the mayor's response, the landowners presented petitions for annexation and notice to the city council of Rogers, pursuant to Act 779, and the City of Rogers subsequently passed ordinances accepting and annexing the property.

Thereafter, the City of Lowell filed suit in the Benton County Chancery Court seeking a declaratory judgment that Act 779 is unconstitutional and that the landowners' respective properties remain a part of the City of Lowell. The suit named the City of Rogers and the individual landowners as defendants. Following an order transferring the case to the Benton County Circuit Court, the landowners and the City of Rogers filed a motion for summary judgment. The trial court granted summary judgment and dismissed the case with prejudice. In doing so, the trial court made the following findings:

- Act 779 does not violate either the United States or Arkansas Constitutions;

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[2] Although not relevant to this appeal, we also rejected the city's argument that Act 779 provides for an unconstitutional retroactive application.

[3] The Horace Obern Nations Trust, Horace Obern Nations, trustee; Frances B. Williams; Gilbert and Eileen Brooks; The Fadil Bayyari Trust, Fadil Bayyari, trustee; the amended and restated George Henry Mills Trust, George H. Mills and Frances M. Mills, trustees; Don Mills; the Ingrid D. Costaldi Trust, Dated 12/22/86, Ingrid D. Costaldi, trustee; Diane Huffman; and Roy D. and Shirley J. Miller. All of these landowners, except for the Ingrid D. Costaldi Trust, Diane Huffman, and Roy D. and Shirley J. Miller, are appellees herein.

• Act 779 does not constitute an unlawful or unconstitutional delegation of legislative authority;

• Act 779 contains sufficient standards and safeguards to protect the interests of all parties;

• the landowners complied with the notice requirement of Act 779 by sending their notices to the mayor of Lowell;

• the City of Lowell did not make a commitment to provide the requested services;

• the City of Lowell has no standing to raise the argument that the City of Rogers has not taken substantial steps to provide the services requested by the landowners in the time set out in Act 779; and

• even if the City of Lowell did have standing to raise that issue, the City of Rogers has complied with the requirements of Act 779 and the services are available.

The City of Lowell now appeals from the trial court's entry of summary judgment.

For its first three points on appeal, the City of Lowell argues (1) that Act 779 is an unconstitutional delegation of legislative authority to private property owners because it does not contain procedural safeguards or standards and does not afford any form of review; (2) that Act 779 is unconstitutionally vague due to several alleged deficiencies: it provides no procedures for filing a request for services; it contains no definition of "substantial steps;" it cannot be reconciled with other state statutes governing municipal annexation; and it allows municipal property to be completely severed from other municipal territory, i.e. the creation of an "island" of one city within another city's boundaries; and (3) that the trial court erred in finding that the landowners properly filed a statement with the municipality under Act 779, when the landowners served notice on the city's mayor instead of the city's planning commission. Each of these arguments must be rejected for the reasons enumerated by this court in *City of Cave Springs v. City of Rogers, supra.* Specifically, we held in that case that Act 779 was not an unconstitutional attempt to delegate legislative authority, and that the landowners satisfied the notice requirement of Act 779 by serving their notice on the city's mayor instead of the city's planning commission. *Id.* With regard to the vagueness argument, we

held that a municipal corporation is not a "person" for purposes of the Due Process Clause of the Fourteenth Amendment. Accordingly, we declined to address the city's argument that Act 779 is unconstitutionally vague. *Id.* Likewise, we decline to address the City of Lowell's vagueness argument in this case.

Next, the City of Lowell contends the trial court erred when it found as a matter of law that "the City of Lowell did not make a commitment to provide the requested services." We agree that the trial court erred in so finding as a matter of law.

Our standards governing the entry of summary judgment are well-settled:

> "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, 66, 961 S.W.2d 712 (1998) (*Wallace I*) (citing *Pugh v. Griggs*, 327 Ark. 577, 824 S.W.2d 387 (1992)). The standard is whether the evidence is sufficient to raise a fact issue, not whether the evidence is sufficient to compel a conclusion. *Id.* (citing *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995)). A fact issue exists, even if the facts are not in dispute, if the facts "may result in differing conclusions as to whether the moving party is entitled to judgment as a matter of law. . . . [I]n such an instance, summary judgment is inappropriate." *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998) (supplemental opinion denying rehearing) (*Wallace II*).
>
> On review, this court determines if summary judgment was appropriate based on whether the evidence presented in support of summary judgment leaves a material question of fact unanswered. *Wallace I, supra.* 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. *Wallace I, supra.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.* (citing *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997)).

Ultracuts Ltd. v. Wal-Mart Stores, Inc., 343 Ark. 224, 231, 33 S.W.3d 128, 133 (2000). Furthermore, the object of summary-judgment proceedings is not to try the issues, but to determine whether there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied. *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000).

The question before the trial court in this case was whether the City of Lowell made the "commitment" required by Act 779. Such a determination necessarily must be governed by the provisions of Act 779 that specify the "commitment" contemplated by the Act. According to section 14-40-2002(b)(1), the landowner shall file a statement with the municipality that, among other things, requests the municipality:

> to make a commitment to take substantial steps, within ninety (90) calendar days after the statement is filed, towards making the services available and within each thirty-day period thereafter to continue taking steps to demonstrate a consistent commitment to provide the service within a reasonable time, as determined by the kind of service requested.

Ark. Code Ann. § 14-40-2002(b)(1)(D)(i) (Supp. 1999). Thus, by specifying what the landowner must request in its notice to the municipality, the legislature has delineated what course of action the city must commit or obligate itself to take within specified periods of time. In other words, the Act outlines specific terms of commitment that a landowner may demand from a city. The city must first *commit to take substantial steps, within the ninety-day period following receipt of the landowner's notice, toward making the services available. Id.* Next, the city must *continue to take steps, within each thirty-day period thereafter, to demonstrate a consistent commitment to provide the services within a reasonable time. Id.* With regard to this latter requirement, the Act further states that the reasonableness of the time-frame within which the city commits to provide services should be determined by the kind of services requested. *Id.*

In this case, the mayor of Lowell sent a letter to the landowners, which stated, in pertinent part, as follows:

> The City of Lowell has a contract with the City of Rogers for water service in the Rogers Water District where this property is located. This property can be serviced with water in either city limits. Therefore, de-annexing for water service is not a viable reason under Act 779.
>
> The City of Lowell currently has a contract with the engineering firm of McGoodwin, Williams & Yates to perform a sewer study. We are committed to providing sewer service to this area as soon as feasibly possible.

The landowners do not dispute the timeliness of the City's written response to their statements filed pursuant to the Act. Ark. Code Ann. § 14-40-2002(b)(1)(D)(ii).

We conclude that genuine issues of material fact remain to be decided regarding whether the City of Lowell made the "commitment" required by Act 779. Although the facts set forth in the mayor's letter may not be in dispute, those facts could result in varying conclusions about whether the letter amounted to a "commitment" as required by Act 779. For example, the letter stated that the city has contracted with an engineering firm to perform a sewer study, presumably to determine the feasibility of providing the requested services. Hiring an engineering firm to conduct a feasibility study would be a necessary first step by the city "towards making [sewer service] available" to an area. Thus, reasonable minds might draw different conclusions from these facts as to whether the mayor's letter made a commitment *to take substantial steps toward making the service available.* Furthermore, a trier of fact might reasonably conclude that the city's commitment to provide sewer service "as soon as feasibly possible" was a commitment to provide sewer service "within a reasonable time." We therefore hold that the trial court clearly erred when it found as a matter of law that the City of Lowell "did not make a commitment to provide the requested services."

The City of Lowell's fifth point on appeal concerns standing. When property is detached from one municipality and annexed into another pursuant to Act 779, the Act provides:

> The annexation shall be void and the land shall be returned to the original municipality if the annexing municipality fails to take substantial steps within ninety (90) calender days after the statement is filed towards making the services available and within each thirty-day period thereafter, continues taking steps demonstrating a consistent commitment to provide the services within a reasonable time, as determined by the kind of services requested.

Ark. Code Ann. § 14-40-2002(b)(3)(B)(i). In granting the motion for summary judgment, the trial court found that "the City of Lowell has no standing to raise the argument that the City of Rogers has not taken substantial steps to provide the services requested by the landowners in the time set out in Act 779[.]" The City of Lowell avers that the trial court erred in finding that it lacked standing to make such an argument. We agree.

In *City of Cave Springs v. City of Rogers*, this court held that the original municipality's standing to challenge the constitutionality of Act 779 is not derived from the Fourteenth Amendment, but from Arkansas's law on declaratory judgments. In so holding, we specifically relied on Ark. Code Ann. § 16-111-104 (1987), which states:

> Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Likewise, section 16-111-104 gives the City of Lowell standing to argue that the City of Rogers did not meet the requirements of Act 779. For purposes of declaratory-judgment actions, a municipal corporation is a "person." Ark. Code Ann. § 16-111-101 (1987). Thus, a municipality whose rights, status, or legal relations are affected by a statute is entitled to have any question of construction or validity arising under the statute determined, and the municipality is entitled to obtain a declaration of its rights, status, or legal relations arising under the statute. Ark. Code Ann. § 16-111-104. The City of Lowell's rights are clearly affected. Whether the property in question remains a part of the City of Lowell depends upon whether the City of Rogers has met its obligations under this Act. Thus, we hold that the City of Lowell has standing to argue that the City of Rogers did not comply with the provisions of the Act.

Finally, the trial court made an alternative finding "that the City of Rogers has complied with the requirements of Act 779, and that the services are available." The City of Lowell asserts that the trial court erred in making this finding as a matter of law.

According to the Act, the City of Rogers was required to "to take substantial steps within ninety (90) days after the statement is filed towards making the services available[.]" Ark. Code Ann. § 14-40-2002(b)(3)(B)(i). The evidence presented in support of summary judgment leaves a material question of fact unanswered: whether "substantial steps" were taken by the City of Rogers. Tom McAlister, who oversees the operations of the Rogers water and sewer departments, testified that only one of the several landowners involved in this case had submitted a water and sewer plan that had been approved by the City of Rogers. With regard to the other

landowners, Mr. McAlister confirmed that none of them had submitted a water and sewer plan to the city for approval. With regard to the property of the Horace Obern Nations Trust, he said that the City of Rogers had not provided any water or sewer services to the property and had not taken any actions to do so. He also stated that nothing had been done by the City of Rogers to provide water or sewer to the property owned by the Fadil Bayyari Trust. He testified similarly as to the Mills property. We therefore conclude that there are genuine issues of material fact regarding whether the City of Rogers "complied with the requirements of Act 779." The trial court's entry of summary judgment on this question was inappropriate. *Ultracuts Ltd. v. Wal-Mart Stores, Inc., supra.*

Affirmed in part; reversed and remanded in part.

Jennifer SHOOK, as a Shareholder on Behalf of
Delta P.C. & I, Inc. *v.* The Honorable Don HUFFMAN

00-1131 43 S.W.3d 735

Supreme Court of Arkansas
Opinion delivered May 17, 2001

Hodson, Wood & Snively, by: *Michael Hodson*; and *Shemin Law Firm*, by: *Kenneth Shemin*, for petitioner.

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Mark W. Dossett*, for respondent.

RAY THORNTON, Justice. On September 15, 1997, petitioner, Jennifer Shook, filed a complaint seeking a divorce from John Shook. On January 20, 1999, petitioner's complaint was amended. John responded to both complaints. At the time of the divorce, the Shooks were each fifty-percent stockholders in Delta P.C. & I., Inc. [Delta], a subchapter S corporation. The corporation was not a party to the divorce proceedings.

On November 22, 1999, the Benton County Chancery Court entered a decree of divorce granting petitioner's request for divorce. The divorce decree ordered that all marital property was to be sold in a commissioner's auction, with the proceeds being distributed equally between the Shooks. The chancellor also ordered that the property and assets owned by Delta be sold in the commissioner's auction and that the proceeds be divided equally between the Shooks.

Neither Jennifer Shook nor John Shook appealed the divorce decree. However, eleven months later, Jennifer, as a shareholder in Delta, filed a petition for a writ of prohibition with this court on behalf of Delta. Jennifer argued that the chancery court of Benton County did not have subject-matter jurisdiction to order the sale of Delta's assets because Delta was not a party to the divorce action. Jennifer requested that we issue a writ of prohibition and that we stay the commissioner's sale. To assist in our consideration of whether to issue a writ of prohibition, we granted a partial stay of

the sale, and directed that the parties brief the issues. *See Shook v. Chancery Ct. of Benton County*, 342 Ark. 276, 27 S.W.3d 745 (2000)(*per curiam*).

This case is now presented as an original action for a writ of prohibition. We have noted that the purpose of a writ of prohibition is to prevent a court from exercising a power not authorized by law when there is no adequate remedy by appeal or otherwise. *Young v. Smith*, 331 Ark. 525, 964 S.W.2d 784 (1998). It is well settled that a writ of prohibition is an extraordinary writ. *Id.* The party seeking to proceed by petition for writ of prohibition bears the burden of demonstrating that it is clearly entitled to so proceed. *Ramirez v. White County Cir. Ct.*, 343 Ark. 372, 38 S.W.3d 298 (2001). The writ is appropriate only when there is no other remedy, such as an appeal, available. *Id.*

In this case, the order that Jennifer challenges was entered on November 22, 1999. At the time the order was entered, Jennifer Shook, John Shook, and Delta each had available remedies for challenging the chancellor's decree. None of the parties exercised their right to challenge the order. Additionally, we note that the record before us does not reflect that a derivative action was filed in this matter with the chancery court. We hold that Jennifer cannot now bring a petition to this court seeking the equitable remedy afforded by Rule 23.1 of the Arkansas Rules of Civil Procedure in an original action for a writ of prohibition. *See Hames v. Cravens*, 332 Ark. 437, 966 S.W.2d 244 (1998)(holding that a shareholder's derivative suit is an equity action maintainable in chancery court). Accordingly, the petition for a writ of prohibition is denied, and the stay ordered in our previous *per curiam* is dissolved.

GLAZE, J., not participating.

IN RE: Albert Wayne DAVIS,
Arkansas Bar ID # 76026

01-460 43 S.W.3d 156

Supreme Court of Arkansas
Opinion delivered May 17, 2001

Lynn Williams, for petitioner Professional Conduct Committee.

No response.

PER CURIAM. On November 13, 2000, the Pulaski County Circuit Court entered an order of disbarment of Albert Wayne Davis. Mr. Davis and his counsel were served with copies of the circuit court's order. Mr. Davis had a right to appeal that disbarment order in accordance with the rules governing appeals of civil cases, Section 5L.(4) of the Procedures Regulating Professional Conduct, but when no appeal was timely perfected, the circuit court's order became final and binding on all parties. *See* Section 5L.(5) of the Procedures of Regulating Professional Conduct.

The rule is well settled that the failure to file a timely notice of appeal deprives this court of jurisdiction. *Rossi v. Rossi*, 319 Ark. 373, 892 S.W.2d 246 (1995); *Monk v. Farmers Ins.*, 290 Ark. 38, 716 S.W.2d 201 (1986). Here, Mr. Davis did not timely perfect an appeal from the lower court's disbarment order, therefore, the circuit court's order is final.

The Professional Conduct Committee has filed its petition with this court on May 16, 2001, alleging that Mr. Davis has been disbarred by the Pulaski County Circuit Court's order, and requesting this court enter its order barring Mr. Davis from the practice of law and removing his name from the list of attorneys permitted to practice law. The Committee's purpose in filing its petition is essentially ministerial and necessary to officially remove Mr. Davis's name from the court's registry of licensed attorneys. While the Committee should have given notice of its petition to Mr. Davis, *see* Rule 11 of the Rules of Civil Procedure, we direct this court's clerk in this instance to cause Mr. Davis to be served with a copy of the Committee's petition to the last address Mr. Davis has provided the clerk's office. *See In Re: Salamo*, 310 Ark. 446, 841 S.W.2d 589 (1992); *see also* Section 5E. Any response must be made within ten days after service of the petition on Mr. Davis.

STATE of Arkansas *v.* Jackie Lee STAPLETON

01-523 43 S.W.3d 157

Supreme Court of Arkansas
Opinion delivered May 17, 2001

Mark Pryor, Att'y Gen., by: *Joseph V. Svoboda*, Ass't Att'y Gen., for appellant.

William R. Simpson, Public Defender, by: *Kent C. Crause*, Deputy Public Defender; and *Clint Miller*, Deputy Public Defender, for appellee.

PER CURIAM. Appellant State of Arkansas Department of Correction moves for a stay of the order of the Lincoln County Circuit Court granting appellee Jackie Lee Stapleton's petition for writ of habeas corpus. The State further moves for an expedited review of proceedings.

We grant the motion for stay and motion for expedited review of proceedings. We further expedite the appeal of this matter and set the following briefing schedule to allow us to decide the matter prior to our recess in July:

Appellant's original brief due May 28, 2001.

Appellee's response brief due June 4, 2001.

Appellant's reply brief due June 11, 2001.

Lisa K. BENNETT *v.* STATE of Arkansas

CR 00-1399 44 S.W.3d 310

Supreme Court of Arkansas
Opinion delivered May 24, 2001

Jim Petty and *Patrick J. Benca*, for appellant.

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

TOM GLAZE, Justice. This case concerns the Fourth Amendment and specifically whether an officer's smelling of a legal substance is sufficient in itself to show probable cause for a search warrant or to justify a good-faith exception for a warrant's issuance. Appellant Lisa Bennett brings this appeal after entering her conditional plea of guilty to a reduced charge of attempt to manufacture a controlled substance.

The search at issue ensued on October 28, 1998. At 1:30 a.m., Bradford Police Officer Steve Strayhorn was driving along State Highway 367 in White County when he passed a storage building and smelled a strong chemical odor emitting from the building. Strayhorn contacted State Police Investigator Roger Ahlf and Drug Task Force Investigator Robert Parsons, who both arrived on the scene about 3:00 a.m. Ahlf determined the smell was denatured

alcohol, a legal substance, which he described as "extremely strong and in an unstable condition." The officers contacted the building's owner, Nathan Bennett, who said that his daughter, Lisa Bennett, had items stored in the building, and she would have to consent to any search. Lisa was contacted and showed up at the building, but she refused the officers' request to search.[1]

Investigator Ahlf then went to Searcy to prepare a warrant, while other officers secured the Bennetts' building. When Ahlf returned to the building at 4:30 a.m., Lisa again refused entrance. Ahlf then swore out an affidavit for a search warrant, and appeared before Searcy Municipal Judge Leroy Froman, who found probable cause for the issuance of a warrant. The officers executed the search warrant at about 7:30 a.m.; the search turned up a number of items that could be used in the manufacturing of methamphetamine. Lisa was subsequently arrested.

After being charged, Lisa moved to suppress the evidence seized from the building, arguing that the smell of the legal substance of denatured alcohol, by itself, was insufficient to support Municipal Judge Froman's finding of probable cause. At a hearing before the circuit court, the court agreed with that part of Lisa's argument that probable cause had not been shown, but even so, the court held the search was valid under the good-faith exception established in *United States v. Leon*, 468 U.S. 897 (1984). There, the Supreme Court held the Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecutor's case in chief of evidence obtained by officers who had acted in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be invalid. In short, the circuit court applied the *Leon* rationale in the instant case and ruled that it was reasonable for Investigator Ahlf to have concluded that Judge Froman's warrant was valid, and that Ahlf was acting in good faith when he conducted the search of the Bennetts' building.

Before addressing the circuit court's *Leon* ruling and Lisa Bennett's contention that the lower court erred in applying that ruling, we take up the State's argument that the circuit court was wrong to suggest probable cause was not shown; in fact, the State submits that

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[1] At oral arguments, the State attempted to argue that Bennett's refusal to consent to the search of her property somehow contributed to Investigator Ahlf's determination that probable cause existed. However, the State conceded that it had no authority to support this contention.

probable cause did exist to support Ahlf's search warrant. The State's argument is without merit.

Both the State and Lisa Bennett cite the singular case of *United States v. Tate*, 694 F.2d 1217 (9th Cir. 1982) (*Tate I*), where a search warrant was obtained on the basis of the smell of a noncontraband or legal substance, ether. The *Tate I* court held that the smell of a legal or noncontraband substance, standing alone, did not establish probable cause to search a residence. However, the government in *Tate I* challenged that decision and petitioned the Supreme Court for a writ of certiorari. While the government's petition was pending, the Supreme Court decided *Leon*, and, as a consequence, it vacated *Tate I* and remanded the case to the Ninth Circuit so that court could reconsider *Tate* in light of the *Leon* decision. *United States v. Tate*, 468 U.S. 1206 (1984). On remand, the Ninth Circuit adhered to its earlier decision, holding that no probable cause was established to support the search of Tate's residence, but it then applied the Supreme Court's rule in *Leon*; in doing so, the Ninth Circuit held that all of the evidence seized by the government was admissible under *Leon's* good-faith exception. *See United States v. Tate*, 795 F.2d 1487 (1986) (*Tate II*).

While the State appears to disagree with the circuit court's ruling here, which, as in the *Tate* cases, held probable cause could not be established by an officer's smell of a legal substance itself, it has done little to show that ruling to be erroneous. The State cites only four cases in response, and those cases all concern warrants issued to officers who had smelled *unlawful* substances. *United States v. Ventresca*, 380 U.S. 102 (1965) (affidavit for warrant showed probable cause where, among other things, federal officers of Alcohol and Tobacco Division of the Internal Revenue Service investigating an illegal distillery smelled odor of fermenting mash); *Johnson v. United States*, 333 U.S. 10 (1948) (search warrant justified based on qualified officers who smelled the forbidden substance of burning opium coming from a hotel room); *People v. Benjamin*, 91 Cal. Rptr. 2d 520 (Cal. App. 1999) (odors may constitute probable cause if the magistrate finds the affiant qualified to know the odor — here, marijuana — and it is one sufficiently distinctive to identify a forbidden substance). The fourth case cited by the State is *Lowery v. State*, 843 S.W.2d 136 (Tex. Ct. App. 1992) which contained a statement that ether can provide an element of probable cause for a search, but the Texas court's opinion also mentioned an officer "smelled a meth lab near the residence in question." The *Lowery* court also concluded no probable cause was shown because the

odors related to drug manufacturing did not emanate from the residence. *Id.* at 141.

Our court applies the totality of the circumstances analysis when determining whether the issuing magistrate had a substantial basis for concluding that probable cause existed. *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999) (citing *Langford v. State*, 332 Ark. 54, 962 S.W.2d 358 (1998)). This court has held probable cause exists where there is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that a crime has been committed by the person suspected. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001); *Williams v. State*, 300 Ark. 84, 776 S.W.2d 359 (1989). In viewing probable cause, our court has stated the following:

> The determination of probable cause is based upon factual and practical considerations of everyday life upon which ordinary men, not legal technicians, act. A nontechnical approach correctly balances the competing interests of the individual and society, so that law enforcement officers will not be hampered, nor law abiding citizens left to the mercy of over-zealous officers. In making the determination of probable cause, we are liberal rather than strict.

Williams, 300 Ark. at 86 (quoting *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989)).

As already noted, the State has not furnished us with any precedent which has sanctioned the issuance of a search warrant based solely on a trained officer's smell of a legal substance, when that substance has legitimate uses, but also might be used to make an illegal substance. Here, the State is forced to concede that the denatured alcohol Officer Strayhorn and Investigators Ahlf and Parsons smelled had other legal uses. As pointed out by Lisa Bennett, to uphold the search in the circumstances of this case would open the door to the issuance of search warrants based simply on an officer's smell of a noncontraband substance. For example, a business and building where denatured alcohol is kept to strip or refinish furniture could be subject to search. Certainly, the circumstance of smelling denatured alcohol, without other factors, would not cause a cautious man to believe a crime has been committed, nor should the mere storage of denatured alcohol subject a law abiding citizen to the mercy of an over-zealous officer. Once again, the only evidence presented here was that officers smelled unstable denatured alcohol, and that the smell lingered during a three-hour period before the officers sought a warrant.

Finally, because we agree with the circuit court's ruling that the smell of denatured alcohol alone was insufficient to support a finding of probable cause, we now must consider and decide whether the lower court was correct to determine that the evidence seized as a result of the search can still be admissible under the good-faith exception established in *Leon*. The Court in *Leon* wrote that "[i]f the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence should be suppressed only if it can be said that the law-enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 468 U.S. at 919. In this respect, the evidence may only be excluded if the officer was not acting reasonably and with objective good faith.

This court has on several occasions discussed the four errors, noted in *Leon*, which an officer's objective good faith cannot cure. These errors occur (1) when the magistrate is misled by information the affiant knew was false; (2) if the magistrate wholly abandons his detached and neutral judicial role; (3) when the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid. *Leon*, 468 U.S. at 914-15; *see also Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985); *Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983); *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986). In the instant case, we are concerned only with the third of these errors; therefore, we must determine whether the affidavit supporting the search warrant was so lacking in indicia of probable cause that it was unreasonable for the executing officers to rely on it. We conclude that this affidavit was so lacking.

In *Herrington, supra*, this court held that sufficient information must be presented to the magistrate to allow that official to ascertain probable cause; his action cannot be a mere ratification of the bare conclusions of another. *Herrington*, 287 Ark. at 233 (quoting *Illinois v. Gates*, 462 U.S. 213 (1983)); *see also Collins, supra* ("bare, conclusory statements are . . . insufficient"); *Nathanson v. United States*, 290 U.S. 41 (1933) ("[A]n officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.").

Here, Investigator Ahlf prepared his affidavit for search warrant based solely on the smell of denatured alcohol. The remaining "facts" asserted in his affidavit are no more than bare, conclusory statements with no support to be drawn from the surrounding circumstances. For example, the warrant noted Investigator Ahlf's assertion that he "had reason to believe" that Lisa Bennett's storage shed contained items such as records of drug sales, methamphetamine recipes, scales, plastic bags, syringes, pipes, anhydrous ammonia, sulfuric acid, and other such items. However, the State conceded at oral argument that none of those other items were apparent to Investigator Ahlf at the time he obtained the search warrant. Because probable cause for a search warrant *must exist at the time the warrant is issued*, *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000) (emphasis added), we hold that a warrant based on nothing more than the smell of a legal substance presented Ahlf with no reasonable grounds for believing the warrant was properly issued. We point out that, even in *Tate II*, where the Ninth Circuit accepted a good-faith argument when the warrant was initially based on the smell of ether, there were other circumstances which would have lent support to the investigator's conclusion that drugs were being manufactured on the premises.[2] Here, however, there was only the smell of a legal substance. There was no additional evidence to support a conclusion that drugs were being or would be manufactured. As the Court noted in *Leon*, "it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." 468 U.S. at 922. This case presents exactly those circumstances, and the trial court's determination that the good-faith exception applied was clearly against the preponderance of the evidence.

Bennett also raised a second point on appeal, namely, that the officer's refusal to let her or her father enter the storage building until Investigator Ahlf could obtain a search warrant amounted to an unlawful seizure. However, in light of the fact that this case must be reversed, we need not reach this second issue.

For the foregoing reasons, Bennett's motion to suppress should have been granted, and we hereby reverse and remand for entry of an order consistent with this opinion.

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[2] For example, the police had conducted extensive surveillance on the property, the defendants involved had been engaged in suspicious activity, and the police had received several anonymous phone calls about the situation.

Stan JACKSON *v.* CITY of BLYTHEVILLE
CIVIL SERVICE COMMISSION

00-1409 43 S.W.3d 748

Supreme Court of Arkansas
Opinion delivered May 24, 2001

Buchholz, Sassin & DeMaio, P.L.L.C., by: *F. Bady Sassin* and *Robert W. Buchholz*, for appellant.

Mike Bearden, Blytheville City Attorney, for appellee.

ROBERT L. BROWN, Justice. Appellant Stan Jackson appeals from an order granting summary judgment in favor of

appellee City of Blytheville Civil Service Commission (Commission).[1] We affirm the order.

In 1993, Stan Jackson was the Fire Chief for the City of Blytheville. In late 1993, Jackson chose to participate in the Deferred Retirement Option Plan (DROP) for fire fighters. Jackson completed his participation in DROP and retired on November 1, 1998.[2] On November 2, 1998, the Commission unanimously voted to rehire Jackson as the City's Fire Chief. Jackson was rehired as Fire Chief on November 3, 1998, with an effective rehire date of November 4, 1998.

On April 5, 1999, the Attorney General for the State of Arkansas issued an opinion to State Representative Ann H. Bush of Blytheville answering the question of whether the Commission could rehire a fire chief after he had participated in DROP. The Attorney General concluded that based on Ark. Code Ann. § 24-11-830, the Commission could not. On April 16, 1999, the Commission unanimously adopted a motion requiring Jackson to retire as Fire Chief on or before May 3, 1999. The motion stated that Jackson's failure to comply with the request would result in termination by the Commission. Jackson did not comply with the request for retirement. As a result, on May 5, 1999, the Commission unanimously voted to terminate Jackson as Fire Chief.

Following the termination, Jackson requested a hearing before the Commission, and after that hearing, the Commission upheld Jackson's termination. Jackson appealed that action to circuit court on the issues of whether Jackson was wrongfully rehired after his DROP participation and then wrongfully terminated. Both Jackson and the Commission moved for summary judgment, and the circuit court granted summary judgment in favor of the Commission.

Jackson raises the same issues on appeal as he did in his appeal before the circuit court. He contends that the operable statutes

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[1] At various times in the record and briefs, the case is styled "In re: Stan Jackson" and the appellant is named "Stanley Jackson." The appellee, at times, is referenced as "City of Blytheville and Blytheville Civil Service Commission." For ease of reference, we have settled on the style and parties as set out in this opinion.

[2] Jackson's five-year participation apparently ran from November 1, 1993, to November 1, 1998. His Member Election Form, however, shows the beginning and end of his participation as January 1, 1994, and January 1, 1999.

permit the rehiring of a person who has completed DROP participation or, alternatively, that those statutes do not specifically prohibit rehiring. The statutes at issue in this case are Ark. Code Ann. §§ 24-11-827 and 24-11-830 (Repl. 1996, Supp. 1999). Section 24-11-827 concerns the issue of a retired member returning to service and read in pertinent part on November 1, 1993:

> (a) Notwithstanding any other provision of the law to the contrary, should an age or service retirant return March 1, 1986, or later, to employment in a position covered by the firemen's fund from which he retired, no pension payments shall be paid him for the period of such reemployment, and he may make member contributions to the system as if he were an active member during such reemployment.

Section 24-11-830 is the DROP statute and read in pertinent part on November 1, 1993:

> (a) In lieu of terminating employment and accepting a service retirement pension pursuant to §§ 24-11-801 *et seq.*, any full-paid fire fighter who is a member of a firemen's pension and relief fund who has not less than twenty (20) years of credited service and who is eligible to receive a service retirement pension may elect to participate in the Arkansas Fire Fighters' Deferred Retirement Option Plan and defer the receipt of benefits in accordance with the provisions of this section, provided the local firemen's pension and relief fund board of trustees approves the participation in the plan.
>
> (c)(1) The duration of participation in the Arkansas Fire Fighters' Deferred Retirement Option Plan for active full-paid fire fighters shall not exceed five (5) years.
>
> (2) At the conclusion of a member's participation in the Arkansas Fire Fighters' Deferred Retirement Option Plan, the member *shall* terminate employment with *all* participating municipalities as a fire fighter and *shall* start receiving the member's accrued monthly retirement benefit from the firemen's pension and relief fund.

[Emphasis added.][3]

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[3] Act 762 of 2001 extended the duration of participation in DROP to seven years.

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. *Shelton v. Fiser*, 340 Ark. 89, 8 S.W.3d 557 (2000); *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998), *supp. opinion on denial of reh'g*, 332 Ark. 189, 961 S.W.2d 712 (1998). The evidence is viewed most favorably for the person resisting the motion, and any doubts or inferences are resolved against the moving party. But in a case where the parties agree on the facts, this court simply determines whether the appellee was entitled to judgment as a matter of law. *Aloha Pools & Spas, Inc. v. Employer's Ins. of Wausau*, 342 Ark. 398, 39 S.W.3d 440 (2000); *City of Little Rock v. Pfeifer*, 318 Ark. 679, 887 S.W.2d 296 (1994).

With regard to statutory construction, we have recently said:

> We have held that issues of statutory construction are reviewed *de novo* on appeal, and it is for the appellate court to determine the meaning of a statute. *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). The appellate court is not bound by the trial court's interpretation, but in the absence of a showing that the trial court misinterpreted the law, the trial court's interpretation will be accepted as correct. *Id.* This case involves a first-impression interpretation of a statute. The basic rule of statutory construction is to give effect to the intent of the Legislature. *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999). The Workers' Compensation Law must be strictly and literally construed by the Commission and the courts, and a particular provision in a statute must be construed with reference to the statute as a whole. *Flowers v. Norman Oaks Constr. Co.*, 341 Ark. 474, 17 S.W.3d 472 (2000). Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. *Id.* The first rule in considering the meaning of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. The statute should be construed so that no word is left void, superfluous, or insignificant; and meaning and effect must be given to every word in the statute if possible. *Id.* If the language of the statute is plain and unambiguous, the analysis need go no further. *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997).

Aloha Pools & Spas, Inc., 342 Ark. at 403-404, 39 S.W.3d at 443. There is, too, the principle recognized in this state that pension laws

are construed liberally in favor of those benefitted. *Looper v. Gordon*, 201 Ark. 841, 147 S.W.2d 24 (1941).

This court has never interpreted the two statutes before us today. We turn then to the legislative history of the two statutes. Section 24-11-827 was enacted by Act 429 of 1991 and deals with "service retirants" who return to employment after retiring. It specifies the effect of contributions made to the retirement system for a period of less than three years and for a period of more than three years after reemployment. The section was amended by the General Assembly during the First Extraordinary Session in 1992 but not in a manner material to the instant case.

Section 24-11-830 was enacted by Act 1004 of 1993. The Act contained a general repealer clause and provided that fire fighters who are members of the pension and relief fund with twenty or more years of service and who are able to receive a retirement pension may elect to participate in the DROP program. The duration of that participation could not exceed five years in 1993. To repeat, the Act provides:

> (2) At the conclusion of a member's participation in the Arkansas Fire Fighters Deferred Retirement Option Plan, the member shall terminate employment with all participating municipalities as a fire fighter, and shall start receiving the member's accrued monthly retirement benefit from the firemen's pension and relief fund.

Ark. Code Ann. § 24-11-830(c)(2) (Supp. 1999). During DROP participation, contributions by the municipalities and fire fighters shall continue but receipt of benefits will be deferred. At the end of the DROP period, the participant may receive a lump sum payment of amassed contributions or any other approved method of payment.

Jackson's core argument is that nothing in the DROP statute prohibits rehiring after a DROP termination. In addition, he contends that § 24-11-827 contemplates that service retirants may reenter employment and commence anew contributions to the retirement system. According to Jackson, when read together, the statutes authorize rehiring in the same position after DROP participation and termination.

We disagree. The DROP program provides an option to normal retirement benefits, and Jackson elected to participate in

DROP. Thus, he was subject to the precise terms of § 24-11-830. To our way of thinking, the issues in this case turn in large part on what the DROP statute means when it says "the members shall terminate employment with all participating municipalities." The widely recognized definition of "terminate" is "to bring to an end." *See, e.g., Merriam-Webster's Collegiate Dictionary*, p. 1216 (10th ed. 1997). Rehiring a fire fighter after the statute mandates that he end his employment with the City and commence receiving retirement benefits runs directly counter to the express intent of the DROP statute. In short, rehiring as was done in the instant case does not bring an end to employment but does exactly the opposite.

We note, of course, that Jackson was not a typical service retirant due to his DROP election, and for that additional reason, we conclude that the General Assembly did not intend for § 24-11-827 to apply to his situation. Moreover, the DROP statute, which was enacted after § 24-11-827, contains a general repealer for all laws in conflict with it which, we believe, renders § 24-11-827 inapplicable to DROP participants. We further observe that there has been no legislative clarification of the DROP statute following the Attorney General's opinion in 1999. Finally, with regard to the principle of liberal construction of pension statutes in favor of those benefitted, we agree with the Commission that deferred income plans, which necessarily involve deferred income taxes, must comply with statutory mandates or else run the risk of nonqualification with the Internal Revenue Service.

We hold that § 24-11-830 is plain and unambiguous and provided a separate and distinct retirement plan option for fire fighters. The circuit court correctly concluded that Jackson's rehiring violated the statute's terms.

Affirmed.

John Aaron LACY *v.* STATE of Arkansas

CR 00-909 44 S.W.3d 296

Supreme Court of Arkansas
Opinion delivered May 24, 2001

[redacted]

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

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

ROBERT L. BROWN, Justice. The appellant, John Aaron Lacy, was convicted of first-degree murder and sentenced to life imprisonment. He appeals and raises one point — the trial court erred in admitting his statement to a police officer into evidence. Specifically, Lacy contends that he unequivocally invoked his right to counsel and that his statement was taken in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). We hold that the trial court's finding that the statement was freely and voluntarily given after a knowing and intelligent waiver of his *Miranda* rights was not clearly erroneous.

The facts are that on October 4, 1998, Beverly Henderson was staying at the Park Lane Motel in North Little Rock with her friend, Jeff Galandt, who was a truck driver. Galandt testified that he and Henderson were engaged to be married and that Henderson had been a prostitute and suffered from a drug problem. On October 5, 1998, after leaving on his truck route and not hearing from Henderson, Galandt became concerned and called the motel manager of the Park Lane Motel, Mike Patel. Patel was busy and Galandt asked Patel's wife to have Patel check on Henderson. Patel did so and found that her motel room was in total disarray and that there was blood on the walls, carpet, and bed. He immediately notified the North Little Rock Police Department. Police officers found in their examination of the motel room that among the blood splatters was a bloody hand print on a wall.

Lacy, who was age 31 at the time, had also been staying at the Park Lane Motel on October 5, 1998, and he had been seen by another motel guest going in and out of Henderson's room that night. As part of the investigation, North Little Rock police detectives began interviewing the guests of the motel. On October 13, 1998, Lacy voluntarily came to the North Little Rock police station for an interview. All of the police interviews with Lacy on October 13, 1998, were videotaped. Prior to the interview, a police investigator took Lacy's finger prints and palm print and gave him the standard *Miranda* warnings. While the interview was underway at the police station, the State Crime Lab found that Lacy's palm print matched the palm print found on the wall of Henderson's room. Upon discovering this positive match, the police considered Lacy to be in custody.

Lacy initially denied knowing Henderson or having any knowledge of what happened in Henderson's motel room on the night in question. However, after learning of the matching palm prints, Detective Scott Armstrong, who had been asking Lacy routine questions, confronted him with the Crime Lab evidence and began interrogating him about his involvement in Henderson's murder. Lacy continued to deny any knowledge of the murder over the next two hours. Sergeant Larry Dancy then took over the interview. During this time period, Lacy invoked his right to counsel on two occasions. After visiting with his mother, Linda Tolliver, for a prolonged period of time, Lacy asked to see Sgt. Dancy. Lacy gave a statement admitting his involvement in Henderson's death, after receiving his *Miranda* warnings. He said that he had been drinking alcohol and taking cocaine at the motel and that Henderson approached him about sex. She performed oral sex on him for $20.00 in his room. After she left his motel room, he believed his wallet and a package of cocaine had been stolen. He returned to Henderson's room and accused her of the theft. They fought. According to Lacy, she pulled a gun on him and stabbed him with scissors. He hit her and strangled her until she died. With the help of a stranger, whom he paid, he transported Henderson's body to Mayflower, dragged her onto his mother's property, and buried her in a shallow grave. After giving the statement, Lacy accompanied police officers to Mayflower at about midnight and showed them where the body was buried. The following day, Lacy gave a formal statement to Detective Scott Armstrong after being given his *Miranda* warnings.

Lacy was charged with first-degree murder, and an enhancement of his sentence was requested by the prosecuting attorney owing to a criminal record of four or more felonies, with two or more of those crimes being serious crimes which involved violence.

Lacy moved to suppress his statements and the fruits of those statements and asserted that North Little Rock police detectives continued to interrogate him after he had invoked his right to counsel in violation of *Edwards v. Arizona, supra.* The trial court held a hearing where testimony was taken from the detectives and Lacy. The trial court denied the motion to suppress and found that Lacy had knowingly and voluntarily given his statement. As a result, the trial court ruled that the statements were admissible.

Over Lacy's renewed objection at trial, the audio portion of his taped statement given to Detective Armstrong on October 14, 1998, was admitted into evidence and played for the jury. The

verbal statements given by Lacy to Sgt. Dancy the previous day were not presented to the jury. Dr. Charles Kokes, a forensic pathologist with the State Crime Lab, testified that Henderson died from multiple blows to the head from a blunt force and strangulation. After the trial by jury, Lacy was found guilty of first-degree murder. Based on a finding by the trial court that Lacy had previously been convicted of rape and aggravated robbery, the trial court sentenced him to life imprisonment.

Lacy contends on appeal that his right to counsel, as guaranteed by the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966), was violated. We recently set out our criteria for reviewing a trial court's ruling on a motion to suppress in the cases of *Jones v. State*, 344 Ark. 682, 42 S.W.3d 536 (2001) and *Barcenas v. State*, 343 Ark. 181, 33 S.W.3d 136 (2000). In such cases, this court views the evidence in the light most favorable to the State and makes an independent determination based on the totality of the circumstances. *Barcenas v. State, supra; Stegall v. State*, 340 Ark. 184, 8 S.W.3d 538 (2000); *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997). This court will only reverse a trial court's ruling on a motion to suppress, if the ruling was clearly erroneous. *Barcenas v. State, supra.* A statement made while an accused is in custody is presumptively involuntary, and the burden is on the State to prove, by a preponderance of the evidence, that a custodial statement was given voluntarily and was knowingly and intelligently made. *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427 (1998). In order to determine whether a waiver of *Miranda* rights is voluntary, this court looks to see if the statement was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Diemer v. State*, 340 Ark. 223, 9 S.W.3d 490 (2000).

It is well settled that when an accused requests an attorney, a police interrogation must cease until counsel has been made available to him. *Edwards v. Arizona, supra.* However, if the accused initiates further communication, exchanges, or conversations with police officers, any resulting statement may be admissible. *See Edwards v. Arizona, supra*; *Chase v. State*, 334 Ark. 274, 973 S.W.2d 791 (1998). In *Edwards*, the United States Supreme Court concluded:

> We further hold that an accused, ..., having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484–485. Interrogation may take other forms than mere questioning by police officers. In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Court said:

> [T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter part of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

446 U.S. at 301.

All of the police interviews with Lacy on October 13 and October 14, 1998, were videotaped by the North Little Rock Police Department. The interviews and interrogation comprised eight hours and are depicted on six videotapes. Initially, Lacy denied any knowledge of the murder. The precise sequence of events, as shown on the videotapes, is as follows:

- On October 13, 1998, the first *Miranda* form is read to Lacy by Detective Armstrong at 2:20 p.m. and signed by Lacy. Lacy says he understands his rights "perfectly." This rights form states that Lacy was talking to police officers regarding a "missing person." The form was signed by Detective Armstrong. Detective Armstrong later tells Lacy that the Crime Lab experts have concluded that his hand prints match the prints found on the motel room wall.

- Sgt. Dancy begins speaking to Lacy approximately two hours into the interview. He points out that Lacy's arm has been scratched and repeats that the Crime Lab has matched his finger prints. Lacy tells him that he knows he's going to jail. He says he does not want to be in jail when his mother dies. He says his billfold came up missing. Lacy then asks Sgt. Dancy whether "the prosecuting attorney" can come over, and Sgt. Dancy responds that [they] can if you want to talk to one. Lacy asks whether Sgt. Dancy is going to quit talking to him if he asks to see an attorney and Sgt. Dancy says that he would. Then Lacy says "I don't want, I don't, I don't .... I want to keep talking to you. I need to talk to my mom." They discuss searching the Mayflower property

for the body. Shortly after this discussion, Sgt. Dancy tells Lacy that it is about 6:00 p.m. Lacy asks if they will go on and take him to the Pulaski County Jail, and Sgt. Dancy asks, "Why end it that way? Is that what you want?" Lacy says, "No, just tired."

- While he is being questioned, Lacy repeatedly asks to speak to his mother. His mother, Linda Tolliver, is brought to the police station by the detectives. Sgt. Dancy leaves Lacy and his mother alone in the room for a prolonged period of time. Sgt. Dancy testifies that he did not ask Ms. Tolliver to ask any questions on his behalf. After denying any knowledge of the crime for a long time, Lacy eventually tells his mother that the woman is dead. Several times during his conversation with his mother, Lacy asks his mother if she thinks he should talk to an attorney. She tells him to do whatever he wants to do.

- At some point after this, Ms. Tolliver leaves the room at the request of one of the detectives. Lt. Chapman of the North Little Rock Police Department asks Lacy if he can get him anything. Lacy responds that he wants to exercise his right to see an attorney and wants to go on to jail. At that point, Lt. Chapman stops talking to Lacy and leaves the interrogation room.

- After seven to ten minutes, Sgt. Dancy reenters the room with Ms. Tolliver, who has with her a sheet of paper which is the Crime Lab's positive match up of Lacy's hand print to the hand print at the crime scene. At Lacy's request to speak to his mother alone, Sgt. Dancy leaves the room after staying there for a little more than one minute. Ms. Tolliver tries to persuade Lacy to tell her where the body is and to admit that he accidentally killed a prostitute. She says she is concerned about a Christian burial and about kids or animals finding the body.

- While talking to his mother alone, Lacy admits that he accidentally killed Henderson but says he wants to talk to an attorney. His mother says he could have talked to an attorney any time this afternoon but emphasizes that his palm print matches the bloody palm print found in the room. Ms. Tolliver encourages Lacy to tell the police

it was an accident and that he wants to talk to an attorney. Sgt. Dancy then asks to visit with Ms. Tolliver. Ms. Tolliver returns alone, and Lacy tells her Henderson is dead and that it was an accident. Ms. Tolliver says that Lacy needs to tell Sgt. Dancy that, and Lacy says to "go get him." After talking for about 40 minutes, Ms. Tolliver leaves the room to find Sgt. Dancy to tell him that Lacy wants to talk to him. Sgt. Dancy returns to the room.

- The following conversation then transpired:

SGT. DANCY: I know that, or I'm reasonably sure. (Addressing Lacy:) Let me tell you something. If you've requested an attorney, and I don't know that you've formally done that ...

MS. TOLLIVER: No, he hasn't.

SGT. DANCY: But if you have, I'm out of here. That's the law.

LACY: Fuck the law.

MS. TOLLIVER: No, I told him ...

LACY: Ain't nobody requested anything ...

MS. TOLLIVER: He's going to tell you that this was an accident but he's still going to have to have an attorney ...

SGT. DANCY: Oh, he's going to have to have an attorney somewhere down the road ...

LACY: You going to charge me with first degree, second degree or manslaughter ...

SGT. DANCY: I don't know what I'm going to charge you with until you tell me. Look, let me tell you, if you request an attorney I'm up and out of here. That's the law.

MS. TOLLIVER: He wants to tell you ...

SGT. DANCY: I need him to tell me what happened, his side of the story and where I can find her. And because we've even talked about an attorney, I think before, if he wants to do that, before he even does that, I'd like to go over your rights [for] with you again,

because I want it to be clear as a bell. I have to protect the integrity of this investigation, number one. I have to protect your rights as a U.S. citizen, number one. I told you in here earlier, John, that I don't believe you went in this room with the intent of killing anybody.

MS. TOLLIVER: Tell him about what happened.

SGT. DANCY: But, well, no. I think I want to go over a rights form again. I want to keep the integrity ...

MS. TOLLIVER: No, he wants to tell you this.

LACY: Go get the rights form.

- Sgt. Dancy leaves the room and returns with the *Miranda* rights form, and this conversation ensues:

LACY: I can't talk to no attorney tonight?

SGT. DANCY: Well, yeah. You can do anything you want to, John.

LACY: Can I call an attorney now, even though I'm going to make a statement?

SGT. DANCY: Well, an attorney is going to tell you not to, but sure you can.

LACY: I'd rather do that.

MS. TOLLIVER: John ...

LACY: I'd rather do that and still talk to you.

MS. TOLLIVER: He wants to do both.

LACY: I want to talk to an attorney.

SGT. DANCY: They're going to tell you not to, but that's okay. Who do you want to call?

LACY: Greg Bryant.

MS. TOLLIVER: You'll have to use a public defender. I can't afford Greg Bryant.

LACY: Can you get a public defender up here?

SGT. DANCY: No. Not tonight. Not that I'm aware of.

MS. TOLLIVER: It's just what he said. He can take you and have you charged with first degree or he can take you for accidental ... manslaughter.

SGT. DANCY: I've never got a public defender up here at night. I don't know.

LACY: Could you try?

SGT. DANCY: I'll see if I can. I don't know. This is up to you John. I'm through. I'm through.

- Sgt. Dancy leaves the room. The testimony of Sgt. Dancy is that this occurred approximately five and a half hours after the interview started, but he does not give a specific time, although a rough estimate would be about 8:00 p.m. Ms. Tolliver again asks Lacy where the body is and they discuss getting an attorney and the fact it was an accident. Lacy says the body is in Mayflower.

- About twelve minutes later, Ms. Tolliver leaves the room to get Sgt. Dancy and says that Lacy wants to talk to him. Sgt. Dancy is seen reentering the room with a *Miranda* rights form. Lacy says to him immediately as he enters the room: "Yeah, I did it man." Sgt. Dancy stops him and says if Lacy wants an attorney, he is leaving. Lacy says, "Let's do it." Lacy is again read his *Miranda* rights, and Sgt. Dancy emphasizes Lacy's right to counsel. He signs a *Miranda* rights form at 8:15 p.m. Unlike the earlier rights form, this form states that Lacy is talking to police offices about a homicide. Sgt. Dancy signs the form.

- Lacy discusses the details of the crime and the location of the victim's body on his mother's property in Mayflower. He takes the detectives to find the body in Mayflower at around midnight.

- On October 14, 1998, Detective Armstrong read Lacy his *Miranda* rights a third time, and Lacy signed another rights form at 4:38 p.m. Lacy is wearing a prisoner jumpsuit instead of the civilian clothes he was wearing in the videotapes on the previous day. He makes no request for counsel. Lacy gives a lengthy and detailed description of the murder. The interrogation ends at 7:39 p.m. The statement is audiotaped and played for the jury at trial.

Under the test enunciated by the Supreme Court in *Edwards v. Arizona, supra*, the critical inquiry for this court is whether Lacy initiated further communication with the police detectives, before making his statement to Sgt. Dancy. We believe that Lacy did. There is no question in our minds that Lacy was fully aware of his *Miranda* rights and specifically of his right to counsel. Indeed, he had invoked that right once with Lt. Chapman, who immediately left the room, and a second time with Sgt. Dancy, who said: "I'm through. I'm through." Yet Lacy continued to massage the issue with his mother and asked her repeatedly whether he should talk to an attorney. Her ultimate advice was to tell the police detectives that Henderson's death was an accident and where the body was buried and then talk to an attorney. This is the advice that Lacy chose to follow.

Lacy would now have it that after he asked for an attorney, no later statement by him would be admissible. That is not the law. The Supreme Court in *Edwards v. Arizona, supra*, makes it clear that an accused may *initiate* contact with the police even after asking for an attorney. And that is precisely what happened in the case at hand. Lacy told his mother to go get Sgt. Dancy, and when the police sergeant entered the room, Lacy said, "Yeah, I did it man." Sgt. Dancy stopped him and went over his *Miranda* rights again and in doing so, underscored his right to an attorney several times. Lacy executed the *Miranda* rights waiver form and proceeded to tell his story.

Caselaw in Arkansas and other jurisdictions support our conclusion. In 1994, this court affirmed a trial court's ruling to allow a suspect's statement into evidence after that suspect (Rockett) had asked for counsel. *See Rockett v. State*, 318 Ark. 831, 890 S.W.2d 235 (1994), overruled in part on other grounds *Mackintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). In that case, Rockett was arrested for murder, and he requested counsel. Subsequently, he initiated contact with the police, waived his *Miranda* rights, and gave a statement. We stated that on appeal, we looked to the totality of the

circumstances and view the evidence in the light most favorable to the State. We then concluded:

> Here, we hold the record supports the trial court's ruling admitting Rockett's statement. Detective Smiley testified that Jazmar Kennedy, Rockett's girlfriend, came to the jail to visit Rockett. Smiley admitted that he told Ms. Kennedy that maybe if Rockett showed some remorse the jury might give him life instead of the death penalty. After visiting with Rockett, Ms. Kennedy told Detective Smiley that Rockett wanted to talk to him. Although Detective Smiley knew that Rockett had an attorney at this point, he agreed to hear what Rockett had to say. He introduced himself to Rockett and asked if he had wanted to talk. Rockett responded in the affirmative. The two went to another room, and before Smiley said anything, Rockett said that he did not mean to kill the clerk and began to tell the whole story. Detective Smiley interrupted, Rockett's rights were read and a *Miranda* form was completed, and Rockett gave a complete confession of the events at the Stax store. Both Rockett and his girlfriend denied that Rockett requested to speak to Smiley. However, it is for the trial court to decide questions of credibility and conflicts in testimony, and we will not reverse unless the decision is clearly erroneous. *Everett v. State*, 316 Ark. 213, 871 S.W.2d 568 (1994). Having reviewed the record, we are satisfied that the trial court's decision was not clearly erroneous, and we affirm.

318 Ark. at 838, 890 S.W.2d at 238-239. The events in *Rockett* resemble what occurred in the instant case.

This court has affirmed other trial court rulings where statements were admitted into evidence after a suspect had first sought counsel. *See, e.g., Stephens v. State*, 328 Ark. 81, 941 S.W.2d 411 (1997); *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996). In *Stephens*, we observed that in cases when the right to counsel is invoked but then waived, the proper focus is on whether the subsequent waiver of the right to counsel is intelligently and voluntarily made. Other states are in agreement with this principle. *See, e.g., People v. Woolley*, 178 Ill.2d 175, 687 N.E.2d 979 (1997); *State v. Flack*, 260 Mont. 181, 860 P.2d 89 (1993); *State v. Claybrook*, 736 S.W.2d 95 (Tenn. 1987).

We hold that Lacy initiated contact with Sgt. Dancy after invoking his right to counsel and that the trial court did not clearly err in finding that he knowingly and intelligently waived his *Miranda* rights at that time.

Lacy also argues that his mother, in effect, became an agent of the North Little Rock Police Department or at least a "go-between." This, he contends, was utilization of the functional equivalent of the police to obtain a statement in violation of *Rhode Island v. Innis, supra.* We disagree. First and foremost, it was Lacy who repeatedly asked for his mother to be present. Based on the videotapes, Lacy had enormous confidence in his mother's advice and asked her multiple times whether he should talk to an attorney. We have no doubt that Ms. Tolliver had her son's best interests at heart, and her repeated advice to him was to tell the police that Henderson's death was an accident, which is what Lacy ultimately did. We see nothing wrong in the police allowing Ms. Tolliver to continue to talk with her son. We note that after Lacy exercised his right to counsel with Lt. Chapman, Ms. Tolliver reentered the room with Sgt. Dancy, and Lacy dismissed Sgt. Dancy. He then visited with his mother at length. Again, that is analogous to what happened in *Rockett v. State, supra.*

Other jurisdictions have not seen fit to deny admission of a statement when a family member or friend has encouraged the suspect to talk after the suspect has invoked his or her right to counsel. *See, e.g., Arizona v. Mauro,* 481 U.S. 520 (1987) (suspect invoked right to counsel in murder of his son and wife asked to speak to suspect with police present with a tape recorder; Court upheld admissibility of statements which were used to show suspect was sane on grounds this was not police-initiated interrogation and that suspect was not subjected to compelling influences, psychological ploys, or direct questioning by police officers); *Snethen v. Nix,* 885 F.2d 456 (8th Cir. 1989) (suspect declined to speak to police without attorney present, but mother asked to speak to suspect who made incriminating statements in front of police; statement admissible since no evidence police questioned suspect; petition for writ of *habeas corpus* denied); *U.S. ex rel. Whitehead v. Page,* 2000 W.L. 343209 (N.D. Ill. 2000) (friend convinced suspect to confess to murder after he requested counsel; no evidence this was police-initiated interrogation; petition for *habeas corpus* denied); *Lowe v. State,* 650 So.2d 969 (Fla. 1995) (suspect confessed to girlfriend that he murdered victim after requesting counsel; police told girlfriend evidence against suspect; court affirmed admission of statement, holding no violation of *Rhode Island v. Innis, supra*); *Cook v. State,* 270 Ga. 820, 514 S.E.2d 657 (1999) (court upheld confession to murders given to suspect's father, an FBI agent, after suspect requested an attorney; court held father was not directed by law enforcement to obtain confession).

In the instant case, Lacy had been aware for hours that the Crime Lab had matched his palm print to the one on the motel wall. This means the evidence that his mother brought into the interrogation room was nothing new to him. Further, it was Lacy who wanted to consult with his mother and seek her advice. The fact is crystal clear from a viewing of the videotapes. That this ultimately inured to the benefit of police officers does not convert Ms. Tolliver into the Department's agent or functional equivalent, and Sgt. Dancy was adamant that Ms. Tolliver was not acting at the direction of the police department.

Lacy urges that *Hughes v. State*, 289 Ark. 522, 712 S.W.2d 308 (1986), is authority for reversing this case. That is not our view. In *Hughes*, the suspect confessed to murder to an employee of the prosecutor's office who continued to question the suspect after she invoked her right to counsel. We held that the questioning should have stopped and invalidated the confession. The instant case is vastly different. Here, Lacy's mother, whom he wanted to see, discussed the case with him and then Lacy initiated contact with the police.

The totality of the circumstances in the instant case supports a holding that Ms. Tolliver's involvement did not run afoul of *Rhode Island v. Innis, supra.*

There is one additional point. The only statement of Lacy that was played for the jury was the statement given to Detective Armstrong the day following the interrogation by Sgt. Dancy. Detective Armstrong took the formal statement after advising Lacy, once again, of his *Miranda* rights. Lacy waived those rights in writing and proceeded to give his statement. No request for counsel was made. Accordingly, there was no hint of a *Miranda* violation when Lacy gave his formal statement to Detective Armstrong. Because the parties do not argue the point of whether what transpired the next day cured any alleged *Miranda* violations, we do not address it.

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

Affirmed.

IMBER and THORNTON, JJ., dissent.

ANNABELLE CLINTON IMBER, Justice, dissenting. I must dissent. Mr. Lacy clearly invoked his right to the assistance of

counsel during interrogation when he informed. Lt. Chapman that he wished to assert his right to counsel. Lt. Chapman responded appropriately and left Mr. Lacy alone. A few minutes later, however, Sgt. Dancy returned to the interrogation room in the company of Mr. Lacy's mother, Ms. Tolliver. It is this encounter, which the majority merely glosses over, that forces me to dissent from the decision reached by the court today.

When a suspect in custody is subjected to interrogation, the suspect must be informed of his right to counsel and his right to remain silent. *Miranda v. Arizona*, 384 U.S. 436 (1966). If at any time during the custodial interrogation, the suspect unambiguously invokes his right to counsel, all interrogation must immediately cease and may not be resumed, absent a break in custody. *Edwards v. Arizona*, 451 U.S. 477 (1981); *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Once the suspect has invoked his right to counsel, law enforcement officers may not resume the interrogation unless it is the suspect who initiates the exchange. *Edwards v. Arizona*, *supra*.

In the instant case, Mr. Lacy clearly and unambiguously invoked his right to counsel when he engaged in the following exchange with Lt. Chapman:

> MR. LACY: Y'all have just sat up here all this time, catering to me. My mom's out there about to stroke out, *but I'm just ready to go on to jail.* I know y'all are going to get pissed.
>
> LIEUTENANT: We aren't going to be upset about it, but it's like I told you earlier, our main concern is trying to at least get her to where she goes to a proper place.
>
> MR. LACY: *It's best I go on to jail.* I feel like I've wasted y'all's time. I heard my mom out there getting upset.
>
> LIEUTENANT: No, I just saw your mom. She's fine.
>
> MR. LACY: I can say this about your detectives. They're professional. *I will go on and exercise my right to see an attorney. I'm ready to go on to jail.*
>
> LIEUTENANT: Okay.

(Emphasis added.) At that point, Lt. Chapman acted appropriately and ceased his discussion with Mr. Lacy. After a few minutes, however, Sgt. Dancy returned to the interrogation room with Mr.

Lacy's mother. Upon entering the room, Ms. Tolliver confronted Mr. Lacy with evidence of a bloody palm print belonging to Mr. Lacy that had been recovered from the room in which Ms. Henderson died. Sgt. Dancy provided Ms. Tolliver with the evidence. The following exchange then occurred:

> MS. TOLLIVER: John Aaron, now I want you to see what they've got here and I want you to tell me . . . . This is the bloody print that was on the wall, and will you read what this says? Did you accidentally do this? Son, if you accidentally did it, then if you accidentally did this, son, you need to be honest.
>
> (Sgt. Dancy then speaks to Ms. Tolliver, telling her what he has told Mr. Lacy.)
>
> MS. TOLLIVER: If this woman is laying dead in the woods or someplace, would you want Blake (?) and Morgan to walk up on her?
>
> MR. LACY: No.
>
> MS. TOLLIVER: If this lady is laying dead someplace, she needs to be tended to.
>
> (Ms. Tolliver begins to cry and Mr. Lacy asks Sgt. Dancy if he would allow Mr. Lacy to speak with Ms. Tolliver.)
>
> MS. TOLLIVER: Son, I'm OK. Listen to me. Listen to me. It's just hard for Mama to absorb everything, okay? But if this lady's laying dead someplace, it's the Christian thing to do to see to it she's tended to before some little kid or an animal finds her.
>
> (Mr. Lacy again asks Sgt. Dancy to allow him to speak with his mother. At this point, someone from outside the room interrupts to tell Sgt. Dancy that the captain wants to talk to him. Before he leaves the room, Sgt. Dancy addresses Mr. Lacy with the following comment.)
>
> SGT. DANCY: *John, I'm not trying to hurt you, man. I'm trying to be honest with you.*
>
> MR. LACY: I know.

(Emphasis added.)

Following this encounter, Mr. Lacy continued talking with his mother for several minutes and then eventually agreed to speak with Sgt. Dancy again. The constitutional infirmity arises because it was Sgt. Dancy, not Mr. Lacy, who reinitiated the interrogation process during the above encounter. Mr. Lacy had been sitting alone in the room after telling Lt. Chapman that he wanted to see an attorney. Sgt. Dancy[1] reentered the room with Ms. Tolliver and observed as she attempted to convince her son to make a confession about where Ms. Henderson's body could be found. Had Sgt. Dancy's involvement been limited to observation, there would be no constitutional violation. *Arizona v. Mauro*, 481 U.S. 520 (1987). However, Sgt. Dancy was not merely a casual observer. As noted above, Sgt. Dancy provided evidence to Ms. Tolliver to bolster her persuasive efforts. He then interrupted Ms. Tolliver's persistent demands for information to tell her what he had already told Mr. Lacy in his own attempts to persuade him to confess. Finally, when his captain called him from the room, Sgt. Dancy turned directly to Mr. Lacy and said "I'm not trying to hurt you, man. I'm trying to be honest with you." By interjecting this statement into the conversation, Sgt. Dancy was clearly attempting to persuade Mr. Lacy to reveal incriminating information. The fact that the comment was not a direct question is irrelevant. An interrogation occurs when an officer uses any words or actions that the officer should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, 446 U.S. 291 (1980). There was no conceivable purpose for Sgt. Dancy's comment other than to elicit an incriminating response from Mr. Lacy. While Sgt. Dancy made the statement as he was leaving the room, he was nevertheless aware that Mr. Lacy's conversation with his mother was not only being observed by other officers, but it was also being recorded on videotape. Furthermore, Sgt. Dancy was aware that Ms. Tolliver was firmly and persistently demanding that Mr. Lacy tell her where Ms. Henderson was buried.

The majority today glosses over this encounter with Sgt. Dancy, claiming that Mr. Lacy dismissed Sgt. Dancy from the room and that, when Sgt. Dancy returned, Mr. Lacy waived his right to counsel. The fact is that Mr. Lacy asked Sgt. Dancy twice to be allowed to speak privately with his mother; but, it was not until the sergeant was called from the room by a superior officer that he

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[1] The record is silent as to whether Lt. Chapman informed Sgt. Dancy of Mr. Lacy's request for counsel. Sgt. Dancy is charged with having knowledge of any assertion of the right to counsel, regardless of whether he had actual knowledge. *Arizona v. Roberson*, 486 U.S. 675, 687 (1988).

actually left Mr. Lacy alone with his mother. Even then, Sgt. Dancy knew that Mr. Lacy's interaction with his mother was being observed and recorded.

After several more minutes of persuasive efforts by Ms. Tolliver, Mr. Lacy finally acquiesced to his mother's insistence that he tell Sgt. Dancy where to find Ms. Henderson's body. At this point, Mr. Lacy denied having requested counsel and Sgt. Dancy re-*mirandized* him. However, it was too late. Sgt. Dancy had unconstitutionally reinitiated the interrogation of Mr. Lacy when he entered the room with Ms. Tolliver and actively aided her in her persuasive efforts following Mr. Lacy's unequivocal assertion of his right to counsel. "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation even if he has been advised of his rights." *Edwards v. Arizona*, 451 U.S. at 484. Once an accused has "expressed his desire to deal with the police only through counsel," he is "not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85.

The purpose of the *Edwards* rule is to protect a suspect's desire to deal with the police only through counsel. *McNeil v. Wisconsin, supra.* It is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990); *Michigan v. Harvey*, 494 U.S. 344 (1990); *McNeil v. Wisconsin, supra.* The suspect's right to counsel cannot be adequately protected where the suspect is subject to "persistent attempts by officials to persuade him to waive his rights," as Mr. Lacy was in the instant case. *Minnick v. Mississippi*, 498 U.S. at 153. The prophylactic rule requiring the suppression of any statement made following police-initiated interrogation of a suspect who has asserted his right to counsel "ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick v. Mississippi*, 498 U.S. at 151.

To effectuate the above-stated purpose, the *Edwards* decision created a bright-line rule of suppression because it must be presumed that any subsequent waiver of the previously asserted right to counsel that comes at the behest of law enforcement, rather than the suspect's own initiation, is the product of the "inherently compelling pressures" of custodial interrogation rather than the "purely voluntary choice of the suspect." *Arizona v. Roberson*, 486 U.S. 675,

681 (1988) (quoting *Miranda v. Arizona*, *supra*). "The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 498 U.S. at 151. Its "clear and unequivocal" rule, like its predecessor *Miranda v. Arizona*, "has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Minnick v. Mississippi*, 498 U.S. at 151. "Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' " *Arizona v. Roberson*, 486 U.S. at 681 (quoting *Edwards v. Arizona*, *supra*).

The case before us today is precisely the situation the *Edwards* court sought to prevent. Mr. Lacy unequivocally invoked his right to counsel. Interrogation was then reinitiated by Sgt. Dancy. Sgt. Dancy's persuasion, combined with the extensive persuasive efforts of Ms.Tolliver, ultimately led to Sgt. Dancy's desired result—Mr. Lacy waived his previously asserted right to counsel. But, even then, Mr. Lacy attempted to reassert that right. The following exchange occurred when Sgt. Dancy began filling out a rights form.

> MR. LACY: (*to his mother*) You don't want me to talk to an attorney first?
>
> MS. TOLLIVER: John, I don't know. I've never been involved in this. *But he said he wants to help you.*
>
> MR. LACY: *I can't talk to no attorney tonight?*
>
> SGT. DANCY: Well, yeah. You can do anything you want to, John.
>
> MR. LACY: *I'd rather do that.*
>
> MS. TOLLIVER: John . . .
>
> MR. LACY: I'd rather do that and still talk to you.
>
> MS. TOLLIVER: He wants to do both.
>
> MR. LACY: *I want to talk to an attorney.*

SGT. DANCY: *They're going to tell you not to,* but that's okay. *Who do you want to call?*

MR. LACY: *Greg Bryant.*

MS. TOLLIVER: You'll have to use a public defender. I can't afford Greg Bryant.

MR. LACY: *Can you get a public defender up here?*

SGT. DANCY: *No. Not tonight.* Not that I'm aware of.

MS. TOLLIVER: It's just what he said. He can take you and have you charged with first degree or he can take you for accidental ... manslaughter.

SGT. DANCY: *I've never got a public defender up here at night. I don't know.*

MR. LACY: *Could you try?*

SGT. DANCY: I'll see if I can. I don't know. This is up to you John. I'm through. I'm through.

(Emphasis added.)

Following this exchange, Sgt. Dancy left the room again, ceasing the interrogation as he is required to do. There is no evidence that the State ever attempted to contact either Greg Bryant, whom Mr. Lacy requested by name, or the public defender's office, whom Mr. Lacy resorted to upon being informed that he could not have Mr. Bryant. Finally, after eight hours of interrogation, having been informed that he could not have the counsel he clearly and unequivocally requested on multiple occasions, Mr. Lacy confessed to the murder of Ms. Henderson without the assistance of counsel.

The majority holds that Mr. Lacy voluntarily waived his right to counsel; but, that is not the deciding issue in this case. A determination of voluntariness must certainly be made when a suspect has waived his right to counsel, but that determination is not made until after it is proven that the suspect initiated the dialogue with the police. *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). The issue before us today is whether Mr. Lacy initiated the contact that ultimately led to his waiver of the right to counsel and his confession. To this question, the clear and unmistakable answer is no. Mr.

Lacy asked for counsel repeatedly. A suspect's request for counsel during interrogation indicates that he does not "feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist unless the suspect himself initiates further conversation about the investigation." *Arizona v. Roberson*, 486 U.S. at 684. Mr. Lacy finally surrendered to the pressures of custodial interrogation and waived his previously invoked right to counsel. This ultimate waiver of his right to counsel is not surprising considering that Mr. Lacy had not been provided with the attorney he had already requested. *See Arizona v. Roberson*, 486 U.S. at 686 n.6. As a result of the officers' failure to honor Mr. Lacy's request for counsel and Sgt. Dancy's initiation of interrogation in violation of the "clear and unequivocal" *Edwards* rule, Mr. Lacy's statement should have been suppressed. For the above-stated reasons, I would reverse and remand.

It should be noted that the suppression of Mr. Lacy's confession would not leave the State without recourse upon the retrial of Mr. Lacy. Before he invoked his right to counsel and Sgt. Dancy reinitiated the interrogation, Mr. Lacy made highly incriminating statements to Ms. Tolliver. Specifically, he told his mother that he knew Ms. Henderson was dead and that she was buried in Mayflower.[2] In addition, the State has physical evidence linking Mr. Lacy to the crime. Thus, there is ample evidence available to the State upon retrial.[3]

THORNTON, J., joins in this dissent.

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[2] As a result of these statements by Mr. Lacy, Ms. Henderson's body eventually would have been recovered from its burial site on Ms. Tolliver's property at Mayflower. "[W]hen, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Nix v. Williams*, 467 U.S. 431, 448 (1984).

[3] The postscript at the end of the majority opinion can only be characterized as unsolicited dicta. It is certainly difficult to fathom why the majority hints at "one additional point" and then declines to address it because neither of the parties argue the point.

James Wayne WISENER and John Fields Wisener,
Individually and as *Co-Trustees* of the
Elizabeth Hargis Wisener Trust;
Brenda Wisener; and Karen Wisener
v. Judith Wisener BURNS, *Individually*
and as *Co-Trustee* of the
Elizabeth Hargis Wisener Trust

00-792 44 S.W.3d 289

Supreme Court of Arkansas
Opinion delivered May 24, 2001

[redacted]

Friday, Eldredge & Clark, by: *James E. Harris, Barry E. Coplin,* and *Robert S. Shafer,* for appellants.

B. Kenneth Johnson, for appellee.

ANNABELLE CLINTON IMBER, Justice. On February 1, 1978, Elizabeth Hargis Wisener created the Elizabeth Hargis Wisener Trust, transferring several parcels of timberland to her three children, James ("Jim") Wisener, John Wisener, and Judith ("Judy") Burns, as co-trustees and beneficiaries of the trust. Mrs.

Wisener reserved to herself the income produced from the trust property during her life. All three of Mrs. Wisener's children were granted equal authority over the management of the trust, but Judy, the oldest, assumed primary responsibility for management of the trust and the income produced therefrom.

Mrs. Wisener died on August 28, 1991. Thereafter, the appellants, Jim and John,[1] individually and as co-trustees of the Elizabeth Hargis Wisener Trust, filed a complaint against their sister, Judy,[2] alleging that she had mismanaged the income from the trust. In particular, Jim and John accused Judy of making unequal disbursements to herself and her family from the trust account during the entire term of the trust. They requested relief in the Chancery Court of Bradley County, wherein they asked the court, *inter alia*, to order Judy to account for all trust funds that she had handled and to restore to the trust any funds for which she could not properly account. They further requested that the trial court enter a declaratory judgment equally dividing the benefits of the trust among Jim, John, and Judy, allowing for the equalization of funds already disbursed to each party, and that the trial court partition and distribute the real properties of the trust among the parties.

Judy denied any mismanagement of the income produced by the trust properties and alleged that Jim and John had failed to shoulder any responsibility as trustees of the trust or as caretakers for Mrs. Wisener. She further asserted that the income generated by the trust was the property of Mrs. Wisener and not the property of the trust; therefore, the chancery court had no jurisdiction to decide any matter pertaining to its disbursement. According to Judy, any cause of action regarding that income would fall within the jurisdiction of the probate court and the estate proceedings.

Following an extensive trial, the chancery court concluded that the trust terminated by its own terms upon the death of the life beneficiary, Mrs. Wisener, and ordered: (1) the partition of the trust property in accordance with the interests of the remainder

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[1] Brenda and Karen Wisener, wives of Jim and John, are also named plaintiffs and appellants in this action. Brenda and Karen make no claims independent of those raised by Jim and John. Thus, for simplicity in referencing the parties, we incorporate the claims of Brenda and Karen into those raised by Jim and John, and our holdings with respect to the claims of Jim and John apply with equal force to Brenda and Karen.

[2] Judy's husband, Craig Burns, was also named as a defendant but was dismissed by the trial court pursuant to a motion for judgment on the pleadings.

beneficiaries under the trust; and, (2) an accounting and equalization of post-mortem distributions made by Judy from income produced by the real property that had been the trust property. These orders are not challenged on appeal. The trial court refused to order an accounting or restitution of pre-mortem distributions made by Judy from income produced by the trust property, holding that the income generated by the trust belonged to Mrs. Wisener and not to the trust. It is from this order that appeal is taken.

I. Restitution of Pre-Mortem Distributions

A. The Income Produced from the Trust Property

For their first point on appeal, Jim and John argue that the trial court erred in refusing to order restitution of all funds disbursed by Judy from the trust account before their mother's death that cannot be clearly attributed to the maintenance and support of their mother. In an order filed on December 21, 1998, the trial court found that the corpus of the trust, which is comprised of several parcels of real property, was intact[3] and that the value of the trust had increased significantly over the life of the trust. In addition, the trial court found that there had been no showing of mismanagement of the trust property; that the net income generated by the trust was the property of Mrs. Wisener and not the property of the trust; and that most of the net income produced from the trust property was handled by Judy due to the non-participation of the co-trustees, the desires of Mrs. Wisener, and the durable power of attorney granted to Judy by Mrs. Wisener.

The trial court refused to order an accounting or restitution of the pre-mortem distributions from the income produced by the trust property for two primary reasons: (1) Jim's and John's nonfeasance in failing to perform their own duties as trustees made them equally liable for any mismanagement that may have occurred; and, more importantly, (2) the funds Jim and John wanted restored to them were the property of Mrs. Wisener and not the property of the trust. Based upon this second reason, the trial court ruled that, upon Mrs. Wisener's death, the authority to pursue restitution of any misappropriated funds remained with her probate estate.[4]

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[3] The trial court's finding that the corpus of the trust was intact recognized that one parcel of the trust property had been sold by the agreement of all three trustees following the death of Mrs. Wisener in order to pay estate taxes.

[4] The trial court also denied the appellants' oral motion at trial to amend their

We review decisions of the chancery court *de novo*, but we do not set aside findings of fact unless they are clearly erroneous. *Kinghorn v. Hughes*, 297 Ark. 364, 367, 761 S.W.2d 930 (1988). When reviewing trust cases in Arkansas, we have followed the RESTATEMENT (SECOND) OF TRUSTS. *McPherson v. McPherson*, 258 Ark. 257, 5223 S.W.2d 623 (1975).

Jim and John first argue that the trial court clearly erred in finding that the income generated by the trust property belonged to Mrs. Wisener and not to the trust. They rely upon the case of *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), to support their argument that, as a matter of common law, the earnings of a trust fund belong to the trust. However, the *Phillips* decision is inapposite. In that case, the U.S. Supreme Court held that interest income generated by funds held in Interest on Lawyers Trust Account (IOLTA) accounts is the "private property" of the owner of the principal for purposes of the Takings Clause of the United States Constitution. *Id.* The issue in this case is not who owns the interest generated by money in an interest-bearing account; rather, the issue here is who owns the income generated by the trust property. While reciting the general rule that "interest follows principal," Jim and John acknowledge that the instrument creating the trust may provide otherwise.

"Whether proceeds or income from . . . particular property are included within the operation of a trust is determined by the will or intent of the settlor and the language of the trust instrument." 90 C.J.S. *Trusts* § 172(b) (1955). "A trust instrument is to be construed so as to effectuate its purpose, which is ordinarily, or primarily, to be determined from its terms." 90 C.J.S. *Trusts* § 173 (1955). When the purpose of the trust is ascertained, that purpose will take precedence over all other canons of construction. *Id.* The purpose of a trust is to be ascertained from its terms. *Id.* The terms of a trust include the "manifestation of intention of the settlor with respect to the trust" provisions. RESTATEMENT (SECOND) OF TRUSTS § 4 (1959).

The question presented, therefore, is whether the trial court erred in finding that, under the terms of the Elizabeth Hargis Wisener Trust, the income generated from the corpus of the trust belonged to Mrs. Wisener and not to the trust itself. In order to

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pleadings to add to the designation of parties by identifying the plaintiffs as beneficiaries of Mrs. Wisener's estate and Judy as administrator of Mrs. Wisener's estate.

answer this question, we must address the terms of the trust. The introductory provisions of the trust agreement provided, in relevant part, as follows:

> The trust established by this Agreement is generally created in order to: (1) immediately and irrevocably transfer the trust property noted below from the Grantor's estate and to the designated beneficiaries; (2) reserve to the Grantor for life the income produced from such trust property; (3) release the Grantor from the duties and responsibilities required for management of such trust property; and (4) provide for effective and continuing management, growth and further development of the trust property during the existence of this trust.

Paragraph one of the agreement designated the property to be transferred by the trust. That property consisted of various parcels of real property described in the document marked Exhibit A and attached to the trust agreement. A review of the stated purpose of the agreement therefore reveals that it was Mrs. Wisener's purpose in creating the trust to convey the real property described in Exhibit A to her children and to divest herself of the necessity of managing that property while reserving to herself the income produced by that property for the rest of her life.

Although the trust agreement also authorized the trustees to determine the manner in which the expenses incurred in the administration of the trust, as well as the cost of repairs and improvements to the trust property, should be apportioned as between corpus and income, the express terms of the trust agreement limited the authority of the trustees. In apportioning or assessing such cost or expenses against current income produced from the trust property, the trustees could not render that income insufficient to support and maintain Mrs. Wisener in the same style and manner to which she was accustomed. The dispositive provisions of the trust provided for the trustees to pay *all* of the net income produced from the trust property to Mrs. Wisener during her lifetime, such that upon her death the *entire* trust property would be conveyed by warranty deed or bill of sale to Judy, Jim, and John, as remainder beneficiaries of the trust.

A review of the terms of the trust document thus reveals that Mrs. Wisener's intent at the time of the trust's creation was that the income generated by the trust belonged to her. She gave the trustees the authority to invade that income for the purpose of administering the trust, but only to the extent that the costs of

administration would not affect her lifestyle. Furthermore, the trustees could not invade or use the corpus of the trust, i.e., the land, in order to support and maintain Mrs. Wisener in the style to which she was accustomed. Her interest as the "life beneficiary" was limited to the income generated off of the land. In other words, the corpus belonged to the trust and the income belonged to Mrs. Wisener. The trustees were charged with the responsibility of determining the extent to which the costs of administration would be taxed to the trust or to Mrs. Wisener. We conclude that the terms of the trust agreement support the trial court's finding that "[t]here is nothing in the trust document which incorporates the income back into the Trust or designates the income to be trust property."

A review of the evidence presented at trial demonstrates that Mrs. Wisener's conduct after the creation of the trust also supports a finding that her intent was to treat all income generated by the trust during her lifetime as her own property. The intention of the settlor at the time of creation of a trust may be shown by facts occurring after that time. RESTATEMENT (SECOND) OF TRUSTS, § 4, cmt. a (1959). Although the extent to which Mrs. Wisener was aware of Judy's distributions from the income is disputed, it is undisputed that she became aware no later than 1986 that Judy was using the income from the trust for purposes other than the support and maintenance of Mrs. Wisener. In 1986, Jim informed Mrs. Wisener that Judy had made disbursements from income generated by the trust to pay for the college education of her daughters and that Judy intended to make similar disbursements to pay for the education of Jim's sons. Not only did Mrs. Wisener not complain about this conduct, she suggested that Jim accept Judy's offer to pay for his sons' education from the income generated by the trust. Furthermore, on June 3, 1983, Mrs. Wisener executed a durable power of attorney granting Judy authority to handle all of Mrs. Wisener's financial affairs, including the authority to withdraw any or all money deposited in Mrs. Wisener's name or "any or all other money to which I am entitled." Mrs. Wisener never filed any kind of action or complaint about the manner in which Judy administered her finances; nor did Mrs. Wisener ever revoke the durable power of attorney.

In sum, after reviewing the record and the trust instrument, we cannot say that the trial court clearly erred in determining that, under the terms of the trust, the income generated by the trust was the property of Mrs. Wisener and not the property of the trust.

B. Standing

Because we find no error in the trial court's finding that the income generated by the trust belonged to Mrs. Wisener rather than the trust, we must determine whether Jim and John can maintain an action for the mismanagement of that income prior to Mrs. Wisener's death. The trial court made no express finding regarding standing, but dismissed the claim for restitution after finding that the income belonged to Mrs. Wisener. Jim and John suggest that this finding contains within it an inherent finding that they lack standing. We agree.

A party has no standing to raise an issue regarding property in which he or she has no interest. *Nash v. Estate of Swaffar*, 336 Ark. 235, 242, 983 S.W.2d 942 (1999); *McCollum v. McCollum*, 328 Ark. 607, 612, 946 S.W.2d 181, 184 (1997); *Boyle v. A.W.A., Inc.*, 319 Ark. 390, 394, 892 S.W.2d 242 (1995). Jim and John instigated this action in chancery in their capacities as co-trustees and beneficiaries of the Elizabeth Hargis Wisener Trust. The property for which Jim and John demand an accounting and restitution belonged to Mrs. Wisener and not to the trust. Under these circumstances, Jim and John, as beneficiaries of the trust and as co-trustees, have no interest in the property at issue. Accordingly, they have no standing to maintain the claim.

Jim and John insist, however, that the RESTATEMENT (SECOND) OF TRUSTS, § 200, cmt. e (1959), supports their claim to standing. That comment states:

> If there are several trustees, one or more of them can maintain a suit against another to compel him to perform his duties under the trust, or to enjoin him from committing a breach of trust, or to compel him to redress a breach of trust committed by him. A trustee is not precluded from maintaining such a suit by the fact that he himself participated in the breach of trust, since the suit is on behalf of the beneficiary.

This provision is rendered inapposite to the case at hand by the finding that the income was not a part of the trust; rather, the income belonged to Mrs. Wisener. Thus, the suit brought by Jim and John is not maintained on behalf of a beneficiary of the trust as there is no trust property at issue. Furthermore, the RESTATEMENT (SECOND) OF TRUSTS, § 214 cmt. b (1959), states:

> A particular beneficiary cannot maintain a suit for a breach of trust which does not involve any violation of duty to him. Thus if the breach of trust consists only in the failure to pay income to a life beneficiary, the beneficiary entitled to the principal cannot maintain a suit for breach of trust. So also, where the breach of trust is merely in the failure to make trust property productive and the principal is in no way affected, the life beneficiary but not the remainderman can maintain a suit.

Consequently, any attempt by Jim and John to maintain this action in their capacities as remaindermen entitled to the principal of the trust is also unavailing. Finally, Jim and John contend that Judy failed to prove a valid *inter vivos* gift by Mrs. Wisener from income produced by the trust. Such a contention is rendered moot by their lack of standing to prosecute this action.

II. The Agreement to Equalize

On December 7, 1988, Jim, John, and Judy executed an agreement whereby they stated that "any indebtedness owing to the trust by any of the trustees as their individual obligation or any such obligation owing to the Warren Bank and Trust Company or any other party, which is secured by property of the Trust, that shall be outstanding and unpaid at the date of distribution of the Trust, shall be counted as and constitute a portion of the share and distribution to which each such Trustee-Beneficiary shall be entitled and that such amount, including any interest due, shall diminish the distribution to such beneficiary." The agreement was made, according to its preamble, because the trustees had "with the concurrence of the other Trustees and the lifetime beneficiary, used certain trust property as security for certain obligations of the Trustees individually." For their second point on appeal, Jim and John argue that the trial court erred by not requiring Judy to restore to the trust, pursuant to this agreement, any excess disbursements made to herself or her family from income generated by the trust during Mrs. Wisener's lifetime.

The plain language of the agreement clearly limits its application to obligations "secured by the property of the Trust." We have already determined that the income generated by the trust was the property of Mrs. Wisener and not the property of the trust. Consequently, the terms of the agreement do not apply to the distribution of funds from the income.

Furthermore, all three trustees testified at trial that they executed the agreement because they had all received personal loans secured by the trust property, i.e. timberland. The purpose of the agreement, according to the testimony of all three trustees, was to ensure that, when the trust was distributed, any property encumbered by one of their personal loans would be distributed to the one who created the encumbrance and that, if a lien resulted against trust property because of one trustee's failure to make payments on a loan secured by that property, the lien would attach only to that trustee's portion of the trust property upon distribution.

The trial court ordered the partition of the trust property and the equalization of post-mortem distributions from the income produced by the real property that had been the trust property. In so doing, the trial court has given effect to the 1988 agreement to equalize to the extent it is applicable to the present situation. Jim and John have offered no authority or convincing argument to support their assertion that the agreement should be extended to require equalization of pre-mortem distributions made from the income reserved to Mrs. Wisener. We hold that the trial court did not clearly err in refusing to order equalization of the pre-mortem distributions pursuant to the 1988 agreement.

Affirmed.

WESTERN CARROLL COUNTY
AMBULANCE DISTRICT
(aka WCCAD); Bayard Biossat, Jack Faulkner,
and William W. Woodward, in Their Official
Capacities as Commissioners of WCCAD; City of
Eureka Springs, Arkansas; Carroll County,
Arkansas; Carolyn Williams, Phillip Jackson,
Kay Phillips, Cindy Vowell, and Shirley Doss,
in heir Official Capacities as Assessor,
County Judge, Collector, Treasurer, and Clerk
for Carroll County, Arkansas *v.* C. Rodney
JOHNSON, Leonard R. Fowler, and Marvin D. Hoffman

00-1271 44 S.W.3d 284

Supreme Court of Arkansas
Opinion delivered May 24, 2001

John Casteel, for appellants.

Oscar Stilley, for appellees.

RAY THORNTON, Justice. This appeal arises from a grant of a partial summary judgment in an illegal-exaction case. In 1992, the Carroll County Quorum Court adopted ordinance No. 92-13, which created the Western Carroll County Ambulance District and provided for a tax assessment of two mills on both real and personal property. The purpose of the assessment was to acquire vehicles and equipment and was for the maintenance and operation of an ambulance service for the use and benefit of residents and property owners in the district.

On September 22, 1998, appellees, C. Rodney Johnson, Leonard R. Fowler, and Marvin Hoffin, as representatives in a class action filed a complaint against appellees, the Western Carroll County Ambulance District ("WCCAD") and others in their official capacities, alleging that they were taxpayers of Carroll County and that the County did not have the authority to impose the tax on personal property. Other appellants include Bayard Biossat, Jack Faulkner, and William W. Woodward, who are commissioners of WCCAD. Phillip Jackson is the Carroll County Judge to whom service is given in disputes involving Carroll County. Carolyn Williams, Kay Phillips, and Cindy Vowell are the assessor, collector, and treasurer, respectively, of Carroll County. Carroll County and Eureka Springs are political subdivisions of the state of Arkansas.

Carroll County had collected personal property tax for the benefit of WCCAD in the following amounts: $9, 824.00 for 1994, $11,261.82 for 1995, $13,191.26 for 1996, $14,797.79 for 1997, $15,328.38 for 1998, and $15,861.97 for 1999. The total amount of personal property tax collected for the years 1994 through 1999 is $80,265.22.

Appellees filed a motion for partial summary judgment based upon Ark. Code Ann. § 14-282-102 (Repl. 1998), which authorizes an ambulance service district to be formed upon a petition signed by a majority in value and area of the owners of real property within an improvement district and to assess benefits against real property to pay for the service. Alternatively, the statute forms a district by the adoption of an ordinance of the quorum court that imposes a millage property tax and is ratified by a vote of the people. WCCAD responded, alleging that an ambulance district may be formed either by a petition from the real property owners of the proposed district or by a quorum court ordinance and general election. WCCAD acknowledged that if a district is formed by petition of real property owners, then the benefits are to be assessed only against real property. WCCAD argued that if the district is

formed by a quorum court ordinance and a general election, then millages may be imposed upon both real and personal property.

Following a hearing on the matter, the Carroll County Chancery Court granted appellees' motion for partial summary judgment, in compliance with Ark. R. Civ. P. 54(b), ruling that appellants did not have the legal authority to collect a two-mill tax on the personal property of the residents of Western Carroll County Ambulance District and that the collection of such tax constituted an illegal exaction. Appellants now bring an appeal from this order. We disagree with the trial court's ruling and reverse.

For their sole point on appeal, appellants argue that the trial court erred in granting appellees' motion for partial summary judgment based on its finding that, as a matter of law, appellants did not have the legal authority to collect a two-mill tax on the personal property of the residents of Western Carroll County Ambulance District. Specifically, appellants argue that Ark. Code Ann. § 14-282-102(e)(1)(A) provides for an establishment of an ambulance service improvement district by an ordinance ratified by a vote of the people and authorizes the levy of a two-mill tax upon both real and personal property.

Arkansas Code Annotated § 14-282-101 *et seq.* (Repl. 1998) promulgates two methods by which local governments establish, finance, and manage an ambulance service improvement district. Arkansas Code Annotated § 14-282-101 outlines the purpose of these methods:

> It is the purpose and intent of this chapter to authorize the establishment, and to prescribe the procedure for the establishment, of improvement districts for the purpose of providing ambulance services to residents of the districts and to prescribe the procedure for assessing the property in the district to finance the services.

Id.

Arkansas Code Annotated § 14-282-102, provides for two methods by which an ambulance service improvement district can be created. The first method, adopted by Act 1221 of 1975, allows a majority of the owners of real property to file a petition with the county court. Ark. Code Ann. § 14-282-102(a). That statute provides:

> (a) Upon the petition of a majority in value and area of the owners of real property in any designated area, it shall be the duty of the county court to lay off into an improvement district the territory described in the petition and to name three (3) commissioners of the district.

Id. When this method of forming a district by petition is followed, taxes may only be imposed by an assessment of benefits upon real property. *Id.*

The second method by which an ambulance service district may be created is by an ordinance of the quorum court. That method is prescribed by Ark. Code Ann. § 14-282-102(e)(1)(A), first adopted by Act 498 of 1989, which provides:

> (e)(1)(A) An ambulance service district that is composed of an area within a county as established by the quorum court of the county may be created by ordinance of the quorum court. The ordinance shall designate the area to be served. However, in no event shall the area include less than a whole precinct and all precincts must be contiguous. The ordinance shall also set forth the method the ambulance service district *shall assess the persons residing therein or the property owners having property located therein.*

Id. (Emphasis added.) The ordinance of the quorum court is subject to the approval of a majority of voters residing within the boundaries of the district. *Id.*

The issue before us is whether taxes imposed by this second method may be levied against all property, both real and personal. 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). The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Dunklin v. Ramsay*, 328 Ark. 263, 944 S.W.2d 76 (1997). When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S .W.2d 266 (1997).

The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Ozark Gas Pipeline v. Arkansas Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000). Where the language of the statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used.

In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible. *Id.* However, we will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Burford Distributing, Inc. v. Starr*, 341 Ark. 914, 20 S.W.3d 363 (2000).

Applying these well-established principles to the interpretation of Ark. Code Ann. § 14-282-102, it is clear that an alternative method of taxation is provided by subsection (e). The key sentence is found in subsection (e) and reads: "The ordinance shall assess *the persons residing therein or the property owners having property located therein*" (emphasis added). The phrase, "assess the persons residing therein," applies to possible assessment of taxes to each person residing within the district, while the disjunctive phrase, "assess . . . the property owners having property located therein [the district]" indicates that all property located within the district is subject to taxation.

We have held that there is not the slightest difference between real and personal property except so far as such difference is created by particular statutes. *Hoing v. River Valley Gas Co.*, 196 Ark. 1165, 121 S.W.2d 513 (1938). Here, the statute adopted by Act 498 of 1989 and amended by Act 457 of 1991 does not distinguish between real and personal property, and the principle announced in *Hoing, supra*, means that the word, "property," includes both real and personal property.

Appellees argue that the provisions relating to the creation of a district by petition of the owners of real property, found in subsection (a), limits the tax base for either method of creating an ambulance district to the imposition of assessed benefits upon real property. However, a review of the history of Ark. Code Ann. § 14-282-102 reveals otherwise. *See Ozark Gas Pipeline, supra.* In Act 1221 of 1975, the General Assembly promulgated subsections (a), (b), and (c) of the current statute, which codifies the first method of assessment of real property by a petition of the owners of real property. It was not until 1989 that the General Assembly promulgated subsection (e) for the first time.

Act 498 of 1989 promulgated subsection (e) for the first time, and is entitled, "An Act to Amend Arkansas Code 14-282-

102 to Establish an Additional Method of Establishing an Ambulance Service District; and for Other Purposes." Act 498 specifically provides that the assessment provisions of Act 1221 of 1975 are not applicable to the newly established means of forming a district. Arkansas Code Annotated § 14-282-102(e) states:

> An ambulance service district created by this procedure shall be exempt from the assessment procedures set out in this chapter. The taxes collected pursuant to the ordinance shall be administered by the county as an enterprise fund, but shall be levied and collected as county taxes.

Ark. Code Ann. § 14-282-102(e)(3). In other words, subsection (e) establishes an alternative method of imposing a tax millage upon all property within the district.

We hold that the intent of the legislature in adopting an alternative means of forming an ambulance service district by the vote of all eligible voters in the district, as prescribed by subsection (e), allows for the imposition of taxes upon both real and personal property. *Hoing, supra.* Accordingly, we reverse the trial court's grant of partial summary judgment.

Reversed and remanded.

BROWN and IMBER, JJ., dissent.

ANNABELLE CLINTON IMBER, Justice, dissenting. I disagree with the majority's holding that the amended version of Chapter 282, Ambulance Service Improvement Districts, specifically Ark. Code Ann. 14-282-102(e)(1)(A), includes personal property. While I agree that the amended version of the statute uses plain and unambiguous language, there is no basis for the conclusion that the term property as used in section 14-282-102 refers to anything other than real property.

The basic rule of statutory construction is to give effect to the intent of the legislature. *See Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999). The legislature used the words "real property" and "property" interchangeably in section 14-282-102(a) and (b) when it designated the original method of creating improvement districts. In Section 14-282-102(b), the statute states the purpose of the ambulance district to be for the "benefit of the *property holders* within the district." *Id.* The language is clarified to indicate that "the ambulance services would be a benefit to all the *real property*

located in the district. *Id.* (emphasis added). Construing this language just as it reads and giving every word meaning and effect, "property" refers to the real property within the described area.

How then does the term "property" take on a new meaning in section 14-282-102(e)(1)(A)? The majority takes an unwarranted leap in its construction of the statute by assuming that because the legislature set out to create an alternative method of creating and funding an ambulance district, they assigned multiple meanings to a single term used within section 14-282-102. In order to make this leap the majority relies on this court's statement in *Hoing v. River Valley Gas Co.*, 196 Ark 1165,1169, 121 S.W.2d 513, 515(1938) that "[i]n this country, there is not the slightest difference between real and personal estate except so far as such difference is created by statute." This expression of the law, used historically in he context of fixtures, objects appurtenant, etc., does little more in the present context than beg the question. The statute at issue in this case, when enacted as Act 1221 of 1975 and when amended by the enactment of Act 498 of 1989, did in fact differentiate between real and personal property.

The amended language adopted by Act 498 of 1989 includes an additional method to form an ambulance improvement district, permitting formation by ordinance of the quorum court. This alternate method demands that the ordinance "set forth the method the ambulance service shall assess the persons residing therein or the *property owners* having property located therein" *Id.* (emphasis added). The use of the term "property" in this amended version should be construed within the total context of section 14-282-102 to include the real property located within the district.

In any event, if the language used in the amendment were to be considered ambiguous, the cardinal rule in construing tax legislation requires that, "a tax cannot be imposed except by express words indicating that purpose, andwhere there is ambiguity or doubt it must be resolved in favor of the taxpayer." *Pledger v. The Grapevine, Inc.,* 302 Ark. 18, 786 S.W.2d 825 (1990). Another rule of tax law construction is that express designation for one thing mayproperly be understood to exclude another. *Leathers v. A&B Dirt Movers, Inc.* 311 Ark. 320, 844 S.W.2d 314 (1992). Under these rules of statutory construction, the term "property" as used in Section 14-282-102(e)(1)(A) should be construed to mean real

BROWN, J., joins in this dissent.

Curtis Hoyt YANCEY and Lee Roy Cloud
v. STATE of Arkansas

CR 00-1310 44 S.W.3d 315

Supreme Court of Arkansas
Opinion delivered May 24, 2001

[redacted]

Sam T. Huer and *James T. Lessmeister*, for appellants.

Mark Pryor, Att'y Gen., by: *Jeffrey Weber*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Justice. Appellants Lee Roy Cloud and Curtis Hoyt Yancey appeal their conviction and sentence for violation of Arkansas Code Annotated Section 5-64-401 (Supp. 1999), for possession of a controlled substance with the intent to deliver. Both appellants filed conditional pleas of guilty pursuant to Ark. R. Crim. P. 24.3(b), whereby they reserved their right to appeal from the trial court's denial of their motion to suppress evidence seized during the a search of their homes. Both appellants were sentenced to four months confinement and four years probation.

This case was appealed to the court of appeals, which resulted in a 4-2 decision by that court that the warrants to carry out the searches were properly issued because the facts presented formed a substantial basis to conclude that probable cause existed and that marijuana would likely be found where appellants lived. *Yancey v. State*, 71 Ark. App. 280, 30 S.W.2d 117 (2000). The court of appeals additionally found that even if probable cause, was lacking, the search met the requirements of the "good faith exception" set out in *United States v. Leon*, 468 U.S. 897 (1984), in that the

judge determined there was probable cause and the police acted in reasonable reliance on the warrants issued. We granted a petition for review and now consider this matter. When we grant a petition for review pursuant to Ark. Sup. Ct. R. 2-4, we treat the appeal as if it were filed in this court originally. *Tucker v. Roberts-McNutt, Inc.*, 342 Ark. 511, 29 S.W.3d 706 (2000); *Fowler v. State*, 339 Ark. 207, 5 S.W.3d 10 (1999); *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998).

We decline to follow the line of cases cited by the court of appeals and reaffirm our requirement that before a search warrant may issue, an affidavit must be presented to the magistrate that particularly sets forth the facts and circumstances tending to show that the things to be seized are in the place to be searched. Although we hold probable cause in the affidavit lacking, we hold that the officers acted in good faith on the issued warrant and hold that the *Leon* exception applied. We reverse in part and affirm in part.

Facts

On June 17, 1998, at approximately 9:30 p.m, Arkansas Game and Fish Officer David Evans observed a Jeep being driven down a road in a remote wooded area in Monroe County. He knew Yancey had been driving that Jeep for some time. Evans knew both Yancey and Cloud and had spoken with them before. Evans left his lights off and followed the Jeep. He then parked and observed appellants by use of night-vision equipment. He observed them remove containers of water from the Jeep and water plants growing in a tub, in an ice chest, and in the ground. Evans returned to his own vehicle and waited. He then followed appellants back to Cloud's residence in Arkansas County.

At Cloud's residence, Evans asked appellants what they were doing down that road. They responded, "Frogging." Evans testified in the suppression hearing that there were no frogs down that road. He also testified that he asked if they got any frogs, and they responded, "No." He then asked if he could look in the vehicle, and they consented. Evans testified he looked through the window and saw gallon jugs and five gallon cans, that there was no frog-gigging equipment, and that while Cloud was wearing hip waders, they had dry dust all over them. Evans testified he saw nothing in the Jeep other than the water containers.

After leaving appellants, Evans called Arkansas State Trooper Rosencrantz because he was not sure who to call given the plants were in Monroe County and appellants lived in Arkansas County. Apparently nothing came of that call. The next day, Evans called the Monroe County Sheriff's Department and was told that they would be overflying the area soon and that they would get back to him. He did not hear back from them that day, so the next day he went to Wendall Jines, a Criminal Investigative Division investigator for the State Police. Jines took Evan's deposition, and he and Evans returned to the plants. They believed they were marijuana plants. The plants were put under surveillance, but Yancey and Cloud never returned. Jines and Evans removed three plants the day they first went to examine the plants and an additional fifteen on the morning of June 22, 1998. On that same day, Evans appeared before Municipal Judge Norman Smith, at which time the search warrants were issued to search Cloud's home and Yancey's home. Evans was the sole source of information. Marijuana was found in each appellant's home.

Standard of Review

When reviewing a trial court's ruling on a motion to suppress, we view the evidence in a light most favorable to the State, make an independent determination based on the totality of the circumstances, and reverse only if the ruling was clearly against the preponderance of the evidence. *Miller v. State*, 342 Ark. 213, 27 S.W.3d 427 (2000); *Mazepink v. State*, 336 Ark. 171, 987 S.W.2d 648, cert. denied, 120 S.Ct. 321 (1999); *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998).

Reasonable Cause

In this case, search warrants were issued for two homes after appellants were observed watering eighteen marijuana plants in the woods five to six miles from their homes and then driving to Cloud's home. The plants in the woods were seized prior to the issuance of the search warrant. We also note that the water containers used by appellants were transported and were still in Yancey's vehicle when Officer Evans looked in the vehicle window.

The Fourth Amendment to the U.S. Constitution and Art. 2 § 15 of the Arkansas Constitution provide protection against general

search and seizure and require a warrant before a search may take place.

In Arkansas, the procedure for issuance of a search warrant is set out in Ark. R. Crim. P. 13.1. The portions of that rule relevant to the issues of this case provide:

> (b) The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched . . . . An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. . . .

Thus, probable or reasonable cause to believe the things subject to seizure will be found in the particular place identified is required, and this must be established by affidavit or recorded testimony. *See Nance v. State,* 323 Ark. 583, 918 S.W.2d 114 (1996); Ark. R. Crim. P. 10.1.

The cases hereinafter discussed refer to both reasonable cause and probable cause. In *Edwards v. State,* 300 Ark. 4, 775 S.W.2d 900 (1989), we indicated that there is no "substantive distinction" between the terms.

Whether the reasonable or probable cause requirement is met turns on the adequacy of the affidavit or recorded testimony. The test for adequacy of the affidavit set out in *Illinois v. Gates,* 462 U.S. 213 (1983), and adopted by this court in *Thompson v. State,* 280 Ark. 265, 658 S.W.2d 350(1983), was recently quoted by this court in *State v. Rufus,* 338 Ark. 305, 993 S.W.2d 490 (1990), whereby:

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

313 Ark. 616, 856 S.W.2d 623 (1993); *Rainwater v. State*, 302 Ark. 492, 791 S.W.2d 688 (1990).

Rufus, 338 Ark. at 312. In *Rufus*, this court also stated that the current Ark R. Crim. P. 13.1(b) incorporates the test set out in *Thompson*. Consistent with the requirement of substantial evidence of probable cause, Rule 13.1(b) requires "facts and circumstances tending to show that such person or things are in the places ... to be searched."

At issue in this case is the adequacy of Evans's affidavit. An affidavit is a sworn statement of facts. *McIntosh v. Southwestern Truck Sales*, 304 Ark. 224, 800 S.W.2d 431 (1990). Thus, an affidavit places facts before the magistrate so he or she may determine whether they provide a substantial basis for concluding that probable cause exists to issue the search warrant. *Thompson, supra.*

Although the existence of a fact may be proved by circumstances as well as by direct evidence, the circumstantial evidence must be sufficient to lead to the inference. *Merchant's Bank v. State Use Calhoun County*, 180 Ark. 994, 23 S.W.2d 624 (1930). Where circumstantial evidence is relied upon to establish a fact, "the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion." *Wesson v. United States*, 172 F.2d 931, (8th Cir. 1949).

Examining the affidavit in this case reveals the following facts relevant to probable cause:

1. That at about 9:30 p.m. on the evening of June 17, 1998, Game and Fish Officer Evans observed appellants driving down a road in a remote wooded area and followed them;

2. That using night vision equipment, he observed them remove containers from their vehicle and water what he believed to be marijuana plants;

3. That Evans then followed appellants as they drove away and stopped at appellant Cloud's home; approximately five to six miles from the plants;

4. That Evans stopped at Cloud's residence and spoke with appellants and was told they were out frog gigging although Evans

believed it unlikely given a lack of water down the road they had taken;

5. That Evans asked and was given permission to look in Yancey's vehicle, and he saw only the before-mentioned water jugs and containers;

6. That on June 19, 1998, Evans returned to the plants with a county deputy and a state police officer and identified the plants as eighteen marijuana plants.

7. That three plants were removed on June 19, 1998;

8. That on June 22, 1998, Evans and two other officers returned to the wooded area and removed the remaining fifteen marijuana plants;

9. That Cloud had been convicted of possession of controlled substances on a number of occasions;

10. That information and intelligence developed by different law enforcement agencies working within Arkansas County indicated appellants had been, and continued to be, involved in propagation, preparation, consumption, and delivery of controlled substances, specifically marijuana.

The evidence offered in the affidavit may be divided into that regarding what Evans personally observed and that relating to appellants' alleged criminal conduct on prior occasions.

We will dispense with the question of the prior criminal conduct first. This information is provided apparently to infer appellants are known criminals and known criminals would be expected to have the sought evidence in their homes. The known criminal averment is not only insufficient to support a finding of reasonable cause but is entitled to no weight whatsoever. The U. S. Supreme Court has referred to such an assertion as "a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising a magistrate's decision on a warrant." *Spinelli v. United States*, 393 U.S. 410, 414 (1969). Additionally, the "bald" assertion of prior criminal conduct alleging appellants had been and remained involved in growing and selling marijuana is nothing more than an unsubstantiated conclusion and is insufficient to support probable cause. *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898

(1980). Additionally, Evans, a Game and Fish officer, is the declarant on the affidavit. Nothing in the affidavit is offered to show why a Game and Fish officer would have knowledge of investigations of different law enforcement agencies and, thus, the information is unsupported in any event. Affirmative allegations of fact are required. *Montgomery v. State*, 251 Ark. 645, 473 S.W.2d 885 (1971).

Thus, the conclusions asserted in the affidavit regarding Cloud's alleged prior criminal conduct must be ignored in analyzing whether probable cause was shown. The State argues that the challenge to the information of prior criminal conduct was not preserved below. Whether that is so is of no import. If the issue was not preserved, then appellants here may not challenge the factual inference arising therefrom. However, this type of evidence has been rejected as giving rise to any credible inference and, therefore, it still must be ignored by this court because below it could not have given rise to any inference by the magistrate. *See Spinelli, supra; Beed, supra.*

We now move to the evidence arising from what Evans observed. There is no direct evidence to support reasonable cause. The analysis then becomes whether the direct evidence in the facts offered by Evans in his affidavit may constitute circumstantial evidence sufficient to provide an inference to support reasonable cause to believe contraband or evidence of a crime would likely be found in appellants' homes.

The affidavit clearly shows the identified contraband was eighteen marijuana plants, all of which were seized by officers. Evans observed the appellants watering the plants some five to six miles from the homes to be searched. He also testified of seeing the watering containers in Yancey's Jeep when he stopped to speak with them at Cloud's home. Evans was unable to provide any testimony whatever that any portion of any marijuana plant or anything connected with the propagation was likely to be found in the homes to be searched. The facts to which Evans testified might well lead to conviction for propagation of marijuana, and likely possession with the intent to sell. However, no facts are provided that infer in any way that the homes were involved. Thus, there was neither direct nor circumstantial evidence to support reasonable cause to believe contraband or evidence of a crime would likely be found in the homes to be searched.

The court of appeals reached a contrary conclusion based upon their reading of holdings in several federal circuit court cases. We

decline to adopt their analysis. These cases seem to rely upon a conclusion that the magistrate issuing the search warrant "need only conclude that it is reasonable to seek the evidence in the place indicated in the affidavit." *United States v. Peacock*, 761 F.2d 1313, (9th Cir. 1985), *cert. denied*, 474 U.S. 847 (1985). The test is not whether it is reasonable to believe a suspect would have evidence in the place to be searched. Instead, the test is whether there is reasonable cause to believe contraband or evidence of the crime would likely be found in the place to be searched.

The First Circuit Court of Appeals characterized this same idea more bluntly, stating:

> The nexus between the objects to be seized and the premises to be searched need not, and often will not, rest upon direct observation, but rather 'can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide [evidence of a crime]....'

United States v. Feliz, 182 F.3d 82, 88 (1st Cir. 1999) (quoting *United States v. Charest,* 602 F.2d 1015, 1017 (1st Cir. 1979)). Again, there is reliance upon what must be termed presumptions on generalized behavioral patterns of a certain class of criminals.

One must conclude that a number of federal circuit courts now allow issuance of a search warrant based not upon an affidavit providing facts to show or infer reasonable cause to believe contraband or evidence of a crime will likely be found in the place to be searched, but rather upon an affidavit only supplying facts to show or infer reasonable cause to believe the person is a drug dealer, and the court by presumption will supply the lacking inference that the affidavit should have supplied. The Ninth Circuit Court of Appeals in *Pitts v. United States*, 6 F.3d 1366 (1993), quoting *United States v. Terry*, 911 F.2d 272, (9th Cir. 1990)(quoting *United States v. Angulo-Lopez*, 791 F.2d 1394 (9th Cir. 1986), stated, "[i]n the Ninth Circuit we have recognized that '[i]n the case of drug dealers, evidence is likely to be found where the dealers live.' " In *United States v. Lamon*, 930 F.2d 1183 (7th Cir. 1991), the court of appeals stated:

> Warrants may be issued even in the absence of '[d]irect evidence linking criminal objects to a particular site *United States v. Jackson*, 756 F.2d 703, 705 (9th Cir.1985); see also, *United States v. Malin*, 908 F.2d 163, 165 (7th Cir.), *cert. denied,* 498 U.S. 991, 111 S. Ct. 534, 112 L. Ed.2d 544 (1990). An issuing court " 'is entitled to

> draw reasonable inferences about where evidence is likely to be kept, based upon the nature of the offenses.' " *Id.* At 166 (quoting, *Angulo-Lopez*, 791 F.2d at 1399)....

U.S. v. Lamon, 930 F.2d at 1188.

This line of reasoning has been criticized by other courts. *See State v. Thein*, 138 Wash.2d 133, 977 P.2d 582 (Wash. 1999). In *Thein,* the Washington Supreme Court stated, "Probable cause requires a nexus between criminal activity and the item to be seized and also a nexus between the item to be seized and the place to be searched." *See also Guth v. Commonwealth of Kentucky*, 29 S.W.3d 809 (Ky. Ct. App. 2000).

For a search warrant to issue, evidence, either direct or circumstantial, must be provided to show contraband or evidence of a crime sought is likely in the place to be searched. Standing alone, circumstantial evidence that the suspect may be a drug dealer is not circumstantial evidence that anything is in his home. At best, the circumstantial evidence here infers that appellants are drug dealers. To then allow an inference that they likely have contraband or evidence of a crime in their homes is to base an inference upon an inference, which is also known as mere suspicion or speculation. It is not allowable under the rules of evidence to draw one inference from another or to indulge presumption upon presumption to establish a fact. Reasonable inferences may be drawn from positive or circumstantial evidence, but to allow inferences to be drawn from other inferences, or presumptions to be indulged from other presumptions, would carry the deduction into the realm of speculation and conjecture. *Williams v. State*, 222 Ark. 458, 261 S.W.2d 263 (1953).

In coming to their conclusions, the federal circuit courts appear to rely upon *Gates v. Illinois, supra.* In that case the U. S. Supreme Court abandoned its earlier "two pronged" test of *Aguilar v. Texas,* 378 U.S. 108 (1964), and *Spinelli, supra*, and in its place reaffirmed the traditional "totality of the circumstances" analysis and stated:

> The task of the issuing magistrate is simply to make a practical common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is

> simply to ensure that the magistrate had a 'substantial basis for...concluding' that probable cause existed.

Gates v. Illinois, 462 U.S. at 238-239. Probable cause has not been abandoned. The Court then gives two examples of earlier cases that set the limits beyond which a magistrate may not venture in issuing a warrant. These examples are quite instructive. Each case involved an affidavit which included facts that the items to be seized would likely be found in the place to be searched, but the affidavits were found inadequate because they were conclusory. The U.S. Supreme Court then goes on to note that "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause...." *Gates v. Illinois,* 462 U.S. at 239. Nowhere does the Court appear to abandon the requirement that the affidavit provide facts showing that the items to be seized will most likely be found in the place to be searched. The affidavit in the case at bar is devoid of any direct or circumstantial evidence of marijuana or any contraband or that evidence of a crime would likely be found in the two homes searched.

The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that specific things to be searched for and seized are located on the property to which entry is sought. *Zurcher v. Standford Daily*, 436 U.S. 547, 98 S. Ct. 1970 (1978). *Accord Gates v. Illinois,* 462 U.S. at 238, (a fair probability that contraband or evidence of a crime will be found in a particular place). *See also United States v. Malin*, 908 F.2d 163, (7th Cir. 1990). The affidavit must provide facts by direct or circumstantial evidence that there is reasonable cause to believe the specific things sought are located on the property to which entry is sought.

Here, one might argue it is reasonable to infer that persons who are watering marijuana plants in amounts allowing a statutory inference of intent to deliver must be processing it somewhere, and from that inference it might seem reasonable to then infer that their homes are the most likely place for processing. General experience of law enforcement would likely bear out this deduction. However, the test is not whether it is reasonable to believe items to be seized might be found in the place to be searched, but rather whether there is evidence presented to support reasonable cause to believe the items to be seized would likely be found in the place to be searched. There is nothing in Evans's affidavit as to the maturity of the marijuana plants or whether the plants were ready to be harvested for processing. This case is further complicated because there

is no direct evidence that there is any marijuana beyond that seized in the woods. The eighteen marijuana plants were seized and removed to the sheriff's office prior to the affidavit and the search warrant being issued. Thus, how may one then infer where marijuana or other evidence of the crime might reasonably be kept if there is no evidence in the beginning to infer any exists? We also note five days passed from the observance of criminal activity to application for the warrant. A delay in applying for a warrant can diminish probable cause, although the delay is not considered separately, and the length of the delay is considered together with the nature of the unlawful activity and in the light of common sense. Under the facts of this case, the passage of five days from observance of the criminal activity five miles away in the woods to the date the warrant was sought does nothing to increase confidence in the conclusion of probable cause reached by the magistrate.

The State is asking the court to hold that a conclusory allegation in an affidavit for a search warrant that an individual sells drugs would be probable cause to issue a search warrant for that individual's home because drugs are likely to be found where drug dealers live. *See U.S. v. Pitts, supra.* The rule the State proposes would expand our court's opinions and rule that probable cause to search a certain location must be based on a factual nexus between the evidence sought and the place to be searched. This we will not do.

We hold that the affidavit fails to supply sufficient evidence to satisfy Rule 13.1 and our case law. This state requires "probable cause to believe that the place to be searched contains evidence of the crime." *Nance v. State,* 323 Ark. 583, 918 S.W.2d 114 (1996) (citing *Johnson v. State,* 270 Ark. 247, 604 S.W.2d 927 (1980), cert. denied, 450 U.S. 981 (1981)).

Good-Faith Exception

The State argues that regardless of whether we hold the affidavit and search warrants defective, the *Leon* good-faith exception applies, and the suppression of the evidence seized as a result of the search warrants is not required.

The good-faith exception was adopted in Arkansas in *McFarland v. State,* 284 Ark. 533, 684 S.W.2d 233 (1985). The general rule for the application of the Fourth Amendment exclusionary rule to evidence seized under an invalid warrant is discussed in *Leon.* In *Leon,* the Court fashioned a good-faith exception to the

requirement of a valid warrant so that suppression of evidence would not be appropriate when a law enforcement officer acted in good-faith reliance on a facially-valid warrant. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993).

The U.S. Supreme Court in *Leon* noted that the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands. The Court further noted that an examination of the Fourth Amendment's origin and purposes makes it clear that the use of fruits of a past unlawful search or seizure works no new Fourth Amendment wrong. The exclusionary rule rather works to deter future violations generally. *Leon,* 468 U.S. at 906. The Court then went on to note that if the goal is to deter future police misconduct, then it only makes sense to apply the exclusionary rule where indeed its application has a deterrent effect, and that where the officers acted in objective good faith or where the transgressions are minor, the magnitude of the benefit conferred upon guilty defendants offends the basic concepts of the justice system. *Id.* at 907. The Court found that in the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically correct, and that once the warrant issues, there is literally nothing more the officer can do in seeking to comply with the law. *Leon, supra; Starr v. State*, 297 Ark. 26, 759 S.W.2d 535 (1988). *Leon* holds that objective good-faith reliance by a police officer on a facially-valid search warrant will avoid the application of the exclusionary rule in the event the magistrate's assessment of probable cause is found to be in error. Under this rule, the rationale is that the exclusionary rule is designed to deter misconduct on the part of police rather than to punish them for errors on the part of magistrates. *Jackson, supra.*

The Court in *Leon* further concluded that suppression remains an appropriate remedy if the magistrate or judge in issuing a warrant was mislead by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Leon,* 468 U.S. at 923; *See also Franks v. Delaware*, 438 U.S. 154 (1978). Appellants argue that Evans's affidavit was misleading in violation of *Franks* because Evans did not state that he did not find marijuana in the Jeep. In *Pyle* we stated:

> Neither *Franks* nor *Leon* specifically mentions omissions, but the standards they articulate require a knowing intent to deceive, or a reckless disregard of truth. Applying that standard, it would seem

> that matters omitted must be material circumstances which contradict or dispel the incriminating factors in the affidavit. *Leon* states that the good faith standard does not preclude inquiry into the knowing or reckless falsity of the affidavit itself. Therefore, such omissions would need to render what is in the affidavit effectively false because of their nondisclosure.

Pyle, 314 Ark. at 175.

Here, Evans failed to include in his statement that he did not find marijuana in the Jeep. However, it is obvious from reading the affidavit that Evans did not find marijuana in the Jeep because he stated that he found only plastic jugs and a five-gallon metal can. Thus, the omission of not finding marijuana in the Jeep does not render what is in the affidavit effectively false. It has not been proven that this omission was done with a knowing intent to deceive or a reckless disregard of truth. The omission that he did not see marijuana in the Jeep is not a material circumstance that contradicts or disputes the incriminating factors in the affidavit that he only saw plastic jugs and a five-gallon metal can. Evans's listing of what he found would lead any magistrate reading the affidavit to understand that all Evans found in the Jeep was the plastic jugs and the five-gallon metal can, but that no marijuana was found. What else would Evans be looking for? If Evans had found marijuana, he would have so stated in his affidavit. Evans did not mislead Judge Smith. We conclude that the omission does not meet the test provided by *Franks* to suppress the seized evidence.

Here the officers serving the warrant relied upon the finding of probable cause by the magistrate. They knew the appellants had been observed watering a substantial amount of marijuana in the woods and, in fact, at least one of the officers had been involved in the investigation and seizure of those plants. They knew that Evans, after observing the appellants watering the marijuana plants, had followed the appellants to Cloud's home, that appellants lied to Evans as to what they had been doing the wooded area, and that appellants had their watering containers in their Jeep when Evans questioned them. They believed they were investigating the manufacture and distribution of marijuana. While there may have been a lack of probable cause to search the houses, they were acting in good faith on a determination of probable cause by the magistrate. In addition, because we have a split of authority in that some courts, such as the Ninth Circuit Court of Appeals, justify a search of the dealer's residence when facts infer reasonable cause to believe a person is a drug dealer, we cannot say that the reasonably well-

trained police officer was not acting in good faith. Therefore the good-faith exception applies. *Pyle, supra.* The evidence marijuana seized from the appellants home should not be suppressed.

We affirm in part and reverse in part.

BROWN, J., concurs in part and dissents in part.

ROBERT L. BROWN, Justice, concurring in part; dissenting in part. I agree with the majority opinion in certain critical respects. First, I, too, would disavow the principle that the mere fact a person is a drug dealer establishes probable cause to search that person's home. That principle was best illustrated in a statement by the Ninth Circuit Court of Appeals:

> In the Ninth Circuit, we have recognized that "[i]n the case of drug dealers, evidence is likely to be found where the dealers live." *United States v. Terry*, 911 F.2d 272, 275 (9th Cir. 1990) (quoting *United States v. Angulo-Lopez*, 791 F.2d at 1394, 1399 (9th Cir. 1986)).

United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993). The State endorsed the position of the Ninth Circuit at oral argument in the instant case. Were we to likewise adopt the position that dealing drugs automatically justifies a search of the dealer's home, we would be effectively undermining the Fourth Amendment.

In addition, I agree with the majority that Officer Evans was acting in good faith, as defined by *United States v. Leon*, 468 U.S. 897 (1984), when he filed his affidavit for a search warrant. The Court in *Leon* looked to an objective standard of whether a reasonably well trained police officer would have believed that probable cause for a search warrant existed. As already indicated, certain jurisdictions like the Ninth Circuit Court of Appeals believe that the mere fact of drug dealing is enough to justify a search of the dealer's residence. Certainly, when there is a basis in court decisions for that position, I cannot say that Officer Evans was acting other than in good faith in this case.

Where I disagree with the majority is in its conclusion that there was no reasonable nexus between the cultivation of marijuana and Cloud's residence to justify the issuance of a search warrant. Officer Evans's affidavit set out the following:

- He personally observed Yancey and Cloud exit their Jeep, carry water jugs to the field, and water what appeared to be marijuana plants at 9:30 p.m. on June 17, 1998.

- Officer Evans followed the Jeep back to Cloud's residence and talked to both men.

- The men told Officer Evans they had been "frogging," which did not comport with what he had just seen.

- Officer Evans looked in the back of the Jeep and saw several empty plastic jugs, some partially filled jugs, and a metal five-gallon can.

- On January 19, 1998, Officer Evans returned to the marijuana patch with two other law enforcement officers and found eighteen marijuana plants growing either in the field or in containers.

- On June 19 and June 22, 1998, the officers harvested the marijuana plants for evidence. Two plants were found growing in plastic buckets in the field.

- Cloud, over the past several years, had been convicted for possession of controlled substances on a number of occasions.

Officer Evans's affidavit, in my judgment, showed a direct connection between the cultivation of the marijuana and Cloud's residence. The officer followed the two men directly from the marijuana patch to Cloud's residence and observed water jugs and a metal container in the back of the Jeep at the residence. Later, police officers found two marijuana plants in "plastic buckets" out at the patch. I think a reasonable inference could be made that the plastic jugs were not only used for watering but also as containers for the marijuana plants. Indeed, State Police Investigator Wendall Jines testified at the suppression hearing that marijuana plants are usually started in a house or shed in small containers and then transferred to the woods until harvesting. Investigator Jines testified that in the residences or sheds where the plants are started, the police usually find potting soil, grow lights, fertilizers and the like. After harvesting, dried leaves and buds are found in the residences or sheds which are used for processing the marijuana. Investigator Jines was not aware of any other place where inside growing or processing by Yancey and Cloud could take place other than their residences.

Thus, the marijuana had to be processed somewhere, that is, converted from raw, plant matter into a product marketable on the street. Though I disagree that dealing drugs justifies an automatic search of a dealer's home, I certainly believe that one factor in establishing reasonable cause to search a cultivator's residence is that the marijuana had to be processed at a location other than the field, and a cultivator's home is a reasonable location for that work to be done. And, again, in the case of Yancey and Cloud, Officer Evans followed them from the field to Cloud's home and saw the jugs in the Jeep. Investigator Jines testified that those were the only places he knew of which were available to the two men for cultivating and processing marijuana.

Officer Evans, a sheriff's deputy, and a state police officer investigated this matter over a period of six days and put together their case for the municipal judge. I conclude that a direct connection was made between the marijuana patch and Cloud's home, although I agree with the majority that a connection was not established for Yancey's home. Accordingly, I would affirm the trial court's denial of the motion to suppress with respect to Cloud's residence on the basis that the trial court's ruling was not clearly against the preponderance of the evidence. *See Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996). I would affirm the search of Yancey's residence because Officer Evans met the objective standard of good faith under *United States v. Leon, supra.* Thus, I concur with the majority decision in part and dissent in part.

Derrick BURNETT *v.* STATE of Arkansas

CR 01-525 44 S.W.3d 719

Supreme Court of Arkansas
Opinion delivered May 24, 2001

Wayne Juneau, for appellant.

No response.

PER CURIAM. Appellant, Derrick Burnett, by his attorney, Wayne Juneau, has filed a motion for rule on the clerk. On September 12, 2000, the Jefferson County Circuit Court revoked appellant's probation and sentenced him to five years' imprisonment in the Arkansas Department of Correction. His judgment and commitment order was entered on October 2, 2000. Appellant timely filed a notice of appeal on October 6, 2000. On January 5, 2001, appellant filed a motion for extension of time to docket the appeal, but the motion was filed 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) (2000). As a result, appellant was granted a seven-month extension that also ran outside the applicable time limits.

Mr. Juneau admits in the instant motion that the record was tendered late due to a mistake on his part. We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). Accordingly, we grant the motion for rule on the clerk. A copy of this opinion will be forwarded to the Committee on Professional Conduct. *Id.*

Mark Steven CAMBIANO *v.* Stark LIGON, as Executive Director of the Supreme Court Committee on Professional Conduct

00-1297 44 S.W.3d 719

Supreme Court of Arkansas
Opinion delivered May 31, 2001

Jeff Rosenzweig, for appellant.

Stark Ligon, Executive Director of the Arkansas Supreme Court Committee on Professional Conduct, by: *Lynn Williams*, Staff Litigation Attorney, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. Appellant, Mark Steven Cambiano, brings the instant appeal challenging the Conway County Circuit Court's order disbarring him from the practice of law. Our jurisdiction is authorized pursuant to Ark. R. Sup. Ct. 1-2(a)(5) (2000). Prior to his disbarment, Cambiano pleaded guilty on June 29, 1998, in the United States District Court to one count of aiding and abetting the causing of a financial institution to file a false currency-transaction report, a federal Class D felony. While representing a client, Willard Burnett, appellant knowingly made false statements of material fact and failed to disclose material facts to the First National Bank in Morrilton, Arkansas, in order to advance Burnett's interests. Specifically, appellant knowingly and wilfully withheld relevant information from the bank as to the source of a $62,000.00 deposit made by Cambiano. As a result of Cambiano's representations, the bank reported to the IRS that the entire deposit was appellant's money. However, almost half of the deposit actually belonged to Burnett, against whom the Morrilton Security Bank held an outstanding judgment. Notably,

Cambiano's law partner had represented Burnett in Morrilton Security Bank's collection action against Burnett.

As a result of his plea to a felony offense, Cambiano was sentenced to three years' probation, and the remaining thirty counts pending against him[1] were dismissed. Approximately one month later, the Supreme Court Committee on Professional Conduct issued an interim suspension of Cambiano's license and initiated a disbarment action in circuit court. Pursuant to Section 6B of the Procedures of the Arkansas Supreme Court Regulating Conduct of Attorneys at Law, the Committee sought appellant's disbarment as a result of his felony conviction for aiding and abetting the causing of a financial institution to file a false currency-transaction report, in violation of 31 U.S.C. §§ 5113 and 5324(a)(4), 31 C.F.R. 103.11 and 18 U.S.C. § 2. The Committee alleged that appellant's conviction of a "serious crime" as defined in Section 1(E)(8) of the Procedures, warranted his disbarment. In particular, the Committee asserted that Cambiano's criminal acts reflected adversely on his honesty, trustworthiness, and fitness as a lawyer, in violation of the Model Rules of Professional Conduct.

The circuit court agreed and issued an order disbarring appellant on August 9, 2000. From that decision comes the instant appeal. Cambiano raises two points in support of reversal. First, he contends that the circuit court's decision to disbar him is clearly erroneous. Second, he insists that the trial court erred by denying his motion to compel discovery and by refusing to consider evidence of other attorneys' misconduct in determining his sanction. On cross-appeal, the Committee assigns as error the circuit court's finding that during the pendency of the appeal, Cambiano's status was as a disbarred, rather than a suspended, attorney. In light of the applicable factors and case law, we affirm the circuit court's order of disbarment. We also affirm the trial court in all other respects and on cross-appeal.

I. Disbarment

We have held that disbarment proceedings are neither civil nor criminal in nature but are *sui generis* or "of their own kind." Procedures § 1(C); *Neal v. Hollingsworth*, 338 Ark. 251, 992

[1] The thirty-one count indictment included multiple counts of money laundering and the causing of a financial institution to file false currency-transaction reports.

S.W.2d 771 (1999). On appeal from a circuit court's order of disbarment, the supreme court reviews the matter *de novo* on the record and will not reverse the trial court's findings unless they are clearly erroneous. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Cambiano v. Neal*, 342 Ark. 691, 30 S.W.3d 716 (2000).

According to Model Rule 8.4, an attorney engages in professional misconduct if he (1) commits a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, (2) engages in conduct involving dishonesty, fraud, deceit, or misrepresentation, or (3) engages in conduct that is prejudicial to the administration of justice. In making the sanction determination, we have stated that disbarment is generally appropriate when:

> (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously or adversely reflects on the lawyer's fitness to practice.

Wilson v. Neal, 341 Ark. 282, 16 S.W.3d 228 (2000), *cert. denied*, 121 S. Ct. 1355 (2001) (citing American Bar Association Standards for Imposing Lawyer Sanctions, Section 5.11).

We adopted the American Bar Association's Model Standards for Imposing Lawyer Sanctions in *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998). In particular, the standards set forth the following list of aggravating and mitigating factors that are useful in a court's determination of an appropriate sanction:

Aggravating Factors:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;

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

Mitigating Factors:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;
(d) timely good faith effort to make restitution or to rectify [the] consequences of [the] misconduct;
(e) full and free disclosure to [the] disciplinary board or cooperative attitude towards [the] proceedings;
(f) inexperience in the practice of law;
(g) character or reputation;
(h) physical disability;
(i) mental disability or chemical dependency including alcoholism or drug abuse when
    (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
    (2) the chemical dependency or mental disability caused the misconduct;
    (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
    (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.
(j) delay in [the] disciplinary proceedings;
(k) impositions of other penalties or sanctions;
(l) remorse;
(m) remoteness of prior offenses.

Model Standards for Imposing Lawyer Sanctions §§ 9.22 and 9.32 (1992).

Further, Section 7(F) of the Procedures enumerates the factors to be considered by the Committee in imposing sanctions. In particular, the Committee must consider:

(1) The nature and degree of the misconduct for which the lawyer is being sanctioned.
(2) The seriousness and circumstances surrounding the misconduct.
(3) The loss or damage to clients.
(4) The damage to the profession.
(5) The assurance that those who seek legal services in the future will be protected from the type of misconduct found.
(6) The profit to the lawyer.
(7) The avoidance of repetition.
(8) Whether the misconduct was deliberate, intentional or negligent.
(9) The deterrent effect on others.
(10) The maintenance of respect for the legal profession.
(11) The conduct of the lawyer during the course of the Committee action.
(12) The lawyer's prior disciplinary record, to include warnings.
(13) Matters offered by the lawyer in mitigation or extenuation except that a claim of disability or impairment resulting from the use of alcohol or drugs may not be considered unless the lawyer demonstrates that he or she is successfully pursuing in good faith a program of recovery.

Although these factors are not classified as aggravating or mitigating circumstances, they are harmonious in their objectives and focus with the factors this court adopted in *Wilson*. *See Hollingsworth*, 338 Ark. at 265, 992 S.W.2d at 778.

In the instant case, the circuit court applied the appropriate factors. Notably, appellant does not dispute many of the trial court's findings of aggravators, including his prior disciplinary offense for failing to file an appeal from municipal to circuit court. The parties also agreed that Cambiano's experience in the law was substantial as he began practicing law in 1980 and described his interest in criminal law as "intense." Moreover, appellant pleaded guilty to a felony

offense in violation of a federal statute that was designed to thwart a drug dealer's access to ill-gained profits. Indeed, the Supreme Court explained that Congress enacted the Currency and Foreign Transactions Reporting Act (Bank Secrecy Act) "in response to increasing use of banks and other institutions as financial intermediaries by persons engaged in criminal activity. The Act imposes a variety of reporting requirements on individuals and institutions regarding foreign and domestic financial transactions. See 31 U.S.C. Sections 5311-5325." *United States v. Ratzlaf*, 510 U.S. 135 (1994).

Here, the Committee alleged that Cambiano was aware that his client, Burnett, was a drug dealer, although Cambiano denied any such knowledge. Regarding the Section 7(F) factors, the court found that Cambiano's misconduct was felonious and serious, and carried a potential sentence of up to five years in prison and a $250,000 fine. Appellant further conceded that his conduct damaged the legal profession.

However, the parties disagreed as to several factors. First, Cambiano suggests that the court's finding of a dishonest motive was erroneous because he explained that his conduct was intended to protect his client's estate from a judgment creditor, the bank. Appellant maintained that his action, which resulted in a felony conviction, was merely a technical violation or a regulatory offense. Even so, appellant permitted the false, dishonest answer regarding the source of funds in the bank deposit to be inaccurately submitted to the bank and subsequently reported to the IRS. In fact, the court interpreted Cambiano's explanation as further evidence of his refusal to acknowledge the wrongful nature of his conduct and a lack of remorse. Ultimately, the trial court also disagreed with appellant's assessment that the ultimate victim, the government, was not a vulnerable victim.

■ ■ Although the parties do not dispute the existence of several mitigators, including the remoteness of appellant's 1998 warning, Cambiano objects to the court's failure to find the existence of additional mitigators. Significantly, the lawyer bears the burden of proof to present mitigating evidence. Here, we cannot say that the trial court erred when appellant presented no evidence that he cooperated with the disciplinary authorities. Moreover, the trial court was unpersuaded by Cambiano's evidence of character and reputation, and it was in a superior position to consider this evidence. Other than the natural consequences and penalties of his action, Cambiano failed to point to any other penalties that he suffered. In fact, he paid no fine or restitution and received only

three years' probation. Appellant also offers scant support for his argument that the trial court erred by finding that remorse was not a mitigator.

The trial court's finding that appellant's conduct was deliberate, intentional, or negligent, is borne out by Cambiano's plea that he "knowingly and willfully" committed the felony. Although appellant claims that disbarment would not act as a deterrent, the trial court clearly disagreed. Rather, the court concluded that appellant's disbarment would maintain respect for the legal profession. Finally, the court found that appellant offered no matters in mitigation or extenuation of his conduct. After reviewing the applicable factors, we cannot say that the trial court was clearly erroneous. Accordingly, we agree that disbarment was the appropriate sanction in the instant case.

Our case law also supports this holding. In *Neal v. Hollingsworth*, 338 Ark. 251, 992 S.W.2d 771 (1999), we determined that disbarment was the proper sanction when attorney Hollingsworth knowingly diverted more than $100,000.00 from his client's funds to his own use and then attempted to postpone discovery of his misconduct by failing to account to the probate court and by stonewalling his client's requests for an accounting. *See also In re Hollingsworth*, 339 Ark. Appx. 525, 4 S.W.3d 492 (1999). We acknowledged that Mr. Hollingsworth's actions of misusing and misappropriating funds from his client's estate clearly came within four out of six considerations for "serious misconduct" under Section 7(B) of the Procedures.

Most recently, in *Neal v. Matthews*, 342 Ark. 566, 30 S.W.3d 92 (2000), we considered the merits of a disbarment action arising from Matthews's conviction for a federal misdemeanor. As a result of his plea to two counts of bribery of a small business investment official, Matthews was sentenced to twelve months' imprisonment on each count, with four months of the second count to run consecutively with the twelve months of the first count. Matthews was also sentenced to one year of supervised release and fined $7,500.00. Ultimately, he served eleven months in federal prison, one month in a halfway house, and two months of home confinement.

However, in the appeal of Matthews's disbarment, we determined that a review of the factors indicated that a sanction less than disbarment was appropriate, and we reduced the sanction to a five-year suspension. Significantly, we distinguished the case from our

decision in *Hollingsworth*, where an attorney absconded with his client's money. The dishonest conduct in *Matthews* was not an act involving a client or the practice of law but arose from an attorney's self-interest to obtain a small business loan for himself.

Similarly, in *Wilson v. Neal*, 341 Ark. 282, 16 S.W.3d 228 (2000), we affirmed a sanction of less than disbarment for violations of the Model Rules arising from a plea to five counts of federal misdemeanors for conduct occurring twenty years earlier. As a result of Wilson's pleas, he served time in prison. Like Matthews, Wilson's conduct was not perpetrated against a vulnerable and susceptible client. Wilson's fraud was committed against the federal government for his personal benefit. Wilson had borrowed approximately $775,230 from the Farmers Home Administration for farm operating expenses and secured the loan by a lien on the farm's crops. Wilson then "knowingly" disposed of soybeans and rice that were mortgaged and pledged to FmHA and also "knowingly" took money from a Department of Agriculture bank account and used it for unapproved purposes.

In both *Matthews* and *Wilson*, the fraudulent conduct was self-serving and unconnected to the practice of law. However, in *Hollingsworth* and the instant case, the dishonest acts were perpetrated against or on behalf of clients in the course of the practice of law. As a result, we find ample support for concluding that the trial court was not clearly erroneous for disbarring appellant Cambiano for knowingly and wilfully withholding relevant information and making false representations to a bank and the IRS in an attempt to illegally shield his client's assets from a valid judgment. We affirm the trial court's order of disbarment.

II. Motion to compel discovery

Cambiano's second point on appeal concerns the trial court's denial of his motion to compel discovery and refusal to consider evidence of other attorney misconduct in determining an appropriate sanction. At trial, appellant sought discovery of Committee materials concerning similarly situated persons and the introduction of an exhibit detailing disciplinary action received by other lawyers' convicted of various offenses. In response to appellant's request, the Committee claimed that the documentation constituted privileged material, including proceedings that had not yet reached a public stage. The Committee also cited Section 4A of the Procedures as

authority for nondisclosure. The trial court agreed with the Committee and denied appellant's motion.

On appeal, Cambiano avers that a disbarment action contemplates an exception to the general rule of privilege. Per Section 4B, the Committee is authorized in a disbarment action to "release any information that the Committee deems necessary for that purpose." Consequently, Cambiano reasons that the Rules of Civil Procedure apply, and no rule bars the release of the objectionable information. In fact, appellant explains that he cannot advance his case without the comparative data because this court utilizes comparative review of discipline in order to arrive at the appropriate sanction. *See, e.g., Matthews*, 342 Ark. 566, 30 S.W.3d 92.

The Committee maintains that the requested discovery was either "absolutely privileged" or public records that appellant could have retrieved from the Supreme Court Clerk. Although the civil rules apply to a disbarment action that takes place in circuit court, the rule remains that only materials that are not privileged are discoverable. Ark. R. Civ. P. 26(b)(1). Accordingly, we affirm the trial court's order denying appellant's motion to compel and excluding the evidence of other attorneys' misconduct.

III. Cross-appeal

Following his disbarment, appellant filed a motion for clarification of status during the pendency of his appeal to ensure that he complied with the employment restrictions applicable to suspended lawyers. For purposes of the rules, the trial court determined that Cambiano was a "disbarred" attorney. On cross-appeal, the Committee urges us to reverse the trial court's determination that appellant was a disbarred attorney, rather than a suspended attorney, prior to his appeal to this court. "Disbarment" is defined as the termination of the lawyer's privilege to practice law *and* removal of the lawyer's name from the list of licensed attorneys maintained by the Supreme Court Clerk. *See* Procedures Section 7D(1). The Committee suggests that Cambiano is not effectively disbarred until his name is removed from the stated list. However, given that the trial court's order of disbarment was not stayed pending resolution of the appeal, we have no basis to conclude that the order was not final. Accordingly, we agree with appellant that he remains a disbarred attorney during the pendency of his appeal.

Affirmed.

J.E. MERIT CONSTRUCTORS, INC. *v.* Louise COOPER

01-194 44 S.W.3d 336

Supreme Court of Arkansas
Opinion delivered May 31, 2001

Cross, Gunter, Witherspoon & Galchus, P.C., by: *M. Stephen Bingham*, for appellant.

David P. Price, P.A., by: *David P. Price*, and *Hamilton & Hamilton*, by: *James A. Hamilton*, for appellee.

TOM GLAZE, Justice. We assume jurisdiction of this tort case pursuant to Ark. R. Sup. Ct. 1-2(g) in order to achieve a fair allocation of the appellate workload. Appellant J. E. Merit Constructors, Inc. (Merit) raises eight points for reversal of a jury award in the amount of $150,000.00 in favor of appellee Louise Cooper, who sued Merit, alleging L. K. Webb, an employee of Merit's, negligently caused serious injuries to Cooper's face and left jaw.

Taking Merit's points in the order presented, we first consider its argument that the trial court erred in denying Merit's motion for directed verdict. Specifically, Merit submits that Cooper failed to present substantial evidence to show negligence or to prove mental anguish and future medical expenses. When reviewing a denial of a motion for directed verdict, we determine whether the jury verdict is supported by substantial evidence. *Pettus v. McDonald*,

343 Ark. 507, 36 S.W.2d 745 (2001). Moreover, we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered, and when the evidence and inferences create a jury question, we determine the trial court properly denied the defendant's motion for directed verdict. *See Ouachita Wilderness Institute v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997).

The crux of Merit's first argument is that Cooper's negligence case, at best, was built on speculation rather than substantial evidence. In reviewing the evidence in Cooper's favor, as we must, we reject Merit's argument. Cooper's case in chief showed that, on July 20, 1994, she was driving her car north on Highway 79 past Albermarle's plant. Her son Doug Cooper was a passenger. As they passed the plant, they saw a man operating a bush hog tractor mowing the plant's property alongside the highway. Doug saw the operator drive the tractor into a ditch, causing gravel and rocks to be thrown out from underneath the bush hog, and as a result, a rock flew through Cooper's open window, striking Cooper's left jaw. Doug was required to take control of his mother's car, and after stopping it, he got out to examine the bush hog. He saw the bush hog had no deflector shield or guard on it, and he brought this fact to the attention of the operator, who identified himself as L. K. Webb, an employee of Merit. The Merit company maintained the plant property for Albermarle. After the incident and Doug's talk with Webb, Webb looked at Cooper's face and acknowledged her face was swollen. Doug then took his mother to the Magnolia Hospital Emergency Room where Cooper was treated and released the same day. After Cooper returned home that day, Joe Millett, a supervisor at Merit, visited Cooper and confirmed that Webb was an employee of Merit, and was mowing grass at the time of the incident. Cooper also permitted Millett to take possession of the rock that had hit her and was still in Cooper's car. When Cooper's case finally went to trial, she not only presented the foregoing evidence, but also she introduced proof that to operate a bush hog without a protective shield, as Merit and its employee Webb were doing on July 20, was negligence.

While Merit cross-examined Cooper and her witnesses and offered evidence to counter Cooper's case, its version of the events is not controlling. However, as previously mentioned, the crux of Merit's argument on appeal is that Cooper's case bearing on negligence, at best, was built on speculation. To support its argument, Merit argues that Cooper's claim was based on Webb's operating a "yellow" bush hog at the time of the incident, but the proof showed

Merit used Albermarle's bush hog, which was "green" and had a protective shield.

To establish a prima facie case in tort, a plaintiff must show that damages were sustained, that the defendant was negligent, and that such negligence was a proximate cause of the damages. *Mergen*, 329 Ark. at 412 (citing *Southern Farm Bur. Cas. Ins. v. Allen*, 326 Ark. 1023, 934 S.W.2d 527 (1996)). From the foregoing, it is clear that there was sufficient evidence of Cooper's damages, Merit's negligence, and the link between the two. Despite Merit's placing of undue weight on the color of the bush hog, there was considerable evidence shown to the jury for it to believe Webb — Merit's employee — was the one driving the bush hog that caused a rock to hit Cooper when she drove by. The resolution of factual issues, such as the color of the bush hog in this case, is a question for the jury, *see, e. g.*, *Smith v. Prudential Property & Cas. Ins.*, 340 Ark. 225, 10 S.W.3d 846 (2000), and this court will uphold a jury's findings if there is any substantial evidence to support them. *Callahan v. Clark*, 321 Ark. 376, 901 S.W.2d 842 (1995).

We next turn to Merit's contention that Cooper's evidence was insufficient to establish that Merit's negligence caused Cooper's mental anguish and medical expenses. We disagree. Cooper testified at length as to her pain and the "cryo-freeze" procedures she had to endure to gain relief from the pain. Dr. Robert Valentine, an anesthesiologist and pain management specialist, stated that Cooper suffered from "atypical trigeminal neuralgia," which would be consistent with having sustained a blunt trauma. He further said that Cooper would require cryo-freeze procedures well into the future. Dr. David Redding, a neurosurgeon to whom Dr. Valentine referred Cooper, indicated that no surgical procedures could help her pain in the long run. Dr. Susan Samlaska, whom Cooper saw before going to Dr. Valentine, treated her with trigger point injections that only gave her partial relief. Presented with this substantial evidence, the jury concluded that Cooper had suffered mental anguish, and would continue to incur medical expenses in the future. Therefore, we conclude that the trial court did not err in denying Merit's motion for directed verdict.

Merit's second point on appeal is that the trial court erred in excluding photographs it took of a green bush hog that it claimed was the one owned by Albermarle and was being used by Merit at the time of the accident. Merit had sought to introduce these photos into the record during a pretrial conference on May 4, 2000. At that time, Cooper's counsel noted that Merit's attorneys had first

furnished photographs of a bush hog on April 3, 2000; prior to that time, based on earlier discovery responses, Merit had led Cooper to believe that nobody knew where the bush hog was located. Later responses by Merit indicated that it had known where the bush hog was for some time and had never told Cooper. Defense counsel got permission from Albermarle to photograph a bush hog in February of 2000. After Merit took the pictures of the bush hog, which had been sandblasted and painted in the years since the July 20, 1994, incident, Albermarle sold the machine at auction before Cooper could examine it. The trial court ruled that Merit could not introduce the photographs into evidence, but did allow Merit to display the photos to witnesses during the course of the trial.

Questions regarding the admissibility of evidence are matters entirely within the trial court's discretion, and such matters will not be reversed absent an abuse of that discretion. *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986). The first question upon the introduction of photographs, as with all evidence, is whether they are relevant. *Id.*; *see also Ryker v. Fisher*, 291 Ark. 177, 722 S.W.2d 864 (1987) (the test of whether photographs are admissible into evidence depends on the fairness and correctness of the portrayal of the subject and their admissibility addresses itself to the sound discretion of the judge).

Here, the photographs of the bush hog were taken over five years after the July 20 accident, and defense counsel conceded that the machine had been sandblasted and painted at some time during those years. Because the color of the bush hog was an issue at trial, yet there was no proof other than Millett's testimony that it was the same bush hog, the "correctness of the portrayal of the subject" was called into question. The question of the admissibility of the photographs was squarely within the trial court's discretion, and given the circumstances, we cannot say the court abused that discretion. Further, Merit was permitted to show the photographs to witnesses during their testimony; thus, we are unable to determine how Merit was prejudiced by the trial court's ruling. We will not reverse in the absence of prejudice. *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30 (1999).

For its third point, Merit argues that the trial court erred by allowing the introduction of a videotape, which Dr. Valentine made, showing the cryo-freeze procedure undergone by Cooper. This procedure involved freezing some of the nerves in Cooper's face in order to alleviate her pain. Merit contends that the tape was inadmissible "nonverbal hearsay." However, as Merit fails to support

this argument with any citation to authority, we will not address it. *See Public Defender Comm'n v. Greene County*, 343 Ark. 49, 32 S.W.3d 470 (2000).

Merit also urges that the videotape was (1) cumulative, in that Dr. Valentine had already been permitted to display the actual instruments used during the procedure, and (2) prejudicial, because the tape showed Cooper in obvious discomfort, even with the sound muted. This court has held that a videotape is admissible and not prejudicial if it is relevant and helpful to the jury. *See Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993).

Here, the court found that, as Dr. Valentine explained the procedure, the jury could be aided by watching the video depicting the procedure. Prior to trial, the court had ruled that the tape's probative value exceeded any prejudicial effect it might have, although the judge stated he had "reservations about the sound." The court had watched the video at an April 3, 2000, pretrial hearing, and decided that it understood the purpose of the video was to show in graphic detail what Cooper had undergone in support of her damage element claim of pain and suffering. While the video may have been uncomfortable for a person to watch, it unquestionably was helpful to the jury's understanding of the only treatment that alleviated the pain in her face. Since Dr. Valentine testified that Cooper would have to undergo such treatments indefinitely to remain pain free, the showing of the video was intended to demonstrate to the jury what her damages were. The trial judge did not abuse his discretion in allowing the videotape into evidence.

Merit argues next that the trial court erred by restricting its use of Cooper's previous discovery responses. Here, Merit had wanted to utilize assertions made during discovery in order to impeach Cooper's trial testimony that she could not place a value on her pain and suffering. In one of her discovery responses, Cooper had directed Merit to her February 11, 1998, settlement brochure for a calculation of her claimed damages, which amounted to $17.20 per day; in April of 2000, however, her response to a similar interrogatory stated a figure closer to $150 per day for her pain and suffering. Merit sought to introduce these figures into evidence at trial, but the trial excluded them upon Cooper's objection.

Merit urges the trial court's ruling was in error because Ark. R. Civ. P. 33(c) provides that answers to interrogatories may be used at trial to the extent permitted by the rules of evidence. In support of its argument, Merit cites *Piercy v. Wal-Mart Stores, Inc.*, 311 Ark.

424, 844 S.W.2d 337 (1993). However, *Piercy* dealt with answers to interrogatories regarding whether Wal-Mart had experienced any prior slip-and-fall accidents in its stores, not with statements made in connection with settlement negotiations. Merit also cites *Flynn v. McIlroy Bank & Trust Co.*, 287 Ark. 190, 697 S.W.2d 114 (1985), for its holding that a prior statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with his testimony. The *Flynn* case further holds that "[i]n civil cases this rule effectively allows all prior inconsistent statements to be introduced as substantive evidence in addition to any impeachment value they may have." *Id.* at 193.

While this is a correct statement of the law, it nevertheless fails to take into consideration our rules of civil procedure and rules of evidence concerning statements made during settlement negotiations. Ark. R. Civ. P. 33(c) provides that "[i]nterrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used *to the extent permitted by the rules of evidence.*" (Emphasis added.) Thus, we look to our rules of evidence, particularly Ark. R. Evid. 408, which, in pertinent part, reads as follows:

> *Evidence of* (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or *promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove* liability for, invalidity of, or *amount of the claim or any other claim.* Evidence of conduct or statements made in compromise negotiations is likewise not admissible. (Emphasis added.)

Merit sought to impeach Cooper by using prior statements she made in an effort to settle her claim with Merit. Rule 408 makes such settlement statements inadmissible; thus, the trial court did not err in prohibiting Merit from using such statements for impeachment purposes.

Merit's fifth point is that the trial court should have declared a mistrial when Cooper's counsel referred to insurance during closing arguments. The remarks to which Merit takes offense are the following:

> If you hurt someone, Mr. Physician, and cause injury to their hand, your hand will be cut off. It's part of our culture. I love Jimmy Stewart in "It's A Wonderful Life." In the apothecary's office, the

> medicine that is mixed turns out to be poison and George Bailey catches it and tells him. My father-in-law, Norman Canterbury, is a pharmacist. As we were watching that movie, I said, "Norman, I bet your malpractice insurance would go sky high if you gave somebody poison in a prescription by accident. I hope you've got your malpractice paid up." We professionals joke around with each other about that sort of negligence because when you are negligent and hurt someone you are responsible.

At the conclusion of these remarks, Merit made no objection, nor did it move for mistrial. Therefore, this part of Merit's argument is not preserved.

The second alleged improper remark came later during Cooper's closing arguments. At that stage of argument, Cooper's counsel said as follows:

> I had a case with State Farm recently where my client just wanted to get his roof fixed and they accused him of insurance fraud and called him all kinds of ugly names. That jury wouldn't have any of that. Don't let JE Merit get away with the slime job they've tried to pull on this.

At this stage of Cooper's argument, Merit's counsel approached the bench and asked for a mistrial because of the references to insurance. The trial court denied the motion, and it refused to give a cautionary instruction, because it would only reinforce what was said. The trial judge stated that, while counsel's remarks may have been a poor example of argument, it was only argument.

This court has repeatedly held that mistrial is a drastic remedy that should only be granted (1) when there has been error so prejudicial that justice could not be served by continuing the trial or (2) when the fundamental fairness of the trial has been manifestly affected. *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000); *Arthur v. Zearley*, 337 Ark. 125, 992 S.W.2d 67 (1999). The trial court has wide discretion in granting or denying a motion for mistrial, and that decision will not be disturbed on appeal absent an abuse of discretion or manifest prejudice to the movant. *Id.* Here, given the fact that the insurance references were not intended to draw attention to Cooper's or Merit's insurance coverage, but were instead mere illustrations drawn by counsel during his closing arguments, the trial court's ruling on this issue cannot be said to reflect an abuse of discretion.

For its sixth point, Merit contends that it was error for the trial court to require its expert, Dr. Reginald Rutherford, on cross-examination, to read verbatim the records of Dr. Susan Samlaska, Cooper's initial treating doctor. Merit's counsel gave Dr. Rutherford medical records for him to review, and asked him to give an independent medical examination, concerning Cooper's medical problems. Rutherford described an independent medical examination as one needed when a second medical opinion is requested. Among other records, Merit provided Dr. Rutherford with Dr. Samlaska's; he disagreed with Samlaska's opinion that Cooper suffered from trigeminal neuralgia. During Dr. Rutherford's testimony, Cooper asked him to read from Dr. Samlaska's records in order to cross-examine him about how Dr. Samlaska's diagnosis and treatment figured into his medical conclusions. Because Dr. Rutherford's opinion was so different from those of Cooper's other physicians, the trial court ruled that his credibility and the validity of his report were called into question, and Cooper's cross-examination of Dr. Rutherford's review of those records given him would be proper.

To support its contention that allowing these statements into evidence was error, Merit cites *Southern Farm Bureau v. Pumphrey*, 256 Ark. 818, 510 S.W.2d 570 (1974), wherein this court held that the trial court erred in permitting the plaintiff Pumphrey's treating physician to testify that nothing in a written report of an examination made by another doctor was inconsistent with the treating physician's testimony as to Pumphrey's injuries. The *Pumphrey* decision was based on the fact that it would have been hearsay for the treating physician to testify that, based on what the specialist told him, the specialist's report was not inconsistent with his own; for the trial court to permit the treating physician's statements was an impermissible attempt to do indirectly what could not be done directly. *Id.* at 819-20.

The situation before us is distinguishable from *Pumphrey*. Here, the records were not being introduced as part of the plaintiff Cooper's case in chief; rather, Cooper sought to use the records — furnished to Dr. Rutherford by defense counsel — to cross-examine Dr. Rutherford on the basis of his medical conclusions and to determine his credibility. This court has traditionally taken the view that the cross-examiner should be given wide latitude because cross-examination is the means by which to test the truth of the witness's testimony and credibility. *Fowler v. State*, 339 Ark. 207, 5 S.W.3d 10 (1999); *Wilson v. State*, 289 Ark. 141, 712 S.W.2d 654 (1986). The court in *Fowler* further noted that the trial

court is given wide discretion in evidentiary rulings, and we will not reverse unless the trial court has abused its discretion. *Id.*; *see also State Hwy. Comm'n v. 1st Pyramid Life Ins.*, 269 Ark. 278, 602 S.W.2d 609 (1980) (emphasizing "the importance of according a wide latitude in questions on cross-examination tending to impeach the credibility of a witness or to elicit matter to be considered in weighing his testimony, particularly where expert opinion evidence is involved"); *Arkansas State Highway Comm'n. v. Dean*, 247 Ark. 717, 447 S.W.2d 334 (1969) ("The proper cross-examination of [an expert] witness is the most effective attack that can be made upon his credibility and the best means of diminishing the weight which might be accorded his testimony").

Further, the court of appeals, in *Lawhon v. Ayres Corp.*, 67 Ark. App. 66, 992 S.W.2d 162 (1999), held that under Ark. R. Evid. 703, an expert must be allowed to disclose to the trier of fact the factual basis for his opinion because the opinion would otherwise be left unsupported, and the trier of fact would be left with little if any means of evaluating its correctness. *Id.* at 72. Again, it is significant that Merit gave Dr. Rutherford medical records to aid him in forming an opinion. In utilizing Dr. Samlaska's records in the cross-examination of Dr. Rutherford, Cooper engaged in valid cross-examination to test the credibility of Dr. Rutherford's conclusions, and she also was afforded the opportunity to examine the factual basis for Dr. Rutherford's expert opinion. The trial court did not abuse its discretion in permitting this line of questioning.

Merit also asserts that the trial court erred in excluding Dr. Rutherford's own medical report on Cooper; the report contained Cooper's history and Dr. Rutherford's diagnosis as the result of his examination. The trial court ruled that if Dr. Rutherford had testified as to the contents of his report, that would be sufficient.

Dr. Rutherford's report was adequately summarized in his testimony, which did not fail to convey anything which appeared in the report; the report, as such, would have been cumulative. In *Lovell v. Beavers*, 336 Ark. 551, 987 S.W.2d 660 (1999), this court held that Ark. R. Evid. 403 permits a trial court to exclude relevant evidence "if its probative value is substantially outweighed . . . by considerations of . . . needless presentation of cumulative evidence." *Id.* at 554. This weighing is left to the trial court's sound discretion and will not be reversed absent a showing of manifest abuse. *Id.* Here, the court weighed the relevant interests and concluded that the introduction of Dr. Rutherford's actual report, in addition to his testimony that detailed the information

contained in the report, would be unnecessarily cumulative. This decision cannot be said to be an abuse of discretion.

In its seventh major point, Merit contends that the trial court improperly allowed Freddy Johnson to testify as an expert regarding the necessity of warning flags and cones alongside the highway where the bush hog was being operated. Merit also assigns error to Johnson's statement that operating a bush hog without chains constitutes negligence. Merit points to Ark. R. Evid. 704, which states that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," and cites cases which distinguish opinions which "embrace[] an ultimate issue" from those mandating a legal conclusion, which are not permissible. *See, e. g., Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998).

The first of Merit's contentions — that the court erred in permitting Johnson to testify as an expert because he lacked the knowledge, skill, experience, training, or education to qualify him as an expert — must be rejected because Merit did not raise a timely objection to Johnson's qualifications to testify as an expert. *See Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996) (any error argued on appeal must have first been directed to the trial court's attention in some appropriate manner, so that the court had an opportunity to address the issue).

Similarly, we dismiss Merit's arguments that Johnson's testimony — that operating a bush hog without chains was negligent — mandated a legal conclusion, as these statements also failed to draw an objection from defense counsel. In *Marts v. State, supra*, on which Merit relies, the appellant failed to object to a police officer's opinion testimony that Marts was trafficking in methamphetamine, even where that issue was the ultimate question in the trial. This court held that it would not reverse on that point, because "a specific objection is necessary in order to preserve an issue on appeal." *Marts*, 332 Ark. at 641.

Merit also argues that the court erred in allowing Johnson to testify that it was negligent to operate the bush hog without warning cones or flags. However, we also reject this contention, because the ultimate issue in the case was whether Merit was negligent because of its failure to operate the bush hog without chains or protective skirting, and whether that negligence caused Cooper's injuries. The issue of warning flags or cones was not

central or relevant to these questions. In any event, Johnson's opinion as to the presence or absence of warning flags or cones was not an opinion that mandated a legal conclusion that should have been excluded under Ark. R. Evid. 704.

Finally, in its eighth major point, Merit urges that Cooper sought unreduced future medical expenses, and that she offered no proof as to what her future medical expenses would be. In support of this argument, Merit contends that, during closing arguments, Cooper's counsel exhorted the jury to award the maximum possible figure without any reduction when he said, "$976,313.00, that's what she's asking for, no more, no less." The jury eventually awarded Cooper $150,000.

The trial court instructed the jury that closing remarks of counsel were not evidence, and that any argument having no basis in the evidence should be disregarded. *See* AMI Civ. 3d 103(e). In addition, the trial judge gave the following instruction:

> I have used the expression "present value" in these instructions with respect to certain elements of damage which you may find that Louise Cooper will sustain in the future. This simply means that if you find that Louise Cooper is entitled to recover any elements of damage which require you to determine their present value, you must take into consideration the fact that money recovered will earn interest, if invested, until the time in the future when these losses will actually occur. Therefore, you must reduce any award of such damages to compensate for the reasonable earning power of money.

As shown above, the jury was properly instructed to reduce any amount it awarded for future medical expenses. Absent evidence to the contrary, there is a presumption that the jury has obeyed its instructions. *Pearson v. Henrickson*, 336 Ark. 12, 983 S.W.2d 419 (1999). Although Merit argues Cooper should have presented expert testimony to prove the present value of her future medical expenses, no authority supports Merit's position that she was required to do so.

As to Merit's assertion that Cooper did not prove her future medical expenses, we note that she offered the testimony of Dr. Valentine, who stated that his fee for a cryo-freeze procedure was currently $760, and he estimated Cooper would have to receive this procedure approximately four times per year. Thus, there was evidence to support Cooper's request for, and the jury's award of,

future medical expenses. Further, the jury awarded damages on a general verdict form. In *Pearson, supra,* this court held that when a verdict is rendered on a general verdict form, it is an indivisible entity, and this court should not speculate as to the basis for a jury's verdict. *Id.* at 20. Therefore, in the absence of any suggestion that the jury based its decision on something other than the evidence of damages presented to it, or that it did not follow the trial court's instructions, we do not reverse the jury's assessment of Cooper's damages.

For the reasons set forth above, we affirm the jury's verdict in favor of Cooper.

Juanita JACKSON *v.* Jerry KELLY

00-1450 44 S.W.3d 328

Supreme Court of Arkansas
Opinion delivered May 31, 2001

Richard F. Hatfield, for appellant.

Wright, Lindsey & Jennings LLP, by: *Edwin L. Lowther, Jr.*, for appellee.

ANNABELLE CLINTON IMBER, Justice. This appeal raises an issue of first impression — whether Arkansas recognizes the tort of intentional interference with inheritance. We decline to recognize the tort in this case because the appellant's remedy in probate court would have been adequate had she prevailed in her will contest.

Alta Austin died in 1997, and was survived by her two children, Juanita Jackson and Tommy Austin. Following her death, Tommy Austin petitioned the Lonoke County Probate Court to have her January 14, 1994 will admitted to probate. The will named Tommy as the sole beneficiary of Mrs. Austin's estate and specifically excluded Juanita. Thereafter, Juanita contested the will in the probate court on the following grounds: (1) Mrs. Austin did not have the requisite testamentary intent to execute the document as required by Arkansas law, and (2) Mrs. Austin was subject to undue influence in preparing and executing the document. The probate court found that Juanita had failed to meet her burden of proof to

invalidate the will, and admitted the will to probate. Juanita appealed the probate court's decision to the Arkansas Court of Appeals. In an unpublished opinion, the court of appeals concluded that the probate court's findings were not clearly erroneous and affirmed the court's decision to admit the will to probate. *Jackson v. Austin*, CA99-34, slip op. (Ark. App. September 22, 1999).

Having lost in her attempt to invalidate the will in probate court, Juanita filed another action in the Mississippi County Circuit Court. In her complaint and amended complaint, Juanita made claims for (1) civil conspiracy and (2) tortious interference with an expected inheritance. Particularly, she alleged that Mrs. Austin had told Juanita many times that she would inherit one-half of Mrs. Austin's property, thereby causing Juanita to expect an inheritance from her mother. However, on or about August 13, 1993, Juanita's son, Andrew Jackson, borrowed $30,000 from Citizen's Bank and Trust Company of Carlisle, and, at Andrew's request, Mrs. Austin co-signed the note and placed two certificates of deposit in the amount of $37,600 as collateral for the loan. Juanita claimed that she had nothing to do with procuring the loan. On December 23, 1993, the due date on the loan, Andrew failed to repay the loan. According to Juanita, Andrew had contacted the bank about an extension on the loan and Mrs. Austin had agreed to the extension in discussions with Andrew.

Juanita further alleged in her complaint that Tommy Austin and his wife, Betty Austin, convinced Mrs. Austin that the bank would execute on her certificates of deposit due to Andrew's failure to repay the loan on its due date. On or about January 10, 1994, Betty, who assisted Mrs. Austin in personal matters, made an appointment for Mrs. Austin with attorney Jerry Kelly. Four days later, Betty took Mrs. Austin to Mr. Kelly's office in Carlisle, where Mr. Kelly conferred with Mrs. Austin and prepared the will that is the subject of this matter. Juanita claimed that the only reason Mrs. Austin prepared the will on January 14, 1994, and thereby disinherited Juanita, was that Mrs. Austin was convinced she would lose her certificates of deposit because of Andrew's delayed repayment of the loan.[1] Regarding the actions of Mr. Kelly, Juanita alleged that a loan

[1] As a result of that same visit, Mr. Kelly also prepared a complaint for Mrs. Austin. In that complaint, which was later filed in Lonoke County Circuit Court, Alta Austin alleged that Andrew had breached his loan agreement with the bank and that the bank "presently or will in the immediate future execute upon the Certificates of Deposit to the extent of the loan balance[.]" She prayed for a judgment against Juanita and Andrew in the amount of $30,553.32 to compensate her for losses, costs, and attorney's fees. The complaint alleged

officer at the bank talked with Mr. Kelly on or about January 14, 1994, and told him that the bank was not acting to take Mrs. Austin's certificates of deposit and that no such action was contemplated at that time. After Andrew and Juanita were served with copies of Mrs. Austin's complaint, on or about January 18, 1994, Andrew immediately repaid the loan in full, whereupon the bank released the certificates of deposit to Mrs. Austin. Consequently, the bank never executed upon Mrs. Austin's certificates of deposit.

Juanita named Mr. Kelly and Betty Austin as defendants in her complaint and averred that both defendants, jointly and severally, conspired to have Alta Austin sign the January 14, 1994 will, leaving all of her estate to Tommy, and interfered with Juanita's expected inheritance. She prayed for compensatory damages equal to one-half of Alta Austin's property, legal costs, and punitive damages.

In his answer, Mr. Kelly denied that venue was proper in Mississippi County and moved to dismiss the complaint pursuant to Ark. R. Civ. P. 12(b)(3).[2] He also disputed Juanita's allegations (1) that she had nothing to do with procuring the bank loan; (2) that the bank had extended the loan; (3) that Mrs. Austin had agreed to the extension; and (4) that a loan officer had advised Mr. Kelly on January 14, 1994, that the bank was not taking action against Mrs. Austin's certificates of deposit. Furthermore, based upon his assertion that the complaint failed to state facts upon which relief could be granted, Mr. Kelly moved to dismiss the complaint pursuant to Ark. R. Civ. P. 12(b)(6). Finally, he asserted that Juanita's claim was waived by the applicable statute of limitations, as well as the doctrines of *res judicata* and collateral estoppel. In a joint memorandum, Mr. Kelly and Betty argued that the suit was barred by the probate court's order admitting the January 14, 1994 will to probate pursuant to the doctrines of *res judicata* and collateral estoppel, and that the tort of intentional interference with expected inheritance had not been recognized in Arkansas.

The circuit court treated the joint motion to dismiss as a motion for summary judgment and, after conducting a hearing, entered an order dismissing Juanita's claims against Mr. Kelly and Betty. The order stated, in pertinent part:

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that both Juanita and Andrew had persuaded Alta Austin to pledge her certificates of deposit as security for the loan to Andrew. The lawsuit was eventually dismissed.

[2] He subsequently filed a separate motion to dismiss the complaint pursuant to Ark. R. Civ. P. 12(b)(3) for lack of venue.

- "[T]he tort of interference with prospective inheritance is not recognized in the State of Arkansas."

- "Even if the tort should be recognized, issue preclusion clearly bars the claim of plaintiff against defendant Betty Austin."

- "[T]he claim of plaintiff against defendant Jerry Kelly fails as a matter of law based on no dispute as to any issue of material fact. The court finds that even if the tort of interference with prospective inheritance were recognized by the court that under the record before the court, defendant Kelly is entitled to prevail because [sic] an absence of proof as to some of the essential elements of that tort."

Also, the findings of fact and conclusions of law announced orally by the circuit court at the conclusion of the hearing were incorporated into and attached to the written order. With regard to venue, the court found as follows: "I think that the broadening of the dismissal motions to summary judgment motions likely constitutes a waiver of the venue argument because it gets into substantive issues that would be dispositive on the merits." With regard to the civil conspiracy allegation against Mr. Kelly and Betty Austin, the court stated:

> I don't think that there's any doubt without getting into the not-yet recognized tort of interference with expectancy of an inheritance that's been argued, and it's been asserted by the plaintiffs in the case; without getting into that, I think that the issue, I think that issue preclusion clearly bars the claim for summary judgment purposes against Betty Austin, and am so holding.
>
> As to Kelly, any conspiracy, any alleged conspiracy with Betty Austin that would lead to undue influence procurement or things of that nature, whether standing alone or as part of a prong of proof for the expectancy tort, uh, interference with expectancy tort, and the probate court has already found there was no undue influence, there was no procurement.

Thus, the circuit court found that the civil conspiracy claim against both defendants was barred by the previous probate court action. Juanita appeals from the circuit court's order dismissing her claim against Mr. Kelly for tortious interference with an expected inheritance. She does not appeal from that part of the order dismissing Betty; nor does she appeal the dismissal of the civil conspiracy claim.

For her first point on appeal, Juanita argues that the trial court erred when it concluded that the tort of interference with inheritance is not recognized in Arkansas. She asserts that although there is no Arkansas case directly on point, this court *impliedly* recognized the cause of action in *Anderson v. Bank of Hot Springs*, 304 Ark. 164, 801 S.W.2d 273 (1990). We disagree. In that case, we affirmed the trial court's summary judgment dismissal of a claim for tortious interference with expected inheritance. *Id.* In doing so, however, this court did not decide whether such a cause of action actually existed under Arkansas law because the issue was never raised by the parties.

Juanita urges this court to recognize the tort of interference with inheritance and cites as authority section 774B of the RESTATEMENT (SECOND) OF TORTS, which is entitled "Intentional Interference with Inheritance or Gift":

> One who by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.

RESTATEMENT (SECOND) OF TORTS § 774B (1979). The question then is whether we should adopt that section of the RESTATEMENT (SECOND) OF TORTS as the law in Arkansas. We recently laid down principles to guide us in making such a decision:

> This Court treads cautiously when deciding whether to recognize a new tort. While the law must adjust to meet society's changing needs, we must balance that adjustment against boundless claims in an already crowded judicial system. We are especially averse to creating a tort that would only lead to duplicative litigation, encouraging inefficient relitigation of issues better handled within the context of the core cause of action.

Goff v. Harold Ives Trucking Co., Inc., 342 Ark. 143, 151, 27 S.W.3d 387, 391 (2000) (citing *Trevino v. Ortega*, 969 S.W.2d 950, 951-52 (Tex. 1998)). We declined to recognize the tort of intentional spoliation of evidence because "there are sufficient other avenues, short of creating a new cause of action, that serve to remedy the situation for a plaintiff" and because "we do not find it necessary to create a new tort out of whole cloth in order to provide a party with a remedy." *Id.*, 342 Ark. at 150, 27 S.W.3d at 391.

Those same principles prevent us from creating a new cause of action to provide Juanita with a remedy in this case. Particularly, she had access to an adequate remedy in probate court. Her claim for interference with inheritance in this case was based on her own assertion that her mother, the decedent, "had many times represented to [her] that she would inherit one-half (1/2) of [the decedent's] property...." Thus, in her complaint, Juanita prayed for compensatory damages equal to one-half of the decedent's property. Had Juanita succeeded in her will contest in probate court, the will that excluded her from inheriting from the decedent would not have been admitted to probate, and the decedent's estate would have passed according to the statutory rules of intestate succession.[3] Arkansas Code Annotated Section 28-9-204 (1987), regarding intestate succession, states, in relevant part:

> Heirs will take per capita in the following circumstances:
>
> (1) If all members of the class who inherit real or personal property from an intestate are related to the intestate in equal degree, they will inherit the intestate's estate in equal shares and will be said to take per capita.
>
> > (A) For illustration, if the intestate leaves no heirs except children, the children will take per capita and in equal shares ....

Because the decedent left only two children, Juanita and Tommy, had Juanita prevailed in her will contest, she would have inherited one-half of the decedent's estate. A successful will contest would have provided her with the same remedy that she sought in her tort action in circuit court. Thus, we conclude that Juanita was provided with an adequate remedy in probate court. Under these circumstances, we hold that it is unnecessary to create a new tort in this case.

Even among those jurisdiction that have recognized a cause of action for intentional interference with inheritance, most courts hold that the plaintiff, in order to pursue the cause of action, must show that there are no adequate alternative remedies to the tort action.

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[3] Juanita never presented another will of the decedent for probate.

> Most states that have considered the issue have held that a claim for tortious interference with expectancy of inheritance may only be brought where conventional probate relief would be inadequate . . . . If a will contest is available to the plaintiffs, and a successful contest would provide complete relief, no tort action is warranted.

James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Traps*, 36 Ariz. Atty. 26 (January 2000) (citing *Moore v. Graybeal*, 843 F.2d 706, 711 (3d Cir. 1988) (applying Delaware law); *Firestone v. Galbreath*, 895 F. Supp. 917, 926 (S.D. Ohio 1995) (applying Ohio law); *McGregor v. McGregor*, 101 F. Supp. 848, 850 (D. Colo. 1951) (apparently applying Colorado or Louisiana law); *Beren v. Ropfogel*, 1992 WL 373935 (D. Kan. 1992), aff'd, 24 F.3d 1226 (10th Cir. 1994); *Benedict v. Smith*, 376 A.2d 774, 776 (Conn. Super. Ct. 1977); *DeWitt v. Duce*, 408 So.2d 215, 218 (Fla. 1981); *Robinson v. First State Bank of Monticello*, 454 N.E.2d 288, 294 (Ill. 1983); *Minton v. Sackett*, 671 N.E.2d 160, 162 (Ind.App. 1996); *Allen v. Lovell's Administratrix*, 197 S.W.2d 424, 426 (Ky. 1946); *Brignati v. Medenwald*, 53 N.E.2d 673, 674 (Mass. 1944); *Scott v. Estate of Ehrmann*, 916 S.W.2d 872, 874 (Mo. App. 1996); *Griffin v. Baucom*, 328 S.E.2d 38, 42 (N.C. 1985)). See also Marilyn Marmai, *Tortious Interference with Inheritance: Primary Remedy or Last Recourse*, 5 Conn. Prob. L.J. 295 (1991). The reason for such a prerequisite has been stated as follows:

> One frequently cited reason for allowing recovery for intentional interference with inheritance is that every wrong should have a remedy. Yet the facts giving rise to the tort are often identical to facts giving rise to a will contest. If either action would provide an adequate remedy, the plaintiff should be limited to the probate action because that is the preferred method for resolving issues related to wills. Accordingly, most jurisdictions prohibit a plaintiff from pursing the tort action unless a probate action is either unavailable or inadequate.

Nita Ledford, Note, *Intentional Interference with Inheritance*, 30 Real Prop. Prob. & Tr. J. 325 (1995).[4]

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[4] Other cases supporting the proposition that a claim for interference with inheritance will be allowed only where probate relief would be inadequate are: *Maxwell v. Southwest National Bank*, 593 F.Supp. 250, 253 (D. Kan. 1984) ("[I]f the plaintiff had challenged the will and succeeded, he could have obtained all the relief he could receive as damages in this case. ... Therefore, this court concludes that plaintiff has not stated a claim upon which relief can be granted with respect to plaintiff's claim of intentional interference with inheritance.");

Furthermore, Juanita's claim for tortious interference with inheritance constitutes a collateral attack on the earlier probate decree:

> [C]ourts from many other jurisdictions have squarely faced the issue of determining when a tortious interference action ought to be considered an impermissible collateral attack on the probate proceedings. The vast majority of these cases characterize as collateral a later tort action whenever the plaintiff has failed to pursue an adequate remedy in the probate proceedings ... When plaintiff was the only heir and could have taken intestate by proving her claim of undue influence to defeat the will at probate, no later tort action is allowable to relitigate the undue influence claim.

DeWitt v. Duce, 408 So.2d 216, 218 (Fla. 1981). *See also, Reinhardt v. Kelly*, 164 F.3d 1296, 1300 (10th Cir. 1999) ("[A] claim of undue influence in the execution of a will is ancillary to a will challenge and belongs in state probate court."), and *McKibben v. Chubb*, 840 F.2d 1525, 1530 (10th Cir. 1988) ("When a claim is brought charging undue influence or fraud in the execution of a will, that action is ancillary to the challenge of the will and belongs in the Kansas probate proceedings ...."). This court has long held that where a probate court has subject matter jurisdiction, its judgment is conclusive, unless reversed, and cannot be attacked collaterally. *Brown v. Kennedy Well Works, Inc.*, 302 Ark. 213, 788 S.W.2d 948 (1990). Thus, we refuse to allow Juanita to make a collateral attack on the probate court's order, which was affirmed by the Arkansas Court of Appeals.

Juanita nevertheless suggests that she did not have an adequate remedy in the will contest because, even if she had been successful in that action, she could not have sought recovery of her legal costs or an award of punitive damages. This suggestion is without merit. In determining the adequacy of relief for a claim of tortious interference with inheritance, an award of punitive damages is not considered a valid expectation. *In re Estate of Roeseler*, 679 N.E.2d 393, 406 (Ill. App. Ct. 1997); *Maxwell v. Southwest National*

Graham v. Manche, 974 S.W.2d 580, 583 (Mo. Ct. App. 1998) ("[m]ost courts allow a plaintiff to pursue an intentional interference claim only if special circumstances exist which make remedy of a will contest inadequate."); *In re Estate of Knowlson*, 562 N.E.2d 277, 280 (Ill. App. Ct. 1990) ("Where a will contest is available and would provide adequate relief to an injured party, a tort action does not lie ...."); *In re Estate of Hoover*, 513 N.E.2d 991, 992 (Ill. App. Ct. 1987) ("The tort action will not lie, however, where the remedy of a will contest is available and would provide the injured party with adequate relief").

Bank, 593 F.Supp. 250, 253 (D. Kan. 1984). Similarly, it stands to reason that the recovery of legal costs is not a valid expectation.

Finally, Juanita contends that we should recognize a cause of action of intentional interference with inheritance because, if we do not, other plaintiffs will be left without an adequate remedy in probate court. She hypothesizes that there would be no adequate probate court remedy where the plaintiff is not an heir of the testator or where the property purportedly to be left to the plaintiff was in a trust and not in the decedent's estate or subject to the decedent's will. However, the undisputed facts of this case are that Juanita was an heir of the testator, and the property was not in a trust. In this case, the relief available in probate court would have been adequate had she prevailed — she would have inherited one-half of the decedent's estate.

For the above stated reasons, we affirm the circuit court's dismissal of Juanita's claim for tortious interference with expected inheritance.

Affirmed.

Don William DAVIS *v.* STATE of Arkansas

CR 00-528 44 S.W.3d 726

Supreme Court of Arkansas
Opinion delivered May 31, 2001

Joel O. Huggins, for appellant.

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

RAY THORNTON, Justice. This appeal arises from a trial court's denial of a Rule 37 petition. Appellant, Don William Davis, shot and killed Jane Daniel in the course of burglarizing her home in Rogers. Appellant was charged with capital murder, burglary, and theft of property. He was sentenced to death

by lethal injection on the capital-murder charge, and was sentenced to forty-year sentences on the burglary and theft charges. We affirmed appellant's conviction on his direct appeal in *Davis v. State*, 314 Ark. 257, 863 S.W.2d 259 (1993) ("*Davis I*"), *cert. denied*, 511 U.S. 1026 (1994). Appellant filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37. After a hearing on the matter, the trial court denied the Rule 37 petition. From that order, appellant brings his appeal and raises eleven allegations of error. We find no reversible error and affirm.

For many years, Arkansas has allowed collateral attacks upon a final conviction and appeal by means of a postconviction challenge to determine whether a sentence was void because it violated fundamental rights guaranteed by the Constitutions or laws of Arkansas or the United States. The present rule for such a challenge is Ark. R. Crim. P. 37, which provides the following grounds for a petition:

> (a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or
>
> (b) that the court imposing the sentence was without jurisdiction to do so; or
>
> (c) that the sentence was in excess of the maximum sentence authorized by law; or
>
> (d) that the sentence is otherwise subject to collateral attack . . . [.]

Ark. R. Crim. P. 37.1. The most common ground for postconviction relief is the assertion that the petitioner was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984).

Other grounds that we have held are so fundamental that a breach renders a judgment a complete nullity and therefore can be addressed under Rule 37 include the following: (1) a trial by a jury of fewer than twelve persons, *see Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996); (2) a judgment obtained in a court without jurisdiction to try the accused, *see Travis v. State*, 286 Ark. 26, 688 S.W.2d 935 (1985) (citing *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982)); and a judgment obtained in violation of the constitutional provisions against double jeopardy. *Travis, supra.*

Rule 37 permits review to determine whether the sentence imposed on the petitioner is subject to collateral attack. *Swisher v. State*, 257 Ark. 24, 514 S.W.2d 218 (1974). The presumption that a criminal judgment is final is at its strongest in collateral attacks on the judgment. *Strickland, supra*. There is a presumption of regularity regarding every judgment of record of a court with competent jurisdiction. *Coleman v. State*, 257 Ark. 538, 518 S.W.2d 487 (1975).

Rule 37 does not provide an opportunity to reargue points that were settled on direct appeal. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000). The rule does not provide a remedy when an issue could have been raised in the trial or argued on appeal. *Weaver v. State*, 339 Ark. 97, 3 S.W.3d 323 (1999). Rule 37 does not permit a petitioner to raise questions that might have been raised at the trial or on the record on direct appeal, unless they are so fundamental as to render the judgment void and open to collateral attack. *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980). Postconviction relief is not intended to permit the petitioner to again present questions that were passed upon on direct appeal. *Hulsey v. State*, 268 Ark. 312, 595 S.W.2d 934 (1980). Rule 37 is a narrow remedy designed to prevent incarceration under a sentence so flawed as to be void. *Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999).

On appeal from a trial court's ruling on Rule 37 relief, 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). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). Based upon these principles of law, and upon our standard of review, we turn to the issues raised in this appeal.

I. Denial of due process

At arraignment, the trial court ordered an evaluation, and appellant received a psychiatric evaluation at the state's expense from Dr. Travis Jenkins at the Ozark Guidance Center in Springdale. Following Dr. Jenkins's examination, appellant, joined by the State, filed a motion for psychiatric evaluation at the Arkansas State Hospital. The trial court agreed and ordered appellant to

undergo a thirty-day evaluation at the state hospital. The psychologist's report from the state hospital considered mitigating factors, such as a long history of alcohol and substance abuse, learning disabilities, hyperactivity, and early childhood deprivation, that "do not appear to impair criminal responsibility." After these two reports were obtained, appellant asked the court for funds to employ an independent psychiatric examiner, and the trial court denied this additional request. At trial, Dr. Jenkins was called by appellant as a witness during the sentencing phase.

■ Appellant argues that he was denied due process when the trial court denied his motion for funds to hire an independent psychiatrist. This argument merely repeats the arguments made in the trial court and direct appeal that have been previously decided in *Davis I, supra,* and is not appropriate for postconviction relief. Addressing this issue on direct appeal, we stated:

> Davis received a psychiatric evaluation at state expense from the Ozark Guidance Center. The psychiatrist there concluded that there was a lack of psychosis but that Davis did have attention-deficit hyperactivity disorder residual [ADHD], which could have contributed to the commission of the offenses.
>
> Subsequently, Davis, joined by the State, filed a motion for psychiatric evaluation at the Arkansas State Hospital, which was granted. The resulting medical report revealed no psychoses but did indicate a psychoactive substance abuse and antisocial personality disorder.
>
> Next, Davis asked the court for funds to employ an independent psychiatric examiner, which the court refused to do. . . . In light of these cases, we conclude that the trial court did not err in refusing to approve funding of a private psychiatric evaluation for Davis after approving two previous evaluations.

Davis I, supra.

■ Notwithstanding our consideration of this issue in the direct appeal, appellant now argues that our decision in that appeal did not reach the question of the employment of a private psychiatrist to assist in the sentencing phase. We disagree and hold that *Davis I, supra,* reflects the consideration at trial of evidence produced through two previous psychiatric examinations. Those examinations revealed, in addition to a lack of psychosis, a showing of psychological problems relating to the presence of mitigating

circumstances, such as ADHD, psychoactive substance abuse, and antisocial personality disorder. This testimony was available for consideration by the jury in the sentencing phase, and the issue was reached on direct appeal. Therefore, we conclude that the trial court's decision denying Rule 37 relief on this argument was not clearly erroneous.

II. Ineffective assistance of counsel

Appellant next argues that his trial counsel was ineffective for not sufficiently supporting his argument that he should have been provided funds to employ an independent psychiatrist to advise him on the mitigating factors in the sentencing phase. Appellant specifically argues that the failure of the trial counsel to cite and argue the effect of our decision in *Coulter v. State*, 304 Ark. 527, 804 S.W.2d 348 (1991), constituted ineffective assistance of counsel, and violated the protections of the Sixth and Fourteenth Amendments of the United States Constitution.

Addressing this issue, we turn to the analysis provided in *Strickland, supra*. We recently restated the *Strickland* standard for assessing the effectiveness of trial counsel:

> According to that standard, the petitioner must show first that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. The petitioner must show there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

Sasser v. State, 338 Ark. 375, 993 S.W.2d 901 (1999).

[11] Appellant argues that because his attorney failed to cite *Coulter, supra,* he should be afforded postconviction relief and that his counsel should have developed the issue further. However, *Coulter, supra,* did not resolve this issue, but rather left it undecided. We cannot say that counsel's failure to cite *Coulter, supra,* was so serious an error that it deprived appellant of a fair trial, or that he would have prevailed if trial counsel had cited this case. *Strickland, supra.*

The request for another independent expert was presented and denied during the trial. In *Davis I,* we concluded as a part of our Ark. Sup. Ct. R. 4-3(h) review that the denial of this request did not constitute reversible error. We now hold that the trial court was not clearly erroneous in finding that ineffective assistance of counsel was not proven on this point.

III. Denial of funds to employ an independent psychiatrist witness

In our previous analysis of the first point raised in this appeal, we affirmed the trial court's finding that Rule 37 relief is not appropriate to set aside the conviction on the basis of the denial of funds for the employment of an expert to further develop mitigation factors. Appellant now presents the argument that his Rule 37 hearing should have been used to reargue this point, and contends that the trial court abused its discretion in not approving funds for an expert to reargue this point during the Rule 37 hearing.

The purpose of Rule 37 was never intended to provide a means to add evidence to the record or refute evidence adduced at trial. *Taylor v. State,* 297 Ark. 627, 764 S.W.2d 447 (1989). The standards previously articulated in this opinion, which relate to the purpose and scope of rule 37 proceedings, dispose of this argument. Appellant presents no citation of authority to the contrary, and we do not grant relief without the citation of authority or clear and convincing arguments. *Dixon v. State,* 260 Ark. 857, 545 S.W.2d 606 (1977). We conclude that the trial court did not abuse its discretion in denying this request.

IV. Recusal and continuance

Appellant argues that he was prejudiced by the trial court's denial of his motion to recuse. Prior to the Rule 37 hearing, appellant requested that the trial judge recuse because of complaints

filed against him and moved for a continuance to prepare for the Rule 37 hearing. The trial court denied both motions. The court addressed appellant's motion to recuse, stating that he was not biased and that he would not let the complaints affect his consideration of the Rule 37 action.

There is a presumption of impartiality on the part of judges. *Black v. Van Steenwyk*, 333 Ark. 629, 970 S.W.2d 280 (1998). The decision to recuse is within the trial court's discretion and will not be reversed absent abuse. *Trimble v. State*, 336 Ark. 437, 986 S.W.2d 392 (1999). The question of bias is usually confined to the conscience of the judge. *Black, supra*; *Dolphin v. Wilson*, 328 Ark. 1, 942 S.W.2d 815 (1997). An abuse of discretion can be shown by proving bias or prejudice. *Massongill v. County of Scott*, 337 Ark. 281, 991 S.W.2d 105 (1999); *Trimble, supra*. To decide whether there was an abuse of discretion, we review the record to see if any prejudice or bias was exhibited. *Black, supra*; *Dolphin v. Wilson, supra*.

Although it was alleged that the trial judge was the target of a judicial ethics inquiry, appellant has not included these complaints in the record before us. Appellant has not alleged any specific instances of bias, nor has he shown any way that he was prejudiced by the judge's denial of his motion to recuse. Moreover, this point does not address any of the fundamental issues appropriate for a Rule 37 proceeding. However, it challenges the conduct of the hearing itself, and upon examination of the conduct of the Rule 37 hearing, we conclude that there was no abuse of discretion.

Appellant also argues that the trial court erred in denying his Rule 37 motion for a continuance because he did not have adequate time to review all possible Rule 37 issues. The law is well established that the granting or denial of a motion for continuance is within the sound discretion of the trial court, and that court's decision will not be reversed absent an abuse of discretion amounting to a denial of justice. *Dirickson v. State*, 329 Ark. 572, 953 S.W.2d 55 (1997). Appellant must show prejudice from the denial of the continuance, and when a motion for continuance is based on a lack of time to prepare, we will consider the totality of the circumstances; the burden of showing prejudice is on the appellant. *Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1994). Finally, the court has also held that a lack of diligence alone is sufficient cause to deny a continuance. *Id.*

In the present case, appellant has failed to demonstrate prejudice from the court's denial of his continuance under *Davis,*

supra. Appellant's Rule 37 attorney was appointed to represent appellant on May 2, 1999, and the Rule 37 hearing was scheduled for June 29, 1999. Appellant's attorney had approximately two months to familiarize himself with the case. Appellant merely argues that appellant's counsel did not have enough time to review the record, and that they were forced to rely upon the work of his previous attorneys. The trial court exercised its discretion in finding that approximately two months is ample time to prepare for a Rule 37 hearing. We cannot say that the trial court abused its discretion. *Dirickson, supra.*

Appellant also argues that the trial court committed error in denying his motion for continuance on the grounds that his attorney, Mr. Huggins, was not allowed time to become certified by the Public Defender Commission to handle this death-penalty case, as required by Ark. R. Crim. P. 37.5. Arkansas Rule of Criminal Procedure 37.5(c)(5) specifies that "[a]t least one of the attorneys shall meet the standards of (c)(1) or (c)(4)." *Id.* We note that Mr. Huggins's co-counsel, Charles Duell, was qualified to represent defendants in death-penalty cases. Therefore, we conclude that the trial court did not abuse its discretion on this point.

V. Withdrawal of counsel

Appellant argues that the court at the Rule 37 hearing committed error in allowing the public defender's office to argue that appellant's counsel at trial, provided by the public defender's office, were ineffective. Appellant cannot prevail on this issue because he has not shown that any perceived conflict of interest adversely affected Mr. Duell's representation of him. Prejudice is presumed from a conflict of interest only when the defendant demonstrates that an actual conflict of interest adversely affected his lawyer's performance. *Sheridan v. State*, 331 Ark. 1, 959 S.W.2d 29 (1998). In the absence of a showing of prejudice, we find no abuse of discretion by the trial court.

VI. Alternate theories

Without citation to applicable authority, appellant argues that the State is precluded from charging the offense of capital murder under the alternate theories of felony-murder under Ark. Code Ann. § 5-10-101(a)(1) (Repl. 1997) and premeditation and deliberation under Ark. Code Ann. § 5-10-101(a)(4) (Repl. 1997). He

further claims that the trial court did not submit proper verdict forms to the jury. Both of these issues should have been raised on direct appeal. *Weaver, supra.*

There is no showing that appellant objected to either the information or the verdict form at trial. During the Rule 37 proceeding, appellant contended that he was convicted of a nonexistent offense. Appellant cites *Ward v. State*, 293 Ark. 88, 733 S.W.2d 728 (1987) and *Bosnick v. State*, 248 Ark. 846, 454 S.W.2d 311 (1970) for his argument that the alternate charges were for two difference offenses. We disagree. Neither case holds that the State could not have charged the murders under the appropriate alternate theories. We have held that the duplication, or "double-counting," of an element of a capital offense by one or more aggravating circumstances does not broaden the death-eligible class nor render our death-penalty statutes unconstitutional. *Simpson v. State*, 339 Ark. 467, 6 S.W.3d 104(1999); *Jackson v. State*, 330 Ark. 126, 954 S.W.2d 894 (1997). As we stated in *Simpson, supra*, we see no need to revisit or reconsider this issue yet again. We conclude that there was no merit to this argument. It follows that appellant's counsel was not ineffective for failure to raise these arguments at the trial or on direct appeal.

VII. Dr. Jenkins's testimony

Appellant called Dr. Jenkins to testify during the sentencing phase. Appellant now contends that his trial attorneys were ineffective because they did not object during the testimony of Dr. Jenkins when he responded to a question on cross-examination concerning his psychiatric interview with appellant. On direct examination, appellant's counsel asked Dr. Jenkins if he had reviewed a report on appellant prepared by the Arkansas State Hospital. Dr. Jenkins replied that he had reviewed the report. On cross-examination, the State asked Dr. Jenkins if, in his opinion, appellant had "the ability to form the specific mental intent of premeditated and deliberated purpose in killing a person[.]" Dr. Jenkins responded by volunteering that "I did not have the opportunity to interview him around all of those events because of his Fifth Amendment rights, but — [.]" The State then restated its question, making it clear that the question was directed to Dr. Jenkins about his conclusion based on the report from the Arkansas State Hospital. On redirect examination, Dr. Jenkins confirmed that the Arkansas State Hospital had reached the same results that he had reached.

We have held that an inadvertent comment by a witness with respect to an accused's post-arrest silence that was not responsive to the prosecutor's question did not constitute a violation of *Doyle v. Ohio*, 426 U.S. 610 (1976), or warrant a mistrial. *Tarkington v. State*, 313 Ark. 399, 855 S.W.2d 306 (1993). Where a comment on a defendant's post-arrest silence is not an attempt to impeach the defendant, it is not the type of comment prohibited by the Court in *Doyle, supra. Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996).

Here, Dr. Jenkins's testimony was during the sentencing phase of appellant's trial after appellant had already been found guilty. We conclude that Dr. Jenkins's inadvertent remark did not violate the principles of *Doyle, supra.* Accordingly, appellant's counsel was not ineffective for failure to pursue this issue, and we affirm the trial court on this point.

VIII. Vagueness and overbreadth

In the sentencing phase at trial, the prosecutor presented as an aggravating factor that appellant committed the murder "for the purpose of avoiding or presenting an arrest or effecting an escape from custody." Ark. Code Ann. § 5-4-604(5) (Repl 1997). Appellant claims that Ark. Code Ann. § 5-4-604(5) is unconstitutionally vague and overbroad, and that it violates due process and the Eighth Amendment protection against cruel and unusual punishment.

This issue is one that should have been presented to the trial court and raised on direct appeal. *Weaver, supra.* We have rejected this argument in the past. *See Bowen v. State*, 322 Ark. 483, 911 S.W.2d 55 (1995); *Pickens v. State*, 292 Ark. 362, 730 S.W.2d 230 (1987). Appellant has not advanced an argument that would require a different result in this case. Accordingly, we find no error. Any inference that trial counsel was ineffective for failing to raise this point in the direct appeal is meritless.

IX. Overlapping statutes

Appellant argues that felony capital murder and premeditated and deliberated murder are identical to and overlap with first-degree felony murder and first-degree murder. Again, this issue is one that should have been presented to the trial court and raised on

direct appeal. *Weaver, supra.* We have repeatedly rejected this contention. *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994); *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980).

In *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997), we stated simply that "[w]e have decided this issue adversely to Lee's position on many occasions, and adhere to these previous holdings." *Id.* Similarly, in *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), we stated that we have discounted this argument on numerous occasions. *See Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994). Similarly, on this occasion, we adhere to our previous decisions, and we reject this argument. Therefore, any inference that trial counsel was ineffective for failing to raise this point in the direct appeal is meritless.

X. Mitigating factors

Appellant argues that the sentencing instructions and the jury verdict form did not inform the jury that each juror could consider mitigating factors at all times, in violation of *Mills v. Maryland*, 486 U.S. 367 (1988). Appellant has not abstracted the trial court's instructions during the sentencing phase of his trial. Because the record on appeal is confined to that which is abstracted, the failure to abstract a critical document precludes us from considering issues concerning it on appeal. *See Porchia v. State*, 306 Ark. 443, 815 S.W.2d 926 (1991); *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988). Without the proffered instructions before us, we decline to address this argument.

However, we note that appellant's claim regarding the jury verdict form has been previously rejected by this court. This same argument was made in *Pickens, supra*, and we decided the argument lacked merit in that case. We wrote:

> The second argument concerning AMCI 1509 is based on the recent United States Supreme Court case of *Mills v. Maryland*, 486 U.S. 367 (1988).
>
> * * *
>
> The appellant claims there is no meaningful difference between the Maryland and Arkansas sentencing forms, but they are, in fact, very different. Our Form 2, which accompanies AMCI 1509, expressly allows the jury to list mitigating circumstances

> which were found by some, though not all, of its members. Form 3 then allows the jury to determine if the aggravating circumstances outweigh any mitigating circumstances. Nothing in the forms indicates to the jury that a mitigating circumstance must be found unanimously before it may be considered in the weighing process. The potential for misunderstanding is not present in the Arkansas forms as it is in the Maryland forms. Therefore, we reject the appellant's argument.

Id. If we were to reach the merits on this point, appellant's argument would have no merit.

Additionally, appellant claims that the sentencing scheme is unconstitutional because the word, "shall," in Ark. Code Ann. § 5-4-603(a) requires the jury to impose the death penalty on certain findings. We have previously held that Ark. Code Ann. § 5-4-603 does not result in a mandatory death sentence. *See Hill v. State*, 289 Ark. 387, 713 S.W.2d 233 (1986); *Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996). We adhere to our previous holdings in the present appeal. Because appellant's arguments on both claims are meritless, appellant's further claim that counsel was ineffective fails, and we affirm.

XI. Proportionality review

For his last point on appeal, appellant argues that the Arkansas Death Penalty statute is unconstitutional because we do not conduct a proportionality review and have set forth no standards by which such reviews are conducted.

We are not required to conduct a proportionality review of death sentences. *Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995). Although we conducted a proportionality review in the past, we no longer do so. *Id.* However, at the time of appellant's direct appeal, we did conduct a proportionality review. In *Davis I, supra,* we reviewed the facts in appellant's case with those in other robbery-murder cases where the death penalty had been imposed, and we decided that the death penalty was "not freakishly or arbitrarily applied" under these circumstances. *Id.* Moreover, appellant's claim that his trial attorneys were ineffective for failing to raise this claim is meritless under *Monts, supra.*

Because we find no reversible error, we affirm the trial court.

Timothy Delwin GIBBS; Terri Dawn Gibbs Behan; and Clayton Dustin Gibbs *v.* Roy Leo HENSLEY, *Guardian*; Alice Aileen Gibbs; The Estate of Alice Aileen Gibbs; Regions Bank; and the Estate of Vestal M. Gibbs, *Deceased*

01-155 44 S.W.3d 334

Supreme Court of Arkansas
Opinion delivered May 31, 2001

Claude W. Jenkins, for appellants/cross-appellees.

Phil Stratton, for appellee/cross-appellant Roy Leo Hensley.

JIM HANNAH, Justice. Appellants Timothy Delwin Gibbs, Terri Dawn Gibbs, and Clayton Dustin Gibbs appeal the chancery court's decision that their grandfather, Vestal M. Gibbs, entered into a valid contract to make a will and that Roy Leo Hensley was a proper party to a third-party action. Hensley cross-appeals asserting that the chancery court erred in failing to find that Vestal's wife, Alice, ratified and joined in the contract to make a will as a party when she executed the will and other documents required by the contract between Hensley and Vestal.

Equity cases are tried de novo on the record. *Arkansas Presbytery v. Husdon*, 344 Ark. 332, 40 S.W.3d 301 (2001). Unfortunately, we are unable to reach the merits of this case due to a failure to bring up a sufficient record. Although this case began with the

filing of a complaint in September 1998, the record provided commences with the filing of a petition for partition on June 26, 2000. The record is incomplete. The docket sheet does not track the record provided, but rather shows the first document filed was a petition to enforce a contract to make a will filed on January 19, 2000. This is not accurate because, as noted, the first document was filed in September 1998.

The missing pleadings, orders, and documents include several that are relevant to the issues presented by both the appellant and the cross-appellant. The July 12, 2000, order and the November 15, 2000, order are discussed by the parties in their arguments. While the orders appear in the record, the June 20, 2000, memorandum opinion setting out the chancellor's ruling referenced in those orders is neither in the record nor is it abstracted. Additionally, the parties argue the issue of whether the trial court erred in its decision on the contract to make a will; however, the petition that raised this issue in the trial court is not in the record. This is the same situation with the third-party complaint. An initial review of the existing record reveals there are at least fourteen missing documents that can be easily identified.

We have stated time and time again that it is the appellant's burden to produce a record on appeal sufficient for our review. *Lee v. Villines*, 328 Ark. 189, 942 S.W.2d 844 (1997); *Ozark Auto Transp., Inc. v. Starkey*, 327 Ark. 227, 937 S.W.2d 175 (1997). *See also Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999); *SD Leasing Inc. v. RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983). The record simply does not place the matters argued before this court. Issues outside the record will not be considered on appeal. *Stewart v. Winfrey,* 308 Ark. 277, 824 S.W.2d 373 (1992).

For the above reasons, we affirm.

Carol ROSS *v.* STATE of Arkansas;
Mark Singson *v.* State of Arkansas;
Gil Landers d/b/a Big Daddy's Pawn Shop,
Linda Stewart *v.* Ken James;
Quinton Lee Handy *v.* State of Arkansas;
Deborah Rouse *v.* State of Arkansas;
Alexander Davison *v.* State of Arkansas;
Alexander Davison *v.* State of Arkansas

CR 01-177; CR 01-268; CR 01-269;
CR 00-1445; CR 01-336;
CR 01-348; CR 01-342 44 S.W.3d 336

Supreme Court of Arkansas
Opinion delivered May 31, 2001

Jeff Rosenzweig, for appellant Carol Ross.

Julia B. Jackson, Public Defender Conflicts, for appellant Mark Singson.

Josh E. McHughes, for appellant Gil Landers *et al.*

William R. Simpson, Jr., Public Defender, by: *Deborah Sallings*, Deputy Public Defender, for appellants Quinton Lee Handy, Deborah Rouse, and Alexander Davison.

No response.

PER CURIAM. On May 17, 2001, we issued an order for Madeline McClure, court reporter, to appear before this court at 9:00 a.m., Thursday, May 24, 2001, to show cause why she should not be held in contempt of court for failure to comply in a timely manner with the command of the Writs of Certiorari issued in the above-styled actions.

Madeline McClure appeared on May 24, 2001. At that time, she entered a plea of not guilty and requested a hearing.

Therefore, we appoint the Honorable John Lineberger as a master to conduct the hearing. After the hearing, we direct the master to make findings of fact and file them with the court. Upon receiving the master's findings, we will decide whether Madeline McClure should be held in contempt.

Bruce Edward LEAKS *v.* STATE of Arkansas

CR 00-895 45 S.W.3d 363

Supreme Court of Arkansas
Opinion delivered June 7, 2001

Kent McLemore, for appellant.

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

TOM GLAZE, Justice. A jury convicted appellant Bruce Edward Leaks of first-degree murder in the January 7, 1997, shooting death of William Earl Littlejohn, and sentenced him to forty-five years in prison. We take jurisdiction of this appeal pursuant to Ark. Sup. Ct. R. 1-2(a)(7), as this is Leaks's second appeal. We reversed his earlier conviction in *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999), on the basis of the prosecutor's improper and prejudicial closing argument. As his sole point for reversal in this appeal, Leaks contends that there was insufficient evidence to support the guilty verdict.

At the close of the State's case, Leaks moved for a directed verdict on the charge of first-degree murder, asserting that the State had not proven that he had the intent to kill Littlejohn or that he had committed an underlying felony which would give rise to a

charge of felony murder. Leaks's motion was denied at that time, but when he renewed it after resting his defense, the trial court granted the motion only with respect to felony murder.

A directed-verdict motion is a challenge to the sufficiency of the evidence. *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000). The test for determining sufficiency of the evidence is whether there is substantial evidence to support the verdict. On appeal, we will review the evidence in the light most favorable to the State and sustain the conviction if there is any substantial evidence to support the verdict. Only evidence supporting the verdict will be considered. *Id.*; *Copeland v. State*, 343 Ark. 327, 37 S.W.3d 191 (2001).

On appeal, Leaks contends that the evidence adduced at trial was insufficient to convict him of first-degree murder; in particular, he asserts that the evidence of "purposeful conduct" was not substantial. Leaks argues that the proof came closer to that necessary to reach a conviction for second-degree murder.[1] In support of his argument, he cites *Spann v. State*, 328 Ark. 509, 944 S.W.2d 537 (1997). There, David Spann argued that he should have been convicted of manslaughter, not first-degree murder, where the facts showed that he had been involved in a heated argument with the victim immediately prior to the killing. The court wrote that while "there was proof of intense anger on the part of Spann . . . [,] [t]here was no proof of provocation in the form of physical fighting, a threat, or a brandished weapon." *Id.* at 515. Leaks points out that he believed Littlejohn was reaching for a weapon just prior to the shooting, and he urges the court to conclude that Littlejohn's conduct rises above the threshold outlined in *Spann*, in that it constituted "physical fighting, a threat, or a brandished weapon."

We do not consider this alleged "provocation," however, as we need only consider the evidence which supports the guilty verdict. *Terrell v. State*, 342 Ark. 208, 27 S.W.3d 423 (2000). A person commits first-degree murder if, "[w]ith 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). According to Ark. Code Ann. § 5-2-202 (Repl. 1997), "[a] person acts purposely with respect to his conduct or a result thereof when it is his

[1] "A person commits murder in the second degree if: (1) [h]e knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or (2) [w]ith the purpose of causing serious physical injury to another person, he causes the death of any person." Ark. Code Ann. § 5-10-103 (Repl. 1997).

conscious object to engage in conduct of that nature or to cause such a result." 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. *See, e. g., Terrell, supra*; *Steggall v. State*, 340 Ark. 184, 194, 8 S.W.3d 538, 545 (2000). Furthermore, the intent necessary for first-degree murder may be inferred from the type of weapon used, the manner of its use, and the nature, extent, and location of the wounds. *Williams v. State*, 304 Ark. 509, 804 S.W.2d 346 (1991); *Garza v. State*, 293 Ark. 175, 735 S.W.2d 702 (1987).

The evidence introduced at trial showed the following sequence of events. William Earl Littlejohn had been living at the home of Sylvester Leaks, Bruce Leaks's brother, for about a week or two before the shooting. On January 7, George Cheatham, a friend of Leaks, informed Leaks that Littlejohn was at Sylvester's house letting some friends wash clothes there. Upon hearing this, Leaks took a revolver from the trunk of the car belonging to his girlfriend, Shirley Williams, loaded the gun, and went to Sylvester's house to confront Littlejohn. When Leaks arrived at Sylvester's house, he asked Littlejohn about the women doing laundry. After a short, hostile exchange, Littlejohn began to fasten the door, but Leaks grabbed his arm. According to Leaks, Littlejohn then slapped Leaks. At that point, standing about four feet away from Littlejohn, Leaks took out the pistol and shot him. Littlejohn ran to a back bedroom, clutching his chest, where he told Leaks's nephew, James Leaks, "Bob shot me, go call the police." Littlejohn then collapsed on James's bed; he died before medical help could arrive.

After shooting Littlejohn, Leaks returned to his house, where he hid the gun in a drawer and put on his pajamas to pretend that he had been at home all the time because he did not want anyone to know he had left the house. The next day, he returned the gun to the trunk of his girlfriend's car and threw the spent round away. Leaks initially denied any involvement in the shooting, telling both George Cheatham and the police that he did not know anything about the incident. However, in the statement he later gave to the police, he admitted to the shooting, but claimed it had not been his intention to shoot Littlejohn.

At trial, Dr. Frank Peretti, the associate medical examiner for the State, testified that the bullet that killed Littlejohn entered his chest between his ribs and pierced his heart and left lung. Littlejohn essentially bled to death internally from this wound, according to Dr. Peretti. Ronald Andrejack, a firearms tool mark examiner with

the Arkansas State Crime Lab, testified that the bullet that killed Littlejohn was fired from the .38 revolver retrieved from the trunk of Shirley Williams's car. We conclude that these facts were sufficient to support the conviction for first-degree murder.

In *Williams*, *supra*, the court held that it was reasonable to conclude that when Williams fired shots from a .45 caliber pistol into the victim's abdomen and back, from a distance of a few feet, he possessed a purposeful intent to kill. *Id.* at 513. Similarly, the court affirmed a first-degree murder conviction in *Walker v. State*, 324 Ark. 106, 918 S.W.2d 172 (1996). There, Walker was shooting a gun in the victim's home. When the victim, Johnny Jones, asked Walker to stop or to take the gun outside, Walker became angry and confronted Jones, firing one shot at close range into Jones's forehead. This court held that this was "substantial evidence, both direct and circumstantial, for the jury to conclude that it was Walker's conscious objective to engage in the conduct which resulted in the death of Jones." *Id.* at 110.

It is axiomatic that one is presumed to intend the natural and probable consequences of his actions. *Smith v. State*, 337 Ark. 239, 988 S.W.2d 492 (1999); *Walker*, *supra*; *Akbar v. State*, 315 Ark. 627, 869 S.W.2d 706 (1994). Here, Leaks fired a .38 revolver into Littlejohn's chest from a distance of only a few feet away. In addition, after shooting the victim, Leaks returned home, put on his pajamas and went to bed in an effort to conceal his crime; further, he lied to friends and to the police about his involvement in the killing. This court has held that lying about a crime can indicate a consciousness of guilt, *see Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993), and a jury may properly consider an attempt to cover up one's connection to a crime as proof of a purposeful mental state. *See Terrell*, 342 Ark. at 212; *Thompson v. State*, 338 Ark. 564, 999 S.W.2d 192 (1999). Circumstantial evidence of a culpable mental state may constitute substantial evidence to sustain a guilty verdict. *Terrell*, 342 Ark. at 212 (citing *Steggall v. State*, 340 Ark. 184, 8 S.W.3d 538 (2000)). The facts set out above presented sufficient evidence from which the jury could have concluded that Leaks was guilty of first-degree murder. We therefore affirm.

ST. PAUL REINSURANCE CO., Inc. *v.* Cheryl IRONS, Individually, and d/b/a Riverfront Phase II

00-1478 45 S.W.3d 366

Supreme Court of Arkansas
Opinion delivered June 7, 2001

Matthews, Sanders & Sayes, by: *Marci Talbot Liles* and *Roy Gene Sanders*, for appellant.

Bill R. Holloway, for appellee.

DONALD L. CORBIN, Justice. This case is before us on a petition for review from the Arkansas Court of Appeals. At issue, is whether an insurer is required to pay the full face value of an insurance policy, as provided under Arkansas's valued-policy statute, codified at Ark. Code Ann. § 23-88-101 (Repl. 1999), where the insured obtained two separate insurance policies for one insurable interest. We agree with the court of appeals that this is an issue of first impression; as such, initial jurisdiction was proper in this court pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We affirm.

Appellee Cheryl Irons owned a business that was a combination bar and grill and arcade in Arkansas City. She obtained insurance on her business from Appellant St. Paul Reinsurance Co., Inc., on June 26, 1995. The policy, which was to be in effect until June 26, 1996, provided $105,000 in insurance coverage for the building and $25,000 for its contents. On or about July 12, 1995, Appellee renewed her previous insurance coverage with General Star Indemnity Company ("General Star") in the amount of $80,000 on the

building. A fire completely destroyed Appellee's business on October 25, 1995. After detecting the presence of diesel fuel in the building, investigators determined that the fire was the result of arson. No arrests were ever made in connection with the fire.

Following the fire, Appellee attempted to collect on both insurance policies.[1] Appellant and General Star each agreed to pay a pro-rata share of the larger of the two policies, relying on identical provisions in each policy that governed in cases of other insurance. The clauses provided as follows:

> 1. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.
>
> 2. If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect it or not. But we will not pay more than the applicable Limit of Insurance.

Appellant paid Appellee a total of $59,594.59, while General Star paid her $45,405.41, for a total payout of $105,000. After the insurance companies failed to pay the full policy values, Appellee filed suit against General Star in 1997, alleging that General Star owed her the remaining balance of the face value of its policy under the valued-policy statute. The trial court agreed and granted Appellee's motion for summary judgment. General Star paid the remaining amount owed to Appellee, without appealing the trial court's order.

Appellee then filed suit against Appellant on February 23, 1999, again alleging that the existence of other insurance did not prevent Appellant from being obligated for the full value of the insurance policy under Arkansas's valued-policy statute. On December 20, 1999, the trial court granted Appellee's motion for summary judgment, thus ordering Appellant to pay $45,405.41, the

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[1] Appellee only attempted to collect on the proceeds for the building itself. She never filed a claim to recover the $25,000 in proceeds for the building's contents.

face amount of the policy, plus prejudgment interest at six percent per annum, in the amount of $10,897.30, and court costs of $125.00. In addition, the trial court ordered Appellant to pay a statutory twelve-percent penalty in the amount of $5,448.65 and attorney's fees in the amount of $15,135.14. Appellant appealed this decision to the court of appeals, who affirmed the order of the trial court on December 13, 2000. This court granted Appellant's petition for review on January 25, 2001.

This court recently set forth the standard of review appropriate in summary-judgment cases in *Worth v. City of Rogers,* 341 Ark. 12, 14 S.W.3d 471 (2000):

> We have repeatedly held 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. *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999); *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its 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. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998); *Pugh*, 327 Ark. 577, 940 S.W.2d 445. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. *Wallace v. Boyles*, 331 Ark. 58, 961 S.W.2d 712 (1998); *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997). After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts. *George*, 337 Ark. 206, 987 S.W.2d 710.

Id. at 20, 14 S.W.3d at 475.

Section 23-88-101(a) provides:

> In case of a total loss by fire or natural disaster of the [real] property insured, a property insurance policy other than for flood and earthquake insurance shall be held and considered to be a liquidated demand against the company taking the risk for the full

> amount stated in the policy or the full amount upon which the company charges, collects, or receives a premium.

Appellant's sole argument on appeal is that despite the language of the valued-policy statute, it would be against public policy to allow an insured to receive a double recovery by insuring property with multiple policies. Appellee counters that there is no authority in Arkansas to support the view that the valued-policy statute is suspended in cases of concurrent insurance policies covering the same insurable interest. We agree with Appellee.

There is no dispute that the underlying purpose of section 23-88-101 is to protect an insured faced with the total destruction of his or her property. In *Tedford v. Security State Fire Ins. Co.*, 224 Ark. 1047, 278 S.W.2d 89 (1955), this court stated:

> Statutes of this sort are passed for the purpose of avoiding the uncertainty of determining the value after the fire. The manifest policy of the statute is to guard against over-insurance of the property. The agents of the company have the opportunity to inspect the property fully before taking the insurance and fixing the amount of the premiums. It is the valuation fixed in advance by the parties by way of liquidated damages in case of a total loss by fire of the property insured without the fault of the insurer.

Id. at 1049, 278 S.W.2d at 91 (quoting *Farmers' Home Mut. Fire Ass'n v. McAlister*, 171 Ark. 574, 285 S.W.5 (1926)).

This court has held that the "valued policy statute 'becomes a part of every policy of insurance on real property in this State, the same as if it were actually written in the policy.' " *Id.* at 1049, 278 S.W.2d at 90-91 (quoting *E.O. Barnett Bros. v. Western Assur. Co.*, 143 Ark. 358, 220 S.W. 465 (1920)); *Sphere Drake Ins. Co. v. Bank of Wilson*, 312 Ark. 540, 851 S.W.2d 430 (1993). Our case law is clear that the provisions of our valued-policy statute may not be avoided by contrary policy stipulations. *Tedford*, 224 Ark. 1047, 278 S.W.2d 89; *Thurston Nat'l Ins. Co. v. Dowling*, 259 Ark. 597, 535 S.W.2d 63 (1976). In cases where a total loss is involved, a clause that diminishes recovery to less than the full amount stated in the policy is void. *Id.* More specifically, this court has held that a policy provision limiting an insurance company's liability to a pro-rata share of the insurance in force was void where the dwelling was totally destroyed by fire. *See Interstate Fire Ins. Co. v. James*, 252 Ark. 638, 480 S.W.2d 341 (1972). Furthermore, an "insurer may not go behind the policy and show that the insured's interest is worth less

than the amount of the policy." *Tedford*, 224 Ark. at 1050, 278 S.W.2d at 91 (citing 29 AM. JUR. *Insurance* § 1196). Thus, under the valued-policy statute, even an insured who has a limited interest in the insurable property is entitled to recover the full face value of a policy. *Id.*; *see also Gravning v. American Druggists' Ins. Co.*, 259 Ark. 523, 534 Ark. 754 (1976).

While our case law is clear in the above-enumerated respects, a case involving one insured obtaining multiple coverage on a single insurable interest has not previously been decided by our court. A federal court in this state has considered such an issue in *Underwriters at Lloyd's, London v. Pike*, 812 F. Supp. 146 (W.D. Ark. 1993). In *Pike*, the insured obtained insurance coverage for two poultry houses and their contents in the amount of $60,000 from Farmers Mutual Insurance Company. One year later, the insured obtained a second policy for the same property in the amount of $102,000 from Lloyd's of London. A month after the insured obtained the second policy, the covered property was totally destroyed by a fire. Each policy contained an escape clause avoiding liability for a loss if there was other insurance covering the poultry houses. The Eighth Circuit Court of Appeals determined that the escape clauses were mutually repugnant and remanded the matter to the district court, ordering it to prorate the loss between the two policies. The district court then determined the amount to be prorated was to be "no less than the greater of the face amounts of the two insurance policies in effect at the time of the loss." *Id.* at 151.

Appellant now urges this court to adopt the reasoning of the court in *Pike*, wherein the district court distinguished state court cases interpreting the valued-policy statute:

> In spite of what those cases say, the court notes from a careful reading of them that they are not on point because none of them involve the insuring with more than one policy one insurable interest by one insured. Instead, in each of those cases, the property owner or one of several property owners, had insured his or her insurable interest in the property and had obtained an insurance policy to cover that interest, and then another individual or entity with a separate insurable interest had also obtained a policy of insurance insuring that different interest. In spite of the all-inclusive language of those cases, this court doubts that the Arkansas Supreme Court, when squarely faced with this issue, would allow what is clearly and blatantly a double recovery of the loss of one insurable interest. To do so would be to allow something akin to a lottery or wager. One property owner with one insurable interest

> could obtain multiple policies insuring the property at its full value and then wait for (and perhaps hope for) a fire, with all of the attendant temptation to "help the odds."

Id. at 150.

The district court specifically distinguished the cases of *Mann v. Charter Oak Fire Ins. Co.*, 196 F. Supp. 604 (E.D. Ark. 1961), *aff'd* 304 F.2d 166 (8th Cir. 1962), and *Hensley v. Farm Bur. Mut. Ins. Co.*, 243 Ark. 408, 420 S.W.2d 76 (1967). In *Mann*, the plaintiff homeowners insured their home for $15,000 and First Federal Savings and Loan, as mortgagee, obtained coverage of $8,000, the principal amount of the loan, from Charter Oak Insurance Company. When the plaintiffs' house was destroyed by fire, they recovered the $15,000 in proceeds from their insurance policy, paid off their debt to First Federal, and then sued to recover the $8,000 policy amount from Charter Oak. In allowing the plaintiffs to recover under both policies, this court stated that Arkansas's valued-policy statute was applicable, and the measure of the loss was the aggregate of the concurrent policies in force, with each insurer being liable for the full amount of its policy.

Similarly, in *Hensley*, 243 Ark. 408, 420 S.W.2d 76, two different insurance policies covered the same insurable risk, a rent house. The owners of the home insured it with Farm Bureau Mutual Insurance Company in the amount of $2,000. They subsequently entered into a sales contract with a third party, agreeing to sell the house to him for $2,000. Thereafter, the buyer, without the knowledge of the sellers, obtained insurance on the home in the amount of $2,000 from Glen Falls Insurance Company. The house was then completely destroyed by fire. Glen Falls paid the $2,000 face amount of the policy to the buyer, who, in turn, paid the balance due on the sales contract to the sellers. The sellers then attempted to recover under their insurance policy with Farm Bureau, who denied payment on the basis that the property was covered by other insurance. This court held that Farm Bureau was required to pay the face value of its policy under Arkansas's valued-policy statute. In reaching this conclusion, this court relied on the decision in *Mann*, noting that each insured had a separate insurable interest for the full amount of each policy.

The court in *Pike*, 812 F. Supp. 146, found *Mann* and *Hensley* to be distinguishable because neither case involved one insured insuring one insurable interest with multiple policies. While this may be true, such a distinction fails to recognize that in each of

those cases, as well as in the instant matter, there was a single piece of property insured by multiple policies. Under the valued-policy statute, it is irrelevant who applies for the coverage or who recovers under the policy in the event of a total loss. Any objections to the valued-policy statute should be taken up by the General Assembly, and not by the courts. Appellant's attempt to go behind its policy and limit Appellee's recovery to a pro-rata portion of that policy is in direct conflict with our valued-policy statute. Accordingly, we affirm the trial court's order granting Appellee's motion for summary judgment.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. St. Paul Reinsurance Co., Inc. argues the federal district court decision of *Underwriters at Loyds, London v. Pike*, 812 F. Supp. 146 (W.D. Ark. 1993), presents a situation identical to the one now before us, and our court should follow it. Here, as was the case in *Pike*, the insurer argues that the insured obtained two separate valued policies on the same property, and because the insurable interest is the same in both policies, the insured is able to receive a double recovery or "windfall," which exceeds the total value of the insurable interest. St. Paul urges there is an inherent risk in overinsuring property, and further suggests that such added risk and possible double recovery can be removed if the insured's recovery in these circumstances is limited to receiving a pro rata amount from each insurer. *Cf. Underwriters at Lloyd's, London v. Pike*, 977 F.2d 1278 (8th Cir. 1992). The insured, Cheryl Irons, on the other hand, counters that she is in no way enriched by the receipt of monies to which she is entitled, and in paying premiums for the two valued policies, insurers St. Paul and Gold Star were being paid for the risk they underwrote.

There is no dispute in the instant case that the premiums being paid by the insured, Cheryl Irons, for the two fire insurance policies in issue were based on the policies' valued amounts, $105,000 (St. Paul) and $80,000 (Gold Star). There is no issue or question raised concerning the value of Irons's property;[1] nor is there any suggestion that fraud played a part in Irons's loss or claim. At this point, it also seems fair to say that valued policies, such as the ones held by Irons, are issued primarily to avoid potential disputes regarding the value of covered losses. Because Arkansas' valued-policy statute

[1] The record reflects an appraisal letter indicating the total loss amounted to $92,983.29.

authorizes a liquidated demand against the insurer *who takes the risk for the full amount stated in the policy*, I agree with the majority opinion that the statute requires full payment under both St. Paul's and Gold Star's policies. *See* 12 Lee R. Russ, *Couch on Insurance* § 175:106 (3d ed. 1995) ("[u]nder a 'valued-policy law' which is meant to fix the measure of damages in case of loss, the aggregate amount of insurance written is conclusive as to the value of the property and if there are multiple insurers, each is liable to the full amount of the policy").

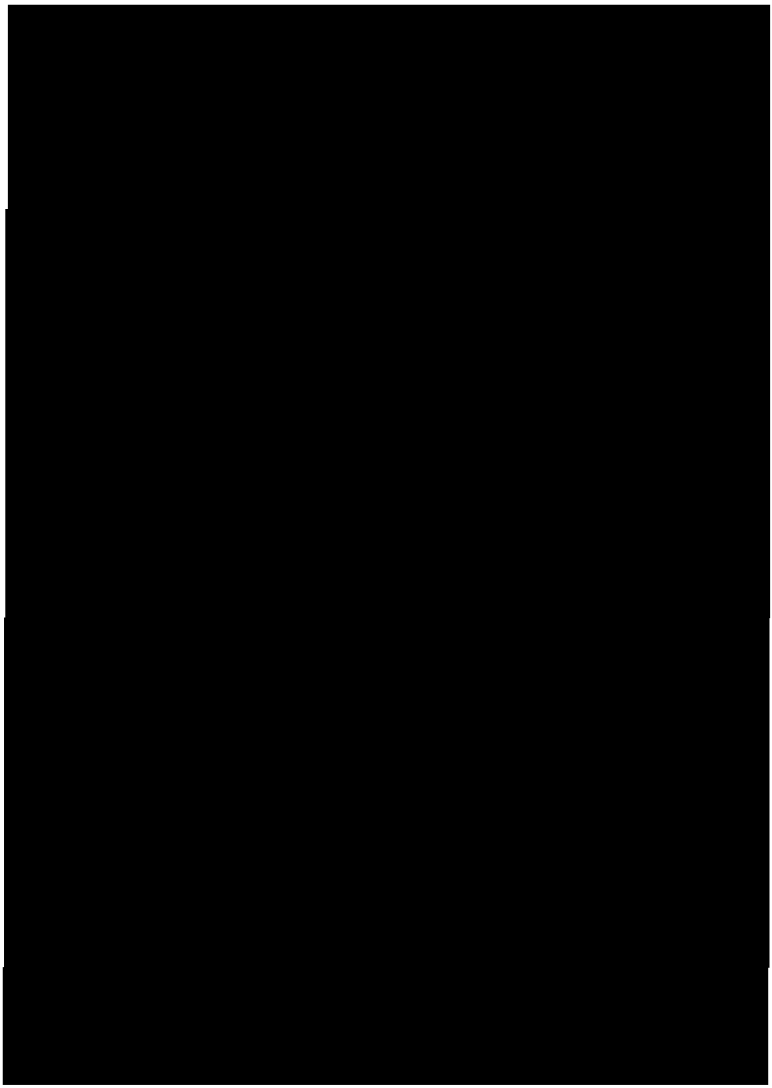
If an insurer is concerned that an insured's recovery under two or more policies could lead to abuses where double recovery might result, nothing precludes an insurer from asking the applicant seeking fire insurance whether the insured has (or intends to obtain) other insurance coverage on the same insurable risk. *Cf. Pike*, 977 F.2d at 1279. Moreover, when such insurance is renewed, it is a simple matter to again inquire of the insured if he or she has obtained (or intends to obtain) other insurance. Obviously, if the insured answers yes, the insurer can then decide if it still wishes to underwrite the insured's property risk. If an insured answers no, but later is shown to have acquired a second policy, the insurer can deny coverage and payment because of the insured's misrepresentation.

In short, I fail to see the potential abuses foreseen by the federal district court in *Pike* and now forecast by the insurer St. Paul. As far as the interplay between the valued-policy law and a pro rata clause in a fire policy, the stated valuation in the policy controls in the absence of a showing of fraud, misrepresentation, collusion, mistake or criminal conduct on the insured's part. *See Tedford v. Security State Farm Ins. Co.*, 224 Ark. 1047, 278 S.W.2d 89 (1955); *see also* 12 Lee R. Russ, *Couch on Insurance* § 175:106 (3d ed. 1995) ("an exception to the valued-policy law applies, and the insurers are entitled to prorate payment under the policies' 'other insurance' clauses, where the policies have been purchased from separate companies and the existence of such purchase was not disclosed to the insurers issuing such policies"). In any event, the remedy St. Paul now seeks from this court is clearly not one that may be extended and can only be authorized by the General Assembly. *Id.* at 1050-1051.

STATE of Arkansas *v.* Dean Marion OSBORN

CR 01-21 45 S.W.3d 373

Supreme Court of Arkansas
Opinion delivered June 7, 2001



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

Ernie Witt, for appellee.

DONALD L. CORBIN, Justice. The State of Arkansas appeals the order of the Franklin County Circuit Court dismissing the charge of hindering apprehension or prosecution against Appellee Dean Marion Osborn. The State argues that the trial court erred in finding that Franklin County lacked jurisdiction

over Osborn's charge. The State asserts that under Ark. Code Ann. § 16-88-108(c) (1987), jurisdiction was proper in either Crawford County, where the act was committed, or Franklin County, where the effects of the offense were felt. This court has not heretofore interpreted the "effects" clause of section 16-88-108(c) as it applies to the charge of hindering apprehension or prosecution. We thus have jurisdiction of the State's appeal, as our holding will establish important precedent and is necessary for the correct and uniform administration of justice. *See* Ark. R. App. P.—Crim. 3(c); *State v. Earl*, 333 Ark. 489, 970 S.W.2d 789, *cert. denied*, 525 U.S. 971 (1998); *State v. Rice*, 329 Ark. 219, 947 S.W.2d 3 (1997). For the reasons set out below, we conclude that the State's argument has merit, and we reverse.

The facts of this case are not in dispute. Don Meador was shot to death in his home in Franklin County on or about January 14, 1998. On February 5, 1998, Investigator Richard Hoffman, of the Arkansas State Police, interviewed Osborn about the homicide at his home in Crawford County. Osborn told Hoffman that he had not seen the victim for a year and a half, and that he was at home in Van Buren on the date in question. About nine months later, in November 1998, Osborn contacted the victim's son, Steve Meador, and told him that he had information about his father's murder. Osborn later met with Steve and told him that he had been present in Meador's home when three individuals, Jeremy Richison, Marshall White, and Gary Harvel, came to the house and attacked Meador at the door leading into the garage. Osborn stated that he fled the house through the back door, but then stopped and watched through the kitchen window, as a struggle ensued between Meador and the three assailants. Osborn then heard five shots and ran toward the front of the house, where he heard one of the assailants call out "Jeremy, let's go!" Osborn stated that one of the assailants had a small-caliber revolver.

Steve Meador reported Osborn's story to the police, who, in turn, arrested Osborn for hindering apprehension or prosecution, pursuant to Ark. Code Ann. § 5-54-105 (Repl. 1997). The charge was based on the State's theory that Osborn had provided false information to the police in his February interview. Osborn was charged in Franklin County, where the murder occurred and where the investigation was ongoing. Osborn subsequently challenged Franklin County's authority to charge and try him. He contended that the proper venue for the charge was Crawford County, where he gave the interview. The State countered that Franklin County

had jurisdiction because the effects of his actions were felt there. The State relied on section 16-88-108(c).

The trial court agreed with Osborn and dismissed the charge. Viewing the issue as one of venue, rather than jurisdiction, the trial court found that venue was in Crawford County. It is evident from the trial court's bench ruling and the subsequent written order that the trial court focused almost entirely on the situs of Osborn's allegedly unlawful acts, with little regard for where the effects of his acts occurred. Moreover, the order of dismissal evinces the trial court's conclusion that Crawford County was the only county in which Osborn could be charged and tried. In other words, the trial court did not interpret section 16-88-108(c) as providing concurrent jurisdiction over Osborn's offense. We conclude that the trial court's interpretation of the law was erroneous.

Before reaching the merits of this appeal, however, we first address the State's contention that this issue is one of jurisdiction, not venue. The terms "venue" and "jurisdiction" are often used interchangeably. *See Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000) (*per curiam*); *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994). Ordinarily, venue refers to the geographic area, like a county, where an action is brought to trial. In contrast, jurisdiction is generally thought of as the power of a court to decide cases, and it presupposes control over the subject matter and the parties. *Id.* One type of jurisdiction is known as local jurisdiction. According to Professor LaFave, local jurisdiction "deals only with where the offense is to be tried, not with whether the state lacks the basic authority to apply its criminal law to the events in question." Wayne R. LaFave, *Criminal Procedure* § 16.1(a), at 461 (2d ed. 1999). In Arkansas, local jurisdiction is statutorily provided for in Ark. Code Ann. § 16-88-105 (1987). Subsection (b) of that statute provides that the local jurisdiction of circuit courts "shall be of offenses committed within the respective counties in which they are held." Section 16-88-108(c) provides for local jurisdiction over those offenses that occur in more than one county. In this respect, section 16-88-108(c) is an extension of the local jurisdiction provided for in section 16-88-105. We thus agree with the State that this appeal is properly viewed as presenting an issue of local jurisdiction, not venue. That being said, we turn now to the substance of the State's appeal.

The State contends that the trial court erred in its interpretation of section 16-88-108(c), which provides: "Where the offense is committed partly in one county and partly in another, or the acts,

or effects thereof, requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in *either* county." (Emphasis added.) This statute is remedial in nature, intended to prevent miscarriages of justice by extending the lines of jurisdiction beyond the limits prescribed by the common law, and is to be liberally construed. *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972). It is presumed that an offense charged was committed within the jurisdiction of the court where the charge was filed, unless the evidence affirmatively shows otherwise. *Id. See also* Ark. Code Ann. § 16-88-104 (1987). The State argues that all of the evidence in this case supports jurisdiction in either Crawford County, where Osborn acted, or Franklin County, where the effects of Osborn's actions manifested themselves and hindered the murder investigation.

The State relies on this court's holdings in *Hill* and *Blackwell v. State*, 338 Ark. 671, 1 S.W.3d 399 (1999). In *Blackwell*, this court held that jurisdiction over a charge of Medicaid fraud was proper in Pulaski County, where the effects of the defendant's acts were felt. Blackwell argued that there was an insufficient nexus to bring charges against him in Pulaski County. This court disagreed:

> While Blackwell's dental practice was located in Pine Bluff and he treated patients there, his offense was *consummated* by submitting fraudulent billings to Arkansas's State Medicaid Agency (Department of Human Services) located in Little Rock. Moreover, it was in Little Rock where the state agency denied or authorized Blackwell's Medicaid claims. *Clearly, Blackwell's acts took effect in Pulaski County* where the Medicaid agency received and processed Blackwell's fraudulent bills. For these reasons, we affirm the trial court's ruling that it had jurisdiction to try the State's Medicaid charges against Blackwell.

Id. at 675-76, 1 S.W.3d at 401 (emphasis added).

Similarly, in *Hill*, 253 Ark. 512, 487 S.W.2d 624, the appellant was convicted in Howard County of selling cattle that were subject to a lien. The evidence showed that all negotiations for the sale of the cattle took place in Sevier County, that both the appellant and the buyer were residents of Sevier County, and that the buyer delivered the check for payment of the purchase price in Sevier County. The only connection between Howard County and the transaction was the fact that the cattle were located on a farm in that county. This court concluded, however, that it was not error to charge the appellant in Howard County:

> In this case, the *acts* of Hill with reference to the sale may well have taken place in Sevier County, *but the intention essential to his conviction* must have been to defeat the holder of the "lien" in the collection of the debt. If the cattle were in Howard County, the "lien" was there and its enforcement could be expected to be conducted or at least initiated in that county. The *effect* of the sale was to transfer title to the cattle located in Howard County to Powell, who would certainly take them into his possession there. *Clearly, acts or their effects requisite to the consummation of the alleged offense would occur in Howard County*. The venue was not improperly laid there, even though it might have been properly laid in Sevier County.

Id. at 527-28, 487 S.W.2d at 634 (footnote omitted) (emphasis added). In reaching this conclusion, this court relied on several cases from foreign jurisdictions and held:

> If the acts committed by the accused *were intended to take effect in a county other than that in which all were actually committed*, venue may be laid in the former county, even though all of the acts of the accused were done before the actual effect of the unlawful purpose has materialized there.

Id. at 524, 487 S.W.2d at 632 (emphasis added) (citing *People v. Wallace*, 78 Cal. App. 2d 726, 178 P.2d 771 (1947); *People v. Quill*, 149 N.Y.S.2d 566 (Kings County Ct. 1956); *People v. Vario*, 2 N.Y.S.2d 611 (Queens County Ct. 1938)).

Two of the cases relied upon by this court in *Hill*, *Wallace*, 78 Cal. App. 2d 726, 178 P.2d 771; and *Quill*, 149 N.Y.S.2d 566, rely on language from the case of *People v. Megladdery*, 40 Cal. App. 2d 748, 106 P.2d 84 (1940). In *Megladdery*, the California court was presented with a question of local jurisdiction over charges stemming from the bribery of a public official. The defendant argued that because the acts that formed the basis of his criminal charges were committed outside of Alameda County, that county had no jurisdiction to try him. The applicable California statute, section 781 of the California Penal Code, is very similar to section 16-88-108(c). Section 781 provided: "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." *Id.* at 774, 106 P.2d at 98. The defendant argued that under section 781, a particular county cannot have jurisdiction over an offense

unless some act that is a necessary element of the offense is committed in that county, or unless some effect of such an act, which effect is an essential or necessary element of such offense, occurs within the county. The appellate court disagreed:

> The interpretation contended by respondent would completely disregard the phrase "or the acts or effects thereof constituting or requisite to the consummation of the offense" contained in the section. Obviously, the phrase, "or requisite to the consummation of the offense," means requisite to the completion of the offense — to the achievement of the unlawful purpose — to the ends of the unlawful enterprise. By the use of the word "consummation" the legislature drew a distinction between an act or an effect thereof which is essential to the commission of an offense, and an act or effect thereof which, although unessential to the commission of the offense, is requisite to the completion of the offense — that is, to the achievement of the unlawful purpose of the person committing the offense.

Id. at 774-75, 106 P.2d at 98. We believe that this reasoning is applicable to the present case.

■ Here, Osborn is charged with hindering apprehension or prosecution, in violation of section 5-54-105. Although this offense may be violated in a number of ways, Osborn was charged pursuant to subsection (a)(6), which prohibits a person from volunteering false information to a law enforcement officer while acting "with purpose to hinder the apprehension, prosecution, conviction, or punishment of another for an offense[.]" The unlawful act is volunteering false information to the police. There is no dispute that the act alleged to have been committed by Osborn was committed entirely within the boundaries of Crawford County, where Osborn gave the interview. However, the effects requisite to the consummation of the offense, *i.e.*, the achievement of the unlawful purpose of hindering the apprehension or prosecution of the three murder suspects, occurred in Franklin County, where the murder occurred and the investigation was ongoing. Indeed, were it not for the murder in Franklin County, Osborn would not have been interviewed by police and there would have been no investigation or prosecution for him to hinder. Thus, under section 16-88-108(c), jurisdiction was proper in either county. Accordingly, the trial court erred in dismissing the charge against Osborn in Franklin County.

We thus reverse the trial court's order and remand with instructions to reinstate the charge of hindering apprehension or prosecution against Osborn. We agree with the State that no double-jeopardy violation will result from reinstating the charge against Osborn. This court recently stated in *State v. Havens*, 337 Ark. 161, 987 S.W.2d 686 (1999), that where the charge is dismissed on a pretrial motion made by the defendant's counsel and is not the result of the State's failure to prove its case, the State should be permitted to refile the charge. "Permitting retrial in this instance is not the sort of oppression at which the Double Jeopardy Clause is directed[.]" *Id.* at 168, 987 S.W.2d at 690 (citing *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997), *cert. denied*, 522 U.S. 1125 (1998)).

Reversed and remanded.

Loye DOUGLAS *v.* ADAMS TRUCKING COMPANY, Inc.

00-1242 46 S.W.3d 512

Supreme Court of Arkansas
Opinion delivered June 7, 2001

Perroni & James Law Firm, by: *Samuel A. Perroni* and *Janan Arnold Davis*, for appellant.

Matthews, Sanders & Sayes, by: *Doralee Idleman Chandler* and *Roy Gene Sanders*, for appellee.

ROBERT L. BROWN, Justice. The appellant, Loye Douglas, appeals from the judgment of the circuit court in which the court found that appellee Adams Trucking Co., Inc., was entitled to an offset of $108,734.57 against the jury's award of damages in the amount of $178,000.[1] We affirm the finding of an offset, but we reverse and remand with instructions to modify the offset amount to $76,723.24.

[1] Although the initial lawsuit was filed by both Loye and Anna Douglas as plaintiffs, only Loye Douglas brings this appeal.

The facts of this case arise from a personal injury-action. On June 5, 1997, appellant Loye Douglas, a 55-year-old chicken farmer, was driving his tractor with an attached mower along the side of Highway 10 in Perry County. While doing so, he was struck from behind by a tractor-trailer rig driven by Billy Carl Holmes and owned by Adams Trucking. The impact of the collision caused his tractor to travel forty feet and strike a tree. Douglas was thrown from the tractor and suffered multiple injuries, including facial lacerations, broken ribs, fractured vertebrae, and a partially collapsed lung. He was unable to work on his chicken farm for about nine months.

Following the accident, the liability carrier for Adams Trucking, Columbia Insurance Company, made several advance payments to Douglas for his injuries and loss of property, which totaled $110,220.13. This amount included $63,111.33 for lost wages, $19,011.10 for property damage, $18,098.24 for medical expenses, funds to reimburse Douglas for hired help in the amount of $8,900, and $1,099.46 for reimbursement of out-of-pocket expenses. The $63,111.33 represents a total of the following payments made to Douglas by Columbia Insurance on the dates noted with the specified statement as to what the payment was for:

- Check dated 7-3-97 in the amount of $1,000.00; payment for "Advance on Settlement."
- Check dated 7-11-97 in the amount of $7,012.37; payment for "Advance."
- Check dated 8-6-97 in the amount of $6,012.37; payment for "Advance on Income."
- Check dated 9-11-97 in the amount of $7,012.37; payment for "Income Advance."
- Check dated 10-10-97 in the amount of $7,012.37; payment for "Income Advance."
- Check dated 11-7-97 in the amount of $7,012.37; payment for "Income Advance."
- Check dated 12-12-97 in the amount of $7,012.37; payment for "Income Advance."

- Check dated 1-14-98 in the amount of $7,012.37; payment for "Advance."
- Check dated 3-16-98 in the amount of $7,012.00; payment for "Lost Wages, Advance on Settlement."
- Check dated 7-10-98 in the amount of $7,012.00; payment for "Lost Income."[2]

After receiving the payments, Douglas and Columbia Insurance attempted to settle the entire liability matter. Their efforts were unavailing. On April 5, 1999, Douglas and his wife, Anna Douglas, filed a personal-injury complaint against Adams Trucking and alleged negligence. They asked for damages for pain and suffering, disfigurement, permanent injuries, lost wages, loss of present and future earning capacity, and loss of consortium. On February 22, 2000, Adams Trucking moved for offset for all of the advance payments, which totaled $110,220.13. The Douglases responded and denied that any payments were made "directly to them" as advance payments on any liability claim. They further asserted that there was no agreement between the parties that the funds were paid for the damages they sustained.

On March 9, 2000, the circuit court held a pretrial hearing on the motion for offset. At the hearing, counsel for the Douglases urged the court to instruct the jury to break down any damages awarded into specific elements such as medical expenses, property loss, and lost earnings and profits. The circuit court tentatively agreed to do this but reserved ruling on whether a credit for advance payments would be allowed against a total damage award or whether the credit would only be allowed for advance payments which corresponded with a specific element of damage.

Trial of this matter commenced on March 20, 2000. Prior to the submission of the case to the jury, it was stipulated by the parties and presented to the jury that Loye Douglas or the Douglases had incurred the following damages: (1) property damage in the amount of $18,625.00; (2) medical bills in the amount of $18,098.24; and (3) paid outside help in the amount of $8,904.00.[3]

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[2] The total amount of these checks is actually $63,110.59. We will continue to use $63,111.33 for ease of reference.

[3] Though the stipulated amount for outside help was $8,904, the correct amount based on the record appears to have been $8,900.

The case was submitted to the jury as a special verdict with the elements of damage broken out, and the jury returned a verdict in favor of Loye Douglas, awarding him:

Medical Expenses	$19,000.00;
Personal Property	$19,000.00;
Lost Earnings and Profits	$40,000.00;
Nature and Permanency of Injury	$0.00;
Pain and Suffering	$100,000.00;
Loss of Ability to Earn	$0.00.

The circuit court conducted a posttrial hearing on the offset issue on March 29, 2000. At that hearing, Loye Douglas testified about the advance payments by Columbia Insurance, and the court received evidence. At the conclusion of the hearing, the court found that Adams Trucking was entitled to an offset in the total amount of advance payments, which was $108,734.57. This amount included the following advance payments but excluded the $1,099.46 paid to the Douglas family for reimbursement of out-of-pocket expenses: (1) $63,111.33 for lost wages, (2) $18,625.00 for property loss, (3) $18,098.24 for medical expenses, and (4) $8,900.00 for the hiring of outside help. That left an unpaid judgment to be paid by Adams Trucking of $69,265.43.

I. Offset For Advance Payments

The first issue raised by Loye Douglas on appeal is whether the circuit court erred in granting an offset against the jury verdicts for advance payments by Columbia Insurance. Under this point, Douglas argues against any offset being made and urges several theories for his position.

We observe at the outset that a paucity of cases exists on this point. However, the cases that do exist tend to support a credit for advances paid. *See, e.g., Keating v. Contractors Tire Serv., Inc.*, 428 So. 2d 624 (Ala. 1983); *Russell v. Ashe Brick Co.*, 267 S.C. 640, 230 S.E.2d 814 (1976); *Edwards v. Passarelli Bros. Auto. Serv., Inc.*, 8 Ohio St. 2d 6, 221 N.E.2d 708 (1966). *See also State Farm Mut. Auto. Ins. Co. v. Rose*, 52 Ark. App. 175, 916 S.W.2d 764 (1996) (liability

carrier entitled to an offset against a jury verdict for medical expenses previously paid). *But see Matthews v. Watkins Motor Lines, Inc.*, 419 So. 2d 1321 (Miss. 1982) (Supreme Court denied credit for advances made where defendant/tortfeasor did not raise issue of credit due until after the jury verdict).

In *Edwards v. Passarelli Bros. Auto. Serv., Inc., supra*, for example, the Ohio Supreme Court held:

> [W]here an advance payment is made to a possible tort-claimant upon condition that such payment is to be credited to the amount of any final settlement or judgment in favor of such tort-claimant, such sum may be credited to any such final settlement or judgment; and, if judgment is rendered, the proper procedure is to ask by post-judgment motion for a credit toward satisfaction of the judgment.

8 Ohio St. 2d at 9, 221 N.E.2d at 711. The distinguishing factor of the *Edwards* case is that there was an agreement in effect which conditioned receipt of payment on the basis that any payment would be credited against any final settlement or judgment.

In two subsequent cases from other jurisdictions, there was no express agreement between the injured party and the insurance carrier, but advance payments were made nonetheless. In *Russell v. Ashe Brick Co., supra*, the South Carolina Supreme Court held that Ashe Brick was entitled to an offset notwithstanding the absence of any receipt from the potential claimant stipulating that payment would be credited against any final settlement or judgment. In that case, the plaintiff, Russell, had been injured at Ashe Brick when a pallet of bricks collapsed on top of him. The insurer for Ashe Brick sent Russell a check for $5,500.00, together with a letter stating its regret that a settlement had not been reached and its hope that the payment would bring the matter to an amicable conclusion. Russell subsequently brought suit against Ashe Brick, and judgment was entered against Ashe Brick in the amount of $2,000.00 for actual damages and $5,000.00 punitive damages. Ashe Brick then filed a posttrial motion in which it requested an offset and credit in the amount of the $5,000.00 previously paid to Russell. The trial court disallowed this, but the Supreme Court reversed. The Supreme Court noted that Russell had cited cases from other jurisdictions which involved advance payments, which the court described as "the laudable practice of expediting payment to injured parties prior to and in anticipation of future settlement or judgment." *Russell*, 267 S.C. at 643, 230 S.E.2d at 815. Additionally, the

Supreme Court stated that in those cases, receipts were signed which stipulated that the payments would be credited against any final settlement or judgment. The court concluded that even though signed receipts were a factor notably absent from the case at hand, a credit was warranted. The court said:

> However, there is a common thread running through all the cases which needs no precedential support and is particularly persuasive. Why should the respondent be allowed to collect $12,500.00 on a judgment that the jury has assessed at $7,000.00? The disjointedness of the question perhaps suggests why it has not been necessary heretofore to litigate it. The nonexistence of a receipt delineating the obvious desire to credit the payment against any future liability secured on the same claim is without legal significance. *See Harrington v. Edwards* [footnote omitted], 262 S.C. 263, 203 S.E.2d 691 (1974).

Russell, 267 S.C. at 643-44, 230 S.E.2d at 815.

Similarly, in *Keating v. Contractors Tire Serv., Inc., supra*, the Alabama Supreme Court held that where the issue was properly raised prior to trial, the trial court did not err in requiring that advance payments to the injured claimant by the tortfeasor's liability insurer be credited against a subsequent judgment in favor of the claimant, notwithstanding the absence of a prior written agreement between the insurer and claimant. After being injured in a vehicle collision, the plaintiff, Keating, received payments totaling $8,853.35 for medical payments and $27,267.29 for lost wages from the defendant's insurer. There was no agreement that these advance payments would be credited against any judgment Keating might receive. Following Keating's filing of his suit, Contractors Tire pled payment and offset in its answer, and the court granted severance of the credit issue. The jury returned a verdict in favor of Keating for $114,000.00, which the trial court reduced by the amount of the advance payments made. In its opinion, the Alabama Supreme Court concluded:

> We hold, therefore, that the trial judge did not err in allowing credit for the advance payments. Keating accepted advances from the corporate Defendant's insurer, endorsed the drafts of payment, and received credit for his medical expenses with full knowledge of both the source and purpose of these advances. These payments were made during the two and one-half year lapse between the date of injury and date of verdict, thereby undoubtedly sparing Plaintiff the economic pressure which otherwise may have caused

him to settle out of court to his disadvantage. Even if Plaintiff had received no judgment for his claim, he would have benefited to the extent of the payments received in advance.

We find unavailing the argument that the same insurer, in the absence of conduct amounting to waiver or fraud, should pay to the same person the same elements of damage again, merely because the insurer failed to get that person to sign a receipt evidencing an agreement to reduce possible future liability. We agree with the Supreme Court of South Carolina:

> "The nonexistence of a receipt delineating the obvious desire to credit the payment against any future liability secured on the same claim is without legal significance." *Russell v. Ashe Brick Company,* 267 S.C. 640, 230 S.E.2d 814, 815 (S.C. 1976).

Keating, 428 So. 2d at 626-27.

We agree with the rationale put forward in these cases. In addition, we are persuaded by the reasoning of one commentator for *American Law Reports, Third*, who has said that advance payment arrangements "have been designed to avoid criticisms which have been leveled at the liability insurance system on the ground that the injured party is normally in no financial position to await the outcome of a trial which might be long delayed and that therefore liability insurers are in a position to exert leverage in forcing a settlement more favorable than might otherwise be available because of the pressure of the injured party's financial necessities." W.E. Shipley, Annotation, *Effect of Advance Payment by Tortfeasor's Liability Insurer to Injured Claimant*, 25 A.L.R. 3d 1091 (1969). Without question, the law favors the amicable settlement of controversies, and because of this, it is the duty of the courts to encourage parties to reach a compromise. *See Burke v. Downing Co.*, 198 Ark. 405, 129 S.W.2d 946 (1939). Because it appears to us that all of this is precisely what Columbia Insurance on behalf of Adams Trucking was attempting to do in this case, it should not be penalized for this practice. Moreover, should this court do otherwise, a double recovery could well be the result. This court has often expressed its disapproval of double recoveries. *See, e.g., Almond v. Cigna Property and Cas. Ins. Co.*, 322 Ark. 268, 908 S.W.2d 93 (1995). We hold that credit for some of the advances made to Douglas by Columbia Insurance should be allowed.

Douglas also argues that the payments from Columbia Insurance constituted payments from a third-party collateral source and, thus, could not be credited against damages awarded. This point has no merit. This Court has defined the "collateral source rule" as a "general rule that 'recoveries from collateral sources do not redound to the benefit of a tortfeasor, even though double recovery for the same damage by the injured party may result.' " *Bell v. Estate of Bell*, 318 Ark. 483, 490, 885 S.W.2d 877, 880 (1994) (quoting *Green Forest Pub. Schools v. Herrington*, 287 Ark. 43, 49, 696 S.W.2d 714, 718 (1985) (quoting *Amos, Adm'x v. Stroud & Salmon*, 252 Ark. 1100, 482 S.W.2d 592 (1972)). However, for the collateral source rule to pertain, the third-party payment must be wholly independent of the tortfeasor. *Overton v. United States*, 619 F.2d 1299 (8th Cir. 1980); *Black's Law Dictionary* 256 (7th ed. 1999); 22 AM. JUR. 2D *Damages* § 566 (1988). That certainly is not the case in the matter before us. Columbia Insurance, the source of the payments, was the liability carrier for the tortfeasor and, as a result, was not wholly independent. We conclude that under such circumstances, the collateral source rule does not apply.

Douglas further maintains that Columbia Insurance's advance payments were voluntarily paid, and, because of this, a credit for those payments against the judgment amount should not be allowed. In *TB of Blytheville, Inc. v. Little Rock Sign & Emblem, Inc.*, 328 Ark. 688, 946 S.W.2d 930 (1997), this court noted that in its past application of the voluntary payment rule, we said: "When one pays money on demand that is not legally enforceable, the payment is deemed voluntary. Absent fraud, duress, mistake of fact, coercion, or extortion, voluntary payments cannot be recovered." *TB of Blytheville*, 328 Ark. at 693-94, 946 S.W.2d at 932 (quoting *Boswell v. Gillett*, 226 Ark. 935, 940, 295 S.W.2d 758 (1956)). *See id.* In *Boswell v. Gillett, supra*, one of the appellants, a tenant-partner, sought to recover rental amounts paid to his landlord because the landlord had not repaired slight damage to the leased theater building after a fire. We made it clear in that case that the voluntary payment rule applied where the payor continued to pay full rent without demanding the repairs.

In the case before us, the insurer did pay Loye Douglas advances and there was no agreement that the insurer would receive full credit for doing so. Nevertheless, it cannot be said that Columbia Insurance had no legal obligation to make such advance payments based on its liability. It is clear from the outset that the liability carrier was paying advances against future settlement or any damage award resulting from the liability of Adams Trucking to

mitigate such damages. And Douglas, without question, considered the purpose of the advance payments to be exactly that. The voluntary payment rule simply does not apply to the facts of this case.

II. Extent of Offset

There still remains the question that even if an offset is permissible, what should the amount of the offset be? As already mentioned in this opinion, at a pretrial conference, the circuit court was persuaded that a special verdict form should be submitted to the jury in order to have verdicts reached on the various elements of damage. That was done. The purpose of the special verdicts was to facilitate a matching between advance payments and specific elements of damage awarded.

With the special verdict form, it is clear what the jury awarded as elements of damage. We must now ascertain what the advance payments from Columbia Insurance were intended to cover. We turn to the testimony of Loye Douglas at the posttrial hearing on this issue. Douglas described a meeting with the adjuster for Columbia Insurance where he bemoaned the fact that he would be unable to run his chicken farm for a period of time. The adjuster replied that that would not be a problem, which Douglas took to mean that "lost income" would be provided. The adjuster told him to go to the company that purchased his chickens and get an estimate for gross income that he would have earned in the next eight months. The adjuster also sought to determine from Douglas what expenses for operating the chicken houses, such as butane, electricity, and feed lids, would come out of that gross income figure. After the income estimates were set, the adjuster delivered a check to Douglas at about the same time each month. Douglas did not sign receipts or an offset agreement relating to these payments. At the same time, he testified that he did not expect to be paid twice.

It is clear to this court that the payments made by Columbia Insurance to Douglas over the nine-month period in the total amount of $63,111.33 were for lost income and that Douglas considered them as such. The payments for which we hold a credit should be allowed correspond to the jury's award of $40,000 for lost earnings and profits. Hence, there is no balance due from Adams Trucking for this element of damage.

Loye Douglas also testified that Columbia Insurance paid his hospital and medical bills directly to the providers. The amount of these payments, as stipulated to by both parties, was $18,098.24. This corresponds to the jury award for medical expenses of $19,000, leaving an unpaid balance of $901.76. Douglas further testified that the carrier paid him the Blue Book value for the tractor and bought him a new mower, all of which totaled $18,625, as stipulated to by the parties. The jury awarded him $19,000 for personal property damages, leaving a balance due of $375.

The principal sum against which we do not believe an offset should apply is the $100,000 awarded for pain and suffering. Because it is obvious to us that the advance payments were earmarked for lost income and that the other payments went to medical expenses and property losses, we see no basis for concluding that a credit was contemplated between the parties for pain and suffering or that a double recovery resulted from the jury verdict. Indeed, the parties could not agree on a settlement figure which, no doubt, encompassed some award for pain and suffering. It would have been an easy matter for Columbia Insurance to have required signed receipts or a written agreement relating to all advance payments, stating that the payments would be a credit against *any and all* settlement amount or judgment. This was not done. We further decline to affirm an offset for the $8,900 paid by Columbia Insurance to reimburse Loye Douglas for hired help, as we conclude that this advance does not correspond to any of the jury's special verdicts.

In sum, we hold that Adams Trucking is not entitled to a credit or offset for all funds paid by its carrier but only for those amounts paid which specifically relate to medical expenses, property losses, and lost income, as awarded by the jury. This leaves Adams Trucking owing Mr. Douglas $100,000 for pain and suffering plus the differences between the amounts paid for medical expenses and property loss and the jury verdicts. The total amount owed by Adams Trucking is $101,276.76.

Though we affirm in part with respect to the grant of an offset, we reverse and remand for entry of a judgment consistent with this opinion.

Andra DILLARD, Annette Barry, and
Joseph Nichols Dillard, Jr. *v.* George NIX

00-1454 45 S.W.3d 359

Supreme Court of Arkansas
Opinion delivered June 7, 2001

Frances Morris Finley, for appellant.

Dover & Dixon, P.A., by: *Monte D. Estes*, for appellee.

RAY THORNTON, Justice. Grace Marie Nix executed a will on February 2, 1979, and the will was attested on that date by the attorney who prepared the will and by his secretary. A codicil was added to the will on April 11, 1989, and the codicil was also witnessed by Eugene Fitzhugh, the attorney who prepared the will, and by his secretary Sheila Eoff White. Following Ms. Nix's death, her surviving spouse, George Nix, appellee, offered the will and its codicil for probate on November 9, 1999.

Appellants, Andrea Dillard, Annette Barry, and Joseph Dillard, Jr., Ms. Nix's children from a previous marriage, contested the validity of the will and its codicil on two grounds. Appellants argued that the witnesses who signed the attestation clauses did not have a sufficient recollection of the execution of the documents. Appellants also argued that even if the will and codicil were properly executed, Ms. Nix, by making numerous marks and interlineations on portions of the will expressed her intention to revoke the will and codicil.

The probate court conducted a hearing on the matter and found that the will and the codicil were valid and that the markings on the will did not reflect an intention to revoke the will, but rather, because the markings were not witnessed, they were of no legal significance and should not be considered as having any effect. Accordingly, the probate court ordered that the will and codicil be admitted to probate and appointed George Nix as personal representative of Ms. Nix's estate. It is from this order that appellants bring this appeal, and we affirm the probate court.

■ We review probate proceedings *de novo*, and we will not reverse the decision of the probate court unless it is clearly erroneous. *Amant v. Callahan*, 341 Ark. 857, 20 S.W.3d 896 (2000). 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.*

In their first point on appeal, appellants argue that Ms. Nix's will should not have been admitted to probate because appellee failed to prove that the will had been properly executed. Specifically, appellants argue that appellee failed to prove that the attesting witnesses remembered witnessing the will. Arkansas Code Ann. § 28-25-103 (1987) articulates the procedure to be followed when executing a will. The statute provides:

> (a) The execution of a will, other than holographic, must be by the signature of the testator and of at least two (2) witnesses.
>
> (b) The testator shall declare to the attesting witnesses that the instrument is his will and either:
>
> (1) Himself sign; or
>
> (2) Acknowledge his signature already made; or
>
> (3) Sign by mark, his name being written near it and witnessed by a person who writes his own name as witness to the signature; or
>
> (4) At his discretion and in his presence have someone else sign his name for him. The person so signing shall write his own name and state that he signed the testator's name at the request of the testator; and
>
> (5) In any of the above cases, the signature must be at the end of the instrument and the act must be done in the presence of two (2) or more attesting witnesses.
>
> (c) The attesting witnesses must sign at the request and in the presence of the testator.

Id. Arkansas Code Ann. § 28-40-117 (1987) explains the procedure whereby a party proves the validity of an attested will. The statute in relevant part states:

> (a) An attested will shall be proved as follows:

> (1) By the testimony of at least two (2) attesting witnesses, if living at known addresses within the continental United States and capable of testifying; or
>
> (2) If only one (1) or neither of the attesting witnesses is living at a known address within the continental United States and capable of testifying, or if, after the exercise of reasonable diligence, the proponent of the will is unable to procure the testimony of two (2) attesting witnesses, in either event the will may be established by the testimony of at least two (2) credible disinterested witnesses. The witnesses shall prove the handwriting of the testator and such other facts and circumstances, including the handwriting of the attesting witnesses whose testimony is not available, as would be sufficient to prove a controverted issue in equity, together with the testimony of any attesting witness whose testimony is procurable with the exercise of due diligence.
>
> * * *
>
> (d) The provisions of this section as to the testimony of subscribing witnesses shall not exclude the production of other evidence at the hearing on the petition for probate, and the due execution of the will may be proved by such other evidence.

Id.

In the case now on review, two people signed an attestation clause, stating that they had witnessed Ms. Nix acknowledge and sign her will. The testimony of both attesting witnesses was presented at the hearing on appellee's petition. We conclude that the testimony of the two attesting witnesses was sufficient to prove the validity of the will. Specifically, Eugene Fitzhugh testified that he had drafted a will for Grace Nix in 1979. He testified that he remembered both Grace Nix and George Nix coming into his office on the day Ms. Nix requested that the will be drafted. Mr. Fitzhugh stated that he witnessed Ms. Nix sign her will and that he witnessed his secretary, Sheila White, sign Ms. Nix's will. He further stated that the procedure followed by his office during the execution of a will was as follows: "[T]he client would sign ... well, first I would call the secretary into the ... to my office. The client would sign the will and then we, my secretary and myself would witness the will." Mr. Fitzhugh also testified that he had stated in an earlier deposition that he did not remember the circumstances surrounding the signing of Ms. Nix's will. However, he further stated that after reviewing his files, he was able to recall the circumstances

surrounding the execution of Ms. Nix's will on the day of the hearing on appellee's petition. Mr. Fitzhugh testified that he would not have acted as a witness on Ms. Nix's will without having seen Ms. Nix sign it first. He further stated that he remembered Ms. Nix coming into his office in 1989 and asking him to add the codicil to the will. Mr. Fitzhugh testified that he wrote the codicil on the will and that he and Ms. White signed the codicil as witnesses.

The testimony of Sheila White was also admitted in evidence. She stated that she had worked for Mr. Fitzhugh for six or seven years starting in 1977 and that she had often served as an attesting witness. She stated that the procedure that they always followed was to attest the will after the testator signed the will. Ms. White further stated that she could not specifically recall the circumstances surrounding the signing of Ms. Nix's will in 1979. However, she noted that her signature was on the will and stated that she would not have signed her name as an attesting witness unless she had seen the testator sign the document. With regard to the codicil, Ms. White testified that while she did not specifically recall the circumstances surrounding the execution of the codicil, she would not have signed her name if she had not seen Ms. Nix sign the codicil on April 11, 1989. Ms. White further stated that although she did not have independent recollection of seeing Ms. Nix execute the will or the codicil, she was sure that the execution had been properly performed because it was her signature on the codicil, and at the time the will and codicil were executed, she was a notary public and she "never ever signed anything without seeing the person sign it."

After hearing the testimony of Mr. Fitzhugh and Ms. White the probate judge found:

> that based on the testimony of the attesting witnesses, Eugene Fitzhugh and Sheila Eoff White, the court finds that ... the proponent of admission to probate of the original will and the codicil has met his burden of proving that the original will and codicil had been executed in all respects according to law when the decedent was competent to do so and acting without undue influence, fraud, or restraint, and has not been revoked.

After reviewing the applicable statutory provisions and the facts surrounding the execution of Ms. Nix's will, we conclude that the trial court did not err in ruling that appellee satisfied the requirements outlined in Ark. Code Ann. § 28-40-117(a)(1) for proving an attested will by the testimony of two attesting witnesses. The two attesting witnesses were credible disinterested witnesses.

Mr. Fitzhugh and Ms. White each testified that his or her signature was on Ms. Nix's will as attesting witnesses. In addition to this proof that they had attested to the validity of the will, Mr. Fitzhugh was able to provide testimony regarding the circumstances surrounding Ms. Nix coming into his office and asking him to draft the will and later the codicil. He also testified that he and his secretary routinely acted as witnesses to wills prepared for his clients and that they would not sign the document until the testator had signed the will and requested that they attest it. Ms. White testified that she would not have acted as a witness to the will or codicil if they had not been properly executed. Accordingly, we cannot say that the probate judge's finding that Ms. Nix's will and codicil were properly executed and attested as required by law was clearly erroneous.

Appellants urge that in *Estate of Sharp*, 306 Ark. 268, 810 S.W.2d 952 (1991), we established an additional requirement that disinterested witnesses called upon to prove a will must remember the exact circumstances surrounding the execution of the will, and contend that because the witnesses in the present case do not have such a detailed recollection, Ms. Nix's will and codicil should not have been admitted to probate. Appellants' assertion is incorrect. In *Sharp*, the will did not contain an attestation clause and the probate court admitted it into probate based on the testimony of one disinterested witness. We held that admission of the will into probate was erroneous based on the requirement of Ark. Code Ann. § 28-40-117. *Sharp, supra*. In the present case, Ms. Nix's will was attested by two witnesses, who each signed an attestation clause acknowledging the proper execution of the will in compliance with the statute. The facts in *Sharp* are inapposite to the facts in the case now on review.

In their second point on appeal, appellants argue that Ms. Nix's will should not have been admitted into probate because she revoked the document prior to her death. Specifically, appellants argue that the "cross-throughs," "interlineations," and "mark-outs" on the face of the document was an attempt by Ms. Nix to revoke her will by obliteration. Arkansas Code Annotated § 28-25-109 (1987) explains the process whereby a will may be revoked. The statute provides in part:

> (a) A will or any part thereof is revoked:
>
> (1) By a subsequent will which revokes the prior will or part expressly or by inconsistency; or

> (2) By being burned, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.
>
> * * *
>
> (c) Where there has been a partial revocation, reattestation of the remainder of the will shall not be required.

Id.

On this issue the probate judge found:

> That it is the further finding of this court that no proof was adduced that any of the interlineations, correction or markings found on the face of the original will were placed there with any intent to revoke the original will, and that said interlineations, corrections and markings, having not been witnessed or attested, are of no legal significance.

We cannot say that the probate judge's findings were clearly erroneous. The changes to the will made by Ms. Nix were of no legal significance. Ms. Nix made several marks on her will. However, appellants have failed to prove that Ms. Nix's changes met the requirement of Ark. Code Ann. § 28-25-109 for revocation of her will because appellants did not establish that Ms. Nix intended to revoke her will by obliteration. Appellants argue that the fact that there were at least twenty-five interlineations and marks on the will indicates that Ms. Nix intended to revoke her will by obliteration. Appellant Barry testified that "my mother made some of those mark-throughs or changes while I was present. It was my impression that my mother was intending to revoke this will. She was unclear about what she wanted at the time. She was using this as sort of a work in progress." The impact of this testimony was diminished by Ms. Barry's additional testimony in which she stated that there "was an understanding between her [Ms. Nix] and George that they both have wills when they married and that is what they did." The trial court concluded that the markings on the will did not support a finding that Ms. Nix intended to revoke her will. We conclude that the trial court's finding was not clearly erroneous.

Affirmed.

John R. BUTCHER *v.* STATE of Arkansas

CR 01-484 45 S.W.3d 378

Supreme Court of Arkansas
Opinion delivered June 7, 2001

Petitioner, pro se.

No response.

PER CURIAM. In 1999, John R. Butcher was charged in the Circuit Court of Garland County in case CR 99-428-I with felony theft by receiving. On February 23, 2000, Butcher filed a *pro se* motion seeking the return of property seized from him in connection with the charge. On April 20, 2000, the court granted the State's motion to *nolle prosequi* the charge. On June 8, 2000, the court entered an order denying the motion for return of the seized property.

On April 26, 2001, Butcher filed in this court a *pro se* motion to proceed with a belated appeal of the order which denied his motion for return of seized property.[1] The return of property seized incident to a criminal prosecution is governed by Ark. R. Crim. P. 15.2. Rule 15.2(e) provides that an order denying a motion for return of property is reviewable on appeal in regular course as a final order.

The issues at hand are not whether the court's order denying the motion was erroneous, but rather whether the attorney who represented petitioner before the *nolle prosequi* order was entered was obligated to appeal from the order denying the motion for return of seized property; and, if counsel was not so obligated, whether petitioner has stated good cause for his failure to file a timely notice of appeal and pursue the appeal.

Rule 16 of the Rules of Appellate Procedure—Criminal provides in pertinent part that trial counsel, whether retained or court appointed, shall continue to represent a *convicted* defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. Petitioner was not convicted of the offense with which he was charged. Thus, counsel's obligation ended when the *nolle prosequi* order was entered.

Petitioner Butcher contends that he failed to file a *pro se* notice of appeal from the order denying the motion for return of seized property because he was not skilled in legal matters and mistakenly filed a civil rights action in federal court before pursuing his State remedies. We find no ground to grant a belated appeal and deny the motion.

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[1] Petitioner Butcher states in his motion that it pertains to the April 19, 2000, order denying the motion for return of the property. As the record does not reflect an order entered on that date and it is clear from the motion that it pertains to the June 8, 2000, order, it may be assumed that petitioner merely misstated the date of the order.

If an appeal from an order pertaining to petitioner's property rights is civil in nature, as property matters are generally considered to be, then there is no provision in the prevailing rules of procedure for a belated appeal in a civil case. Even if the matter were considered to be criminal in nature, a petitioner is not permitted to proceed with a belated appeal in a criminal matter, unless he demonstrates some good cause for his failure to perfect an appeal. *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987). The fact that a petitioner is proceeding *pro se* does not in itself constitute good cause for the failure to conform to the prevailing rules of procedure. *Walker v. State*, 283 Ark. 339, 676 S.W.2d 460 (1984); *Thompson v. State*, 280 Ark. 163, 655 S.W.2d 424 (1983). As petitioner has stated no good cause for his failure to perfect an appeal of the court's order, there is no basis to permit a belated appeal.

Motion denied.

Rodney A. SCALES *v.* STATE of Arkansas

CR 01-549 45 S.W.3d 378

Supreme Court of Arkansas
Opinion delivered June 7, 2001

Johnson & West, by: *Dale West*, for appellant.

No response.

PER CURIAM. Appellant Rodney A. Scales, 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

December 21, 2000. On December 22, Appellant's attorney filed a motion for extension of time to file the record on appeal. The trial court granted the extension on January 8, 2001. The record was tendered with this court's clerk on March 23, 2001. Appellant's attorney, Dale West, acknowledges that both the motion for extension and the order granting the extension were untimely, and he 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*).

Michael RAMAKER *v.* STATE of Arkansas

CR 00-449 46 S.W.3d 519

Supreme Court of Arkansas
Opinion delivered June 14, 2001

Morris & Morris P.A., by: *Tim R. Morris*, for appellant.

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

W.H. "DUB" ARNOLD, Chief Justice. Appellant, Michael Ramaker, was convicted of first-degree murder and sentenced to thirty-five years' imprisonment in the Arkansas Department of Correction for the shooting death of his girlfriend, Ann Swee. We affirm his conviction and sentence.

On August 1, 1998, appellant, after allegedly checking a 12-gauge shotgun to ensure there was no ammunition, pointed the shotgun at Ms. Swee from a distance of eighteen to twenty-four inches and pulled the trigger. The gun discharged, and Ms. Swee died almost instantly from a wound to the left side of her face and

head. Appellant was charged with capital murder. His defense at trial was that the shotgun had a defect that kept him from establishing that the gun was loaded. Many pretrial motions were made, including a motion to exclude photographs of the victim.

During the trial, the State presented an Arkansas Crime Laboratory expert who tested the weapon eight times and found no malfunction. Appellant's expert stated that he tried the weapon 150 times, and the weapon had malfunctioned 10 percent of the time. He stated that he saw a shell spring from the magazine onto a carrier assembly four times and that someone could load a round without one knowing it. Prior to trial, the Benton County Sheriff's Department had cleaned the weapon.

During the trial, appellant's expert witness demonstrated the operation of the weapon; it malfunctioned twice. The first time was exactly like he had seen during his tests. The second time was a new malfunction. The gun's bolt jammed and could not be dislodged. During a recess, the trial judge ordered the expert to unjam the gun while in the presence of a prosecutor's assistant. The gun was unjammed, although a slide release button was broken in the process. The trial judge informed the jury of this process and event. Appellant strenuously objected to anything that entailed an unjamming of the gun. The evidence was submitted to the jury for its use in deliberations.

During trial, appellant made a motion for directed verdict. He claimed that the State had failed to establish the charges against him. He also objected to gruesome photographs of the victim's face. He further asked that his request for a polygraph be admitted before the jury, which the State adamantly opposed, and the trial court denied. Appellant also objected to the weapon's introduction as evidence due to the fact that it had been cleaned.

Appellant was convicted. It is from that conviction that he now appeals. He asserts the following points for reversal:

1) The trial court abused its discretion in allowing the 12-gauge shotgun to be delivered to the jury as evidence;

2) The trial court erred when it allowed the prosecution to introduce a redacted statement that excluded references to the defendant's offer of taking a polygraph test because it substantially prejudiced the defense;

3) The trial court abused its discretion in allowing prejudicial, inflammatory, and cumulative photographs of the victim to be admitted as evidence;

4) The trial court erred when it failed to grant the motion for directed verdict because the evidence failed to support a conviction for first-degree murder.

We affirm.

I. Sufficiency of Evidence

Double jeopardy considerations require this court to consider a challenge to the sufficiency of the evidence before other points are 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); *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998). A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2001); *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (1999). The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Peeler v. State*, 326 Ark. 423, 932 S.W.2d 312 (1996); *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996). On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict. *Barr v. State, supra.*

Appellant was convicted of murder in the first degree. On appeal, he challenges the sufficiency of the evidence to support his conviction; however, he was charged with capital murder and, at trial, when making his motions for directed verdict, he only moved as to capital murder and not as to the lesser-included offense of murder in the first degree, for which he was ultimately convicted. This Court has held that in order to preserve challenges to the sufficiency of the evidence supporting convictions for lesser-included offenses, defendants are required to address the lesser-included offenses, either by name or by apprising trial courts of the elements of the lesser-included offenses, in their motions for directed verdict. *See Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996). As appellant failed to move for a directed verdict on the

lesser-included offense of first-degree murder, he is procedurally barred from challenging the sufficiency of the evidence on appeal.

II. Admission of Shotgun into Evidence

Appellant does not dispute that he caused Ms. Swee's death; he contends, rather, that the shooting was accidental because he believed that the shotgun was unloaded. Consequently, the primary factual issue at trial was whether a malfunction caused the shotgun to be ready to fire, despite allegedly appearing unloaded to the appellant. On appeal, the appellant raises several arguments involving the shotgun. He argues that the trial court erred in admitting the gun after hearing testimony that the police had cleaned it prior to the last of a series of test firings, by ordering the weapon to be repaired after it jammed during the testimony of the appellant's ballistics expert, and in commenting on the weight of the shotgun as evidence.

A. Alleged Police Tampering

Appellant first argues that the trial court erred in admitting the gun as evidence because there was direct evidence of police tampering. During the testimony of Investigator Jim Yarber, appellant made a chain-of-custody objection to the admission of the shotgun. He alleged that the police cleaned the gun prior to the last of a series of test firings and, as a result, that it was no longer the same weapon that he used in the shooting. The trial court did not rule on the objection but allowed Investigator Yarber to testify about the circumstances of the cleaning. Yarber stated that the gun barrel was removed to access the firing pin and that the gun was cleaned. He also testified that the gun was reassembled after the cleaning, that no parts were replaced or altered, and that no one "manipulated the gun in any way." Appellant's counsel then conducted a *voir dire* examination, and Yarber testified that no one videotaped the cleaning of the gun. At the conclusion of the *voir dire* examination, the appellant stated that he had "no objection" to the admission of the shotgun. The gun was then admitted into evidence.

On appeal, appellant claims that the trial court erred in admitting the gun because the cleaning removed soot and other dirt that caused the malfunction that he alleges occurred on the night of the shooting and, consequently, that that malfunction could no longer be demonstrated for the jury. The State asserts that appellant's argument on this issue is procedurally barred as he stated that he no

longer had an objection to the admission of the gun into evidence after the circumstances of the cleaning were developed through Investigator Yarber's testimony. We agree with the State.

We have held that when an objection is withdrawn, it is as though the objection was never made. *See Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994). The appellate court, moreover, will not consider arguments that are raised for the first time on appeal. *See Ayers v. State,* 334 Ark. 258, 975 S.W.2d 88 (1998). Therefore, although he had made the chain-of-custody objection, once he stated that he then had "no objection" to the evidence, it was as though he had never made the objection and his argument on this point is, therefore, barred on appeal.

B. Trial Court's Order to Repair

The appellant next argues that the court abused its discretion when it ordered experts from both sides to repair the gun after it jammed during the State's cross-examination of the appellant's expert. Before the case was submitted to the jury, the prosecutor noted that the malfunction that caused the shotgun to jam was not the same malfunction that the appellant claimed occurred on the night of the shooting, and he requested that the trial court allow the gun to be restored to "working order" to enable the jury to view the gun in substantially the same condition as it existed at the time of the crime. The trial court ordered the repair over the appellant's objection. The gun was operable after the repair, but the slide release was broken. Appellant now argues that the shotgun, in its jammed condition, proved his assertion that it malfunctioned on the night of the shooting and, thus, the repair prejudiced him by removing "direct exculpatory evidence" from the jury. He also intimates that, by ordering the repair, the trial court exhibited a bias in favor of the State. We disagree.

Arguably, the trial court may have abused its discretion by ordering a repair of the gun, when the appellant's very defense was that the gun malfunctioned on the night the victim was shot. Still, the appellant must show that he was prejudiced by the trial court's decision to submit the repaired gun to the jury. This Court will not reverse an evidentiary ruling absent a showing of prejudice. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996); *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996). As the gun had already malfunctioned twice in the presence of the jury, the repair would not seem to diminish the appellant's ability to prove that the gun was prone to malfunction; in fact, it would seem to

work, to the contrary, in his favor. Certainly, he was as likely as the State to benefit from the repair because his defense turned on whether the gun could be ready to fire despite appearing unloaded when it was "racked open." Appellant had, in fact, stipulated to making dummy rounds available to the jury so that it might test the gun to see if it appeared "unloaded" when it was actually loaded. Therefore, if the jam had not been repaired, the jurors would not have been able to do what the appellant wanted them to do, which was "rack" the gun to determine whether it appeared unloaded but ready to fire. In short, we hold any amount of error committed by the trial court on this issue to be harmless, as appellant is unable to demonstrate prejudice as a result. *See Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001).

C. Trial Court's Comment on Evidence

The appellant contends that the trial court improperly commented on the evidence when it admonished the jury about the measures that were taken to repair the gun. His argument is twofold. First, he contends that the trial court's reference to the slide release button as "working properly up until today" amounted to a comment on the credibility of his expert witness. Second, he claims that the trial court commented on the weight of the shotgun as evidence when it advised the jury that it ordered experts from both sides to "get the gun out of the jammed condition it was in because I saw that as perhaps interfering with your study and use of it as evidence." We hold appellant's argument to be procedurally barred, as he did not lodge an objection or move for a mistrial when the court advised the jury of the shotgun's repair.

This Court will not consider arguments on appeal in the absence of a specific, contemporaneous objection at trial. *See Johnson v. State*, 342 Ark. 186, 27 S.W.3d 405 (2000). In this case, appellant did not object at the time the court advised the jury of the repair. His initial objection to the trial court's order to repair the gun certainly would not preserve this issue for appeal because it did not encompass the trial court's comments to the jury. *See Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000)(appellants are limited by the scope and nature of the arguments they made at trial.)

III. Appellant's Offer to Take Polygraph

Appellant argues that the trial court erred when it allowed the State to redact his requests to take a polygraph exam from the tape

recording and the transcript of one of his custodial statements. At trial, appellant objected to the redactions because they removed the implication that he told the truth when he stated that he believed the gun was unloaded. The trial court, citing *Wingfield v. State*, 303 Ark. 291, 796 S.W.2d 574 (1990), overruled appellant's objection. On appeal, appellant acknowledges that *Wingfield* prohibits the admission of evidence of an accused's willingness to take a polygraph, but he argues that the application of the rule in this case interfered with his ability to present his defense. Appellant suggests that this Court adopt Wisconsin's view, as expressed in *State v. Santana-Lopez*, 613 N.W.2d 918 (2000), that an offer to take a polygraph examination can be admissible to show consciousness of innocence. We decline to adopt this view.

Arkansas Code Annotated § 12-12-704 (Repl. 1999) provides that the results of a polygraph exam "shall be inadmissible in all courts in this State." The only exception to this rule occurs when both parties stipulate to the admissibility of the polygraph results in writing. *Foster v. State*, 285 Ark. 363, 687 S.W.2d 829 (1985). The United States Supreme Court has held that because polygraph results only serve to bolster or attack a witness's veracity, rules barring their admissibility do not abridge an accused's right to present a defense. *See United States v. Scheffer*, 523 U.S. 303 (1998). The prohibition against the admission of polygraph results extends to a witness's willingness or reluctance to be examined as evidence of consciousness of innocence or guilt. *See Wingfield, supra.* This rule, like the bar against polygraph results, only prevented the appellant from *bolstering* his own credibility. He was still able to introduce his version of the shooting through his custodial statements and through the testimony of his expert, who corroborated his claim that a malfunction caused the gun to be ready to fire. As such, the appellant cannot show the prejudice upon his right to present a defense. We, therefore, find no error by the trial court on this point.

IV. Admission of Photographs into Evidence

During the testimony of Investigator Mike Sydoriak, the State sought the admission of a series of photographs, sequentially numbered as Exhibits 35 through 37, that depicted the location of the victim's body and the nature of her wounds. The appellant objected, alleging that Exhibits 35 and 36, which are close-ups of the victim's gunshot wound, were inflammatory and cumulative to the medical examiner's testimony. He further alleged that Exhibit

37 did not accurately reflect the scene and that it was cumulative of photos that were already admitted. The court admitted Exhibit 35 because it depicted the nature and location of Ms. Swee's wound, and it admitted Exhibit 37 because it showed that stippling was present at the scene. The trial court agreed that Exhibit 36 was cumulative, however, and sustained appellant's objection regarding that photo.

On appeal, appellant contends that the trial court erred when it admitted Exhibit 35 because it had little probative value, it was gruesome, and it was cumulative to other photos that depicted the victim. He further argues that the trial court erroneously took a "carte blanche" approach to the admission of the photo when it failed to weigh the probative value of the photo against the danger of unfair prejudice. Regarding the admissibility of photos, this Court has stated the following:

> The mere fact that a photograph is inflammatory or is cumulative is not, standing alone, sufficient reason to exclude it. (Citation omitted.) Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: by shedding light on some issue, by proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony, or by enabling jurors to better understand the testimony. (Citation omitted.)

Jones v. State, 336 Ark. 191, 209, 984 S.W.2d 432, 441 (1999)(*quoting Jefferson v. State*, 328 Ark. 23, 941 S.W.2d 404 (1997), and *Weger v. State,* 315 Ark. 555, 869 S.W.2d 688 (1994)). We have further held that the nature and extent of a victim's wounds are 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. Even if photographs are inflammatory or prejudicial in the sense that they show human gore repulsive to the jurors, they are nevertheless admissible at the discretion of the trial court if they help the jury understand the accompanying testimony. *See Jones v. State, supra; Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995). It is only when an inflammatory or gruesome photograph is without any valid purpose that it should be excluded. *Id.* As in all evidentiary matters, the admission of photos rests within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999).

The record reflects that the trial court viewed the photos and asked the prosecutor to explain the necessity of admitting both close-up photos of the victim's face. After listening to the prosecutor's explanation, the trial court admitted Exhibit 35 because "it shows the nature and location of the wound and that is definitely relevant in a homicide," and it excluded Exhibit 36 as cumulative. Clearly, the trial court did not use a "carte blanche" approach in its decision in this regard, as appellant has asserted; and, given the basis for his rulings, we cannot say that the trial court abused his discretion in admitting Exhibit 35.

Affirmed.

Michael Anson THOMAS *v.* STATE of Arkansas

CR 00-1185 45 S.W.3d 818

Supreme Court of Arkansas
Opinion delivered June 14, 2001

John W. Cone, for appellant.

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

W.H. "DUB" ARNOLD, Chief Justice. Appellant, Michael Anson Thomas, brings the instant appeal challenging the Jefferson County Circuit Court's decision rescinding its April 6, 2000 order transferring his case to juvenile court. Our jurisdiction is authorized pursuant to Ark. R. Sup. Ct. 1-2(b)(1) and 1-2(d) (2000). Thomas was charged with committing a terroristic act and battery in the first degree. At the time of the offense, he was sixteen years' old. On April 4, 2000, the circuit court held a hearing pursuant to Ark. Code Ann. section 9-27-318 (Supp. 1999) and entered an order on April 6, 2000, transferring the matter to juvenile court. Approximately two weeks later, on April 20, 2000, the State filed a motion for reconsideration. Following a second hearing on June 30, 2000, the circuit court filed an order on July 5, 2000, rescinding its prior transfer order and retaining jurisdiction over appellant.

According to the trial court, it erroneously granted appellant's motion to transfer based upon inaccurate information, including a belief that the juvenile authorities possessed extended jurisdiction to take further action regarding the appellant when he turned twenty-one. In response, Thomas argued that the trial court lost jurisdiction to modify its prior order because it failed to act within thirty days of the State's filing its motion for reconsideration. In other words, the motion was deemed denied on May 22, 2000, before the hearing took place. For its part, the court explained that the matter was scheduled at the "first available date."

Jurisdiction

Appellant's sole point on appeal challenges the trial court's decision to retain jurisdiction. Thomas argues that the circuit court erred by rescinding its order transferring him to juvenile court because it lacked jurisdiction over him at the time it entered the order. Specifically, Thomas maintains that either the circuit court lost jurisdiction over him on April 6, 2000, the day the transfer

order was filed, or May 22, 2000, the day the State's postjudgment motion was deemed denied.

The State responds that the circuit court's decision was proper in light of Ark. R. Crim. P. 33.3 (2000), governing posttrial motions, or Ark. R. Civ. P. 60(a) (2000), addressing motions seeking relief from a judgment, decree, or order. We disagree. Rule 33.3 applies to facts not present in the instant case, namely, when a person is "convicted of either a felony or misdemeanor." Rule 60 provides a vehicle for the trial court to correct errors or mistakes or to prevent the miscarriage of justice in civil cases. We have never applied this rule to criminal cases. *See State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001); *Ibsen v. Plegge*, 341 Ark. 225, 15 S.W.3d 686 (2000); *McCuen v. State*, 338 Ark. 631, 999 S.W.2d 682 (1999).

Here, the State simply failed to pursue its available remedy by filing a direct and timely appeal within thirty days of the circuit court's April 6, 2000, transfer order. *See* Ark. R. App. P.—Crim. 2 (2000). In light of the State's failure to pursue an appeal from the circuit court's order transferring appellant's case to juvenile court, and the circuit court's ensuing lack of jurisdiction, this court never acquired appellate jurisdiction. Therefore, we dismiss the appeal.

MAY CONSTRUCTION COMPANY and
Ruffin Building Systems, Inc. *v.*
RIVERDALE DEVELOPMENT COMPANY, LLC

01-121 45 S.W.3d 815

Supreme Court of Arkansas
Opinion delivered June 14, 2001

Eichenbaum, Lile & Hester, P.A., by: *Richard L. Ramsay*, for appellant May Construction Company.

Wright, Lindsey & Jennings LLP, by: *David M. Powell*, for appellant Ruffin Building Systems, Inc.

Kaplan, Brewer, Maxey & Haralson, P.A., by: *Philip E. Kaplan* and *Regina Haralson*, for appellee.

DONALD L. CORBIN, Justice. Appellants May Construction Company and Ruffin Building Systems, Inc., appeal the orders of the Pulaski County Circuit Court denying their motions to stay proceedings filed by Appellee Riverdale Development Company, LLC, in the Pulaski County Circuit Court. For reversal, May and Ruffin argue that it was error for the trial court to deny their motions for a stay because the parties had contracted to settle disputes via arbitration, and the arbitration proceedings should go forth prior to the commencement of any circuit court proceedings.

This court previously denied May's petition for a writ of prohibition in this matter in *May Constr. Co. v. Thompson*, 341 Ark. 879, 20 S.W.3d 345 (2000). As this is a second appeal, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(7). We now dismiss the instant appeal, as the orders being appealed from are not final, appealable orders.

The record reflects that on August 30, 1996, Riverdale entered into a contract with May for construction of a commercial office building located at 2102 Brookwood Drive in Little Rock. Included in the project was May's erection of a pre-engineered metal building manufactured by Ruffin, from whom May purchased the materials for construction. Disputes began arising between May and Riverdale regarding completion of the project. The contract entered into by May and Riverdale included a provision requiring arbitration of contract disputes between the parties. May initiated an arbitration proceeding with the American Arbitration Association on May 13, 1999, claiming that Riverdale had failed to pay approximately $33,000 owed under the contract. Riverdale, in turn, filed a complaint in circuit court on May 25, 1999, alleging that May failed to perform certain requirements under the contract and also acted negligently and deceitfully in the performance of the work and the construction of the building. Riverdale also filed a motion to stay arbitration with the circuit court on June 1, 1999. In an order dated June 7, 1999, the circuit court denied the motion to stay arbitration, but did stay discovery in the circuit court action, pending resolution of the arbitration proceeding.

Soon after discovery began in the arbitration proceeding, Riverdale complained that May had failed to comply with its repeated requests for certain discovery. On October 14, 1999, Riverdale sought an order from the arbitrator, Bill S. Clark, compelling May to comply with discovery requests. Clark granted Riverdale's motion to compel discovery on November 1, 1999, thereby ordering May to furnish all the items requested in the motion. In addition, Clark also issued a *subpoena duces tecum* to William Oldner, a design engineer with Ruffin. May continued to ignore Riverdale's repeated attempts to view the requested documents, as well as their attempts to depose Oldner. As a result, Riverdale filed a motion to dismiss the arbitration, or in the alternative, a motion for sanctions.

On January 21, 2000, Riverdale filed a motion to compel discovery in circuit court, arguing that May should not be allowed

to recover the alleged breach damages, and that neither Oldner nor any other representative of Ruffin should be allowed to testify at the arbitration hearing without producing the requested discovery materials. Subsequently, Riverdale filed a motion to continue the arbitration, due to its pending motion in circuit court. May countered that Riverdale's motion was simply an attempt to delay arbitration due to its own failure to properly perform discovery before the scheduled arbitration hearing.

The circuit court held a hearing on Riverdale's motion on February 3, 2000, and issued its orders from the bench. Thereafter, on March 2, 2000, the circuit court entered three orders, *nunc pro tunc*, on March 2, 2000. The first order required May to collect and have available for inspection and copying all of its documents relating to the contract dispute within three days from the date of the order, and allowed Riverdale to redepose Oldner and obtain relevant information from Ruffin, if it so chose. Otherwise, May would be barred from relying on information or testimony from Ruffin during the arbitration hearing. The circuit court also stayed the arbitration until May complied with its order. The second order required Riverdale to file its notice of deposition of Oldner in the appropriate Louisiana court. The circuit court also stated that it retained jurisdiction over the parties and the subject matter to enforce the order. In its final order, lacking the court's file mark, the circuit court ordered May to produce all requested documents and vendor files. The court found further that because May had refused to answer Riverdale's first request for admissions, the requests were deemed admitted.

These orders were followed by a petition for a writ of prohibition filed by May with this court on March 24, 2000. Upon review, this court determined that May's petition was actually a petition for writ of certiorari, because May sought relief for actions already taken by the circuit court. After determining that May failed to demonstrate that there had been a plain, manifest, clear, and gross abuse of discretion, this court denied May's petition. This court went on to state that it was not evident from the record that the circuit court had exceeded its jurisdiction by issuing orders to enforce the arbitrator's discovery orders.

On May 19, 2000, Riverdale filed an amended complaint in circuit court, adding Ruffin as a defendant, and asserting claims against it for negligence, breach of implied warranty, defective product, and fraud. In response, both May and Ruffin filed motions to stay the circuit court proceedings, pending arbitration, because

they alleged that the amended complaint was actually a contract claim, subject to arbitration. On July 14, 2000, May also filed a motion to vacate the March 2 orders, contending that they had complied with the circuit court's orders regarding discovery. Riverdale objected to the motion to vacate on the basis that it was not timely filed, pursuant to Ark. R. Civ. P. 60(a).[1] The circuit court denied each motion, and this appeal followed.

For their sole point on appeal, May and Ruffin argue that the circuit court abused its discretion in refusing to stay the court proceedings until the arbitration could be resolved. May and Ruffin assert that the parties' contract provides for arbitration and that due to the strong preference for arbitration, it should go forward first. Moreover, May and Ruffin contend that judicial economy favors staying the circuit court proceedings, as the arbitration may dispose of the circuit court claims. Riverdale counters that the circuit court's orders denying the stay are not final, appealable orders. We agree.

At issue is the trial court's denial of May's and Ruffin's motion to stay the circuit court proceedings. We disagree with May's and Ruffin's assertions that their pleadings are actually motions to compel arbitration. The circuit court has in no way nullified the agreement between May and Riverdale to arbitrate the contract claims. Only after continued disputes regarding discovery, did the circuit court stay arbitration, pending May's compliance with its discovery orders.[2] May chose not to appeal that order; instead, both May and Ruffin filed motions asking the circuit court to stay its proceedings. In *State v. Nelson*, 246 Ark. 210, 438 S.W.2d 33 (1969), this court held that an order regarding a motion to stay is a matter lying within the sound discretion of the trial court. This court then refused to treat an order denying a stay as a final, appealable order, stating that "[i]f the chancery court was in error through manifest abuse of discretion in refusing to stay, that error is correctable on appeal from a judgment adverse to appellants at the proper time." *Id.* at 218, 438 S.W.2d at 39. Accordingly, the circuit

[1] Although May's notice of appeal includes the circuit court's order denying its motion to vacate, May does not specifically argue on appeal that the trial court erred in refusing to vacate its previous orders. In any event, we note that the motion to vacate was not filed within the ninety-day time period, as required under Rule 60(a), and thus was properly denied as untimely.

[2] A court has the authority to stay further proceedings where a party fails to comply with discovery orders, pursuant to Ark. R. Civ. P. 37(b)(2)(C).

court's orders denying the motions to stay are not reviewable at this time.

Appeal dismissed.

Rodney RUTLEDGE *v.* STATE of Arkansas

CR 00-1146 45 S.W.3d 825

Supreme Court of Arkansas
Opinion delivered June 14, 2001

Darrell F. Brown & Associates, by: *Alvin Schay*, for appellant.

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

ROBERT L. BROWN, Justice. The appellant, Rodney Rutledge, appeals from a judgment of conviction for capital murder and a sentence of life without parole. He raises two points in his appeal: (1) the trial court erred in not granting his motion for directed verdict; and (2) the circuit court erred in denying his motion for declaration of a mistrial based on a material violation of the discovery rules as set out in our Rules of Criminal Procedure. Neither point has merit, and we affirm.

The pertinent facts of this case are garnered from the testimony of the victim's sister, Korey Leavy, Little Rock police officers, and other witnesses at trial. On September 1, 1998, Tammy Williamson, the mother of Rutledge's twin children, was at the home of her sister, Korey Leavy, in Little Rock. Rutledge had called Williamson earlier that day and went to Leavy's home later that morning. After arriving, Rutledge asked Williamson to come outside with him, but she declined and requested that he come into the house instead and sit down. At some point, he walked away from the doorway of Leavy's house, but later he returned, entered the house, and moved toward Williamson, who was seated in a chair. He hit Williamson on the left side of her head with the butt of a pistol. He then grabbed her by the hair, pulled her out of her chair, and dragged her to the kitchen. In the process, he pulled her shirt

off. Leavy attempted to pick her sister up off the floor by grabbing her around the waist but was unsuccessful. She also asked Rutledge "to let her [sister] up." He refused. Rutledge next pointed the .32 caliber pistol to Williamson's head and shot her. Leavy did not remember Rutledge being shot in his hand during the fracas. According to the State's chief medical examiner, Dr. William Quentin Sturner, the fatal gunshot wound was fired at contact or near-contact range.

After the shooting, Leavy ran to the back of her house and called the Little Rock Police Department. She continued to observe Rutledge through a window and saw him carry Williamson over his shoulder towards his car. Rutledge then placed the victim in the back seat and drove away. Little Rock police officers apprehended Rutledge as he was about to cross the I-30 bridge over the Arkansas River, and he was placed under arrest. He was taken to the University Hospital in Little Rock because of a wound to his left hand.

At trial, Rutledge, who was twenty-six years old at the time of the murder, stated that he and Williamson had grown up together. He admitted to having a criminal record and said that he had been drinking and experimenting with drugs since eleven or twelve years of age. He testified that he had been in prison in 1997 or 1998, and that due to his prior contact with Williamson, he believed that she would accept him again after prison, as she had in the past. He was released from prison on Friday, August 28, 1998, four days before the murder. Upon his release, Williamson told him that she had met somebody else. He admitted that he then sought out drugs and got high. In the process, he apparently burglarized a pharmacy, and Little Rock police officers began looking for him. He stated that he was "on drugs" constantly after his release from prison and had not slept. He said that on the day of the murder, his mother dropped him off at his grandmother's house so that his grandmother could take him to his parole officer. At that point, he stated that he wanted to see Williamson, and he called her. He then grabbed some pills and a pistol off the top of his grandmother's refrigerator, took the keys to her car, and drove to Leavy's house. He testified that while at Leavy's house, he hit Williamson with the pistol and the pistol went off, with a resulting gunshot wound to his left hand. He said he did not realize immediately that the bullet from his pistol had also hit Williamson.

The jury convicted Rutledge of capital murder, and he was sentenced to life in prison without parole.

I. Sufficiency of the Evidence

Rutledge argues that the circuit court erred in refusing to grant his motion for a directed verdict. This court will consider an appellant's insufficiency-of-the-evidence argument prior to considering other arguments. *See Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996). When the court conducts such a review, it does so using the following standard, as set out in *Williams v. State*, 331 Ark. 263, 962 S.W.2d 329 (1998):

> Motions for directed verdict are treated as challenges to the sufficiency of the evidence. *Johnson v. State,* 326 Ark. 3, 929 S.W.2d 707 (1996); *Penn v. State,* 319 Ark. 739, 894 S.W.2d 597 (1995). When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the state. *Dixon v. State,* 310 Ark. 460, 470, 839 S.W.2d 173 (1992). Evidence is sufficient to support a conviction if the trier of fact can reach a conclusion without having to resort to speculation or conjecture. *Id.* Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Id.* Only evidence supporting the verdict will be considered. *Moore v. State,* 315 Ark. 131, 864 S.W.2d 863 (1993).

Williams, 331 Ark. at 265, 962 S.W.2d at 330 (quoting *McGehee v. State*, 328 Ark. 404, 410, 943 S.W.2d 585, 588 (1997)). Premeditation and deliberation may be inferred from the type and character of the weapon used, the manner in which the weapon was used, the nature, extent, and location of the wounds inflicted, and the conduct of the accused. *See Chase v. State*, 334 Ark. 274, 973 S.W.2d 791 (1998).

In this case, Rutledge called the victim from his grandmother's house, took a .32 caliber revolver from the top of her refrigerator, and drove his grandmother's car to the home of the victim's sister where the victim was visiting. He talked to Williamson from the doorway and then walked away when she refused to come outside. He was frustrated by this and later returned with a pistol which he used to hit Williamson on the left side of her head. Following that, he dragged Williamson from her chair by her hair into the kitchen and told her to "get [her] motherfucking ass up." He then shot her at very close range in the right side of her head with the pistol. As already indicated, Dr. Sterner testified that due to the grayish black sooty material around the wound, the barrel of the gun was

"extremely close, if not touching, the hair or scalp area" of Williamson, when the gun was fired. After shooting her, he carried the victim over his shoulder to his grandmother's car and drove away with her body in the back seat. He failed to stop immediately when a Little Rock police officer flashed his car's blue lights and turned on his siren, and only came to a stop when he was forced to do so by another vehicle at the I-30 bridge.

We conclude that from these circumstances, premeditation and deliberation can be inferred when viewing the evidence in the light most favorable to the State, as we are required to do. We further conclude that substantial evidence supports Rutledge's conviction. Accordingly, the circuit court did not err in denying his motion for a directed verdict.

II. Discovery Violation

Rutledge next contends that the prosecutor failed to honor his motion for discovery and, thus, he was entitled to a mistrial. More particularly, he claims that the prosecutor failed to turn over to him his medical records from the University Hospital which showed the bullet wound to his left hand. This information, according to Rutledge, would have bolstered his claim that the shooting was accidental since the fatal bullet to Williamson also struck his hand. In short, Rutledge raises a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and Ark. R. Crim. P. 17.1(d), in that the prosecutor did not make available to Rutledge exculpatory evidence. The State responds that Rutledge had access to his own medical records and, thus, no prejudice to Rutledge resulted. The State cites this court to *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996), in support of its position.

We decide this matter on a procedural point. The State urges that Rutledge failed to preserve this point on appeal because he did not obtain a ruling from the circuit court on his mistrial motion. We agree. Following the empanelment of the jury on the first day of the trial, Rutledge moved the circuit court to order the release of his medical records. This was done. The medical records were obtained by fax toward the end of the trial and introduced into evidence. Rutledge, however, maintains that he was prejudiced in his defense because the records were not released to him earlier and that this was a critical violation by the prosecutor because the medical records supported his claim of an accidental shooting.

This court has made it clear in the past that it is up to an appellant to obtain a clear ruling on an issue in order to preserve that point for appeal. *See, e.g., Enos v. State*, 313 Ark. 683, 858 S.W.2d 72 (1993); *Hamm v. State*, 301 Ark. 154, 782 S.W.2d 577 (1990). In the case at bar, however, defense counsel made the following statement with regard to his mistrial motion:

> DEFENSE COUNSEL: Your Honor, I would suggest that they have not complied with our motion for discovery. They have violated *Brady*. And, under the circumstances, I feel obligated on behalf of my client to at this time move for a mistrial.

Defense counsel followed this motion by arguing several other points to the circuit court to which the State responded. The response from the circuit court was this:

> DEFENSE COUNSEL: We would also ask, your Honor, that the officer who is identified as transporting [Rutledge] be made available for cross-examination. And that's one of the reasons I raised the *Brady* question. If I had had [the medical records] when that particular officer was testifying, it is my opinion that I probably would have been able to get more information which is contained within the contents of particular [*sic*] document.
>
> THE COURT: Well, I don't think that that would be necessary. If the document comes in, then the *Brady* issue is moot.
>
> DEFENSE COUNSEL: Probably so.

Later, this discussion transpired:

> THE COURT: Well, the Court's just going to let the [medical record] in. And I think that will take care of most arguments.
>
> DEFENSE COUNSEL: Thank you, your Honor.

Thus, apart from the fact that Rutledge's medical records were always available to him before the trial, it appears that not only did he fail to obtain a ruling on this issue, but his counsel acquiesced in the circuit court's conclusion that the issue would be moot after the admission of the medical records into evidence. Certainly, Rutledge did not urge the court to rule on his mistrial motion following the court's comments on mootness. On the contrary, he seems to have agreed that the matter was moot. This issue is not preserved for our review.

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

Affirmed.

CITY of BENTON and Saline County, Arkansas *v.* ARKANSAS SOIL and WATER CONSERVATION COMMISSION

01-60 45 S.W.3d 805

Supreme Court of Arkansas
Opinion delivered June 14, 2001

Zachary David Wilson P.A., by: *Zachary David Wilson* and *Brian C. Donahue*, for appellants.

Quattlebaum, Grooms, Tull & Burrow PLLC, by: *J. Leon Holmes*, for appellee Arkansas Soil and Water Conservation Commission.

Wright, Lindsey & Jennings LLP, by: *Gregory T. Jones*, for appellees Salem Water Users Association, Southwest Water Users Association, and Town of Tull, Arkansas.

Glover Law Firm, by: *David M. Glover*, for appellee City of Malvern, Arkansas.

ANNABELLE CLINTON IMBER, Justice. In January 1999, the City of Malvern submitted an application to the Arkansas Soil and Water Conservation Commission ("Commission") seeking a determination of compliance with the Arkansas Water Plan. The water development project for which the City sought approval (hereinafter "Malvern Project") was developed through the joint efforts of the City of Malvern, the Salem Water Users Association, the Southwest Water Users Association, and the Town of Tull.[1] Through the Malvern Project, these entities proposed to construct water treatment facilities and pipelines carrying water from the Ouachita River to the City of Malvern and to rural areas of Saline, Grant, and Garland Counties. The City of Benton and Saline County officials objected to the inclusion of rural Saline County in the areas to be serviced by the Malvern Project.

Before approving the Malvern Project, the Commission conducted three public hearings. First, on March 25, 1999, the Commission conducted a hearing at its headquarters in Little Rock. Following this hearing, the Commission's staff issued its report to the Commission's Executive Director, J. Randy Young, on July 12, 1999, recommending approval of the Malvern Project. Executive Director Young did not approve the project immediately, but opted instead to call two additional public meetings. On July 28, 1999, the Commission held a public hearing in Benton at which the Mayor of Benton and other representatives of Saline County and the City of Benton were present. The following day, a hearing was conducted in Malvern. Notice of these hearings was published in the Benton Courier and the Malvern Daily Record on July 16, 1999.

On August 6, 1999, the Commission's Executive Director entered a Final Determination of Arkansas Water Plan Compliance, finding that the Malvern Project complied with the Arkansas Water Plan. The City of Benton and Saline County appealed that determination by the Executive Director to the full Commission. After a hearing before the full Commission on October 28, 1999, the Commission upheld and adopted the Executive Director's Final Determination. The City of Benton and Saline County then

[1] The Malvern Project originated as two separate projects — one being developed by Malvern, and the other by Salem, Southwest, and Tull. When the Commission's Executive Director, J. Randy Young, learned of the two projects that were being developed separately and would be largely duplicative, he directed his staff to work with the parties involved to consolidate the two plans. This was done, resulting in the Malvern Project that is before this court.

appealed that decision to the Pulaski County Circuit Court. The Commission's Final Determination was affirmed by the circuit court on October 3, 2000. The City of Benton and Saline County, appellants herein, now seek review of the Commission's Final Determination in this court. They contend that the Final Determination is flawed as a result of several procedural irregularities that violated the Administrative Procedure Act and deprived them of constitutionally afforded due process. They further allege that the performance of administrative, regulatory, and adjudicative duties by the Executive Director and his staff created "bias and or at least an appearance of bias," and that the Executive Director accepted and relied upon improper *ex parte* communications in making his final determination. Other points of error raised by the appellants include assertions that (1) the Commission failed to determine the status of the Salem Water Users Association, the Southwest Water Users Association, and the Quad County Facilities Board for the Town of Tull; (2) the Commission failed to refer environmental questions to the Arkansas Department of Environmental Quality and the Arkansas Pollution Control and Ecology Commission; and, (3) the Executive Director has an inherent conflict of interest due to his position on the Arkansas Pollution Control and Ecology Commission. Finally, appellants argue that the Pulaski County Circuit Court erred by denying their motion to enforce an agreed stay order entered by the court on April 3, 2000.

I. Standard of Review

It is not the role of the circuit courts or the appellate courts to conduct a *de novo* review of the record when reviewing an agency's decision pursuant to the Administrative Procedure Act. *Arkansas Dep't of Human Servs. v. Thompson*, 331 Ark. 181, 187, 959 S.W.2d 46 (1998). We review the case only to ascertain whether there is substantial evidence to support the agency's decision[2] or whether the decision runs afoul of one of the other criteria set out in Ark. Code Ann. § 25-15-212(h) (Repl. 1999). *Id.*

Where the agency's failure to follow its own procedural rules is urged on appeal, the applicable question on review is "whether the Commission's decision is based upon unlawful procedure." *Stueart v. Arkansas State Police Comm'n*, 329 Ark. 46, 50-51,

[2] Appellants do not challenge the sufficiency of the evidence to support the Commission's Final Determination.

945 S.W.2d 377 (1997) (citing *Regional Health Care Facilities, Inc. v. Rose Care, Inc.*, 322 Ark. 767, 912 S.W.2d 409 (1995)). "It has become axiomatic that an agency is bound by its own regulations." *Id.* (quoting *Panhandle Eastern Pipeline Co. v. F.E.R.C.*, 613 F.2d 1120 (D.C. Cir. 1979)). Thus, the decision of an administrative agency may be reversed if the substantial rights of the petitioner have been prejudiced because the administrative findings from which appeal is taken were made upon unlawful procedure. *Id.*

II. Violations of Due Process and the Administrative Procedure Act

Appellants assert several procedural violations that allegedly occurred during the hearings below and caused the loss of their substantial rights. First, appellants argue that the Commission failed to conduct a full and fair hearing regarding the Malvern Project. According to appellants, the hearings conducted were inadequate in four aspects: (1) the hearings were conducted in a quasi-legislative manner rather than a quasi-judicial manner; (2) notice was inadequate; (3) the Executive Director had already made his decision before the July hearings; and (4) the Executive Director inappropriately received and relied upon *ex parte* communications.

A. Quasi-Judicial Review

The proceedings below arose out of an application by the City of Malvern for a determination that its water development project complied with the Arkansas Water Plan.

> No political subdivision or agency of the state shall spend any state funds on or engage in any water development project . . . until a preliminary survey and report therefor which sets forth the purpose of the project, the benefits to be expected, the general nature of the works of improvement, the necessity, feasibility, and the estimated cost thereof is filed with the commission and is approved by the commission to be in compliance with the plan.

Ark. Code Ann. § 15-22-504(e) (Repl. 2000). "The approval or disapproval of the application shall constitute an adjudication under the Arkansas Administrative Procedures Act. All action taken and all hearings conducted on the question of approval of the application shall be in compliance with the Arkansas Administrative Procedures Act." S.W.C.C. Rule 604.1.

In every case of adjudication under the Administrative Procedure Act, parties must be afforded an opportunity for a hearing after reasonable notice and must be given the opportunity to respond and present evidence on all issues involved in the adjudication. Ark. Code Ann. § 25-15-208 (Repl. 1996). Parties have the right to conduct cross-examination, or file an affidavit of personal bias or disqualification of an allegedly biased presiding officer. Ark. Code Ann. § 25-15-213 (Repl. 1996). Finally, the notice of hearing published by the Executive Director must include notice to all interested persons of the right to present evidence and argument at an adjudicatory hearing. S.W.C.C. Rule 604.4.H.

As the above statutory and regulatory provisions suggest, appellants correctly assert that the proceedings below were an adjudication process and not a rule-making process. Yet, appellants have failed to demonstrate that any lack of judicial formality in the proceedings below prejudiced their substantial rights. The notice of hearing published by the Executive Director in the *Benton Courier* on July 16, 1999, contained the requisite notification of the right to attend with counsel and to present evidence and argument. Yet, the record reflects no attempt by appellants to assert those rights. The Commission's rules require that all evidentiary issues be raised before the Executive Director at the hearing stage, as the Commission's review is limited to the record before the Executive Director. S.W.C.C. Rule 105.4. At no time during the hearings in this matter did appellants seek to present sworn testimony or formally proffer evidence. To the contrary, the record reflects that appellants' representatives participated in the July 28 hearing without objection. Mayor Moore commented extensively about the City of Benton's position toward the Malvern Project and submitted an alternate proposal to the Executive Director "for [his] information." While the appellants' participation in the hearings is amply documented, nowhere does the record reflect that appellants objected to the manner in which the proceedings were being conducted.

Because appellants did not ask to introduce evidence or sworn testimony, they cannot demonstrate that they were deprived of a fair hearing by not being allowed to introduce evidence or sworn testimony. *See Jones v. Reed*, 267 Ark. 237, 242, 590 S.W.2d 6 (1979) (holding that, where substance of evidence appellants sought to introduce was submitted into record by stipulation, there was no prejudice resulting from administrators refusal to permit sworn testimony). Thus, appellants cannot demonstrate prejudice in the conduct of the hearings. *Id.*

Appellants argue on appeal, however, that they preserved the request for a more formal quasi-judicial hearing during review before the full Commission. The record as abstracted does not support appellants' argument. Even if we were to assume that Ark. Code Ann. § 25-15-213 (Repl. 1996) grants an aggrieved person the right to introduce additional evidence and sworn testimony before the full Commission when seeking review of a referee's decision, we are unable to determine from the abstract whether the appellants sought to assert that right. We are presented with a record much like that at issue in *City of Hector v. Arkansas Soil & Water Conserv. Comm'n*, 47 Ark. App. 177, 179-80, 888 S.W.2d 312 (1994). In that case, the court of appeals stated, with reference to appellant's claim that the Commission improperly limited the evidence presented, that "the record before us indicates that two public hearings were had regarding the . . . application prior to the proceeding before the Commission's appeals committee. Furthermore, we are unable to determine from the record before us what evidence the appellant sought to disclose by introduction or cross-examination . . . ." *Id.* The same can be said here.

Two public hearings were had prior to appellants' request for review by the full Commission. Appellants sought to introduce no evidence at those hearings, but assert that they were prevented from doing so not only during those hearings, but also upon review before the full Commission. Counsel for appellants did make reference during argument before the Commission to a motion to supplement the record on review. However, there is no such motion before this court; nor can we determine from the abstract whether the Commission ever ruled upon the motion. Likewise, we are unable to discern from the abstract what evidence, if any, was proffered to the Commission pursuant to said motion. Our review of a case on appeal is limited to the record as abstracted in the briefs. *Hashagen v. Lord*, 341 Ark. 83, 14 S.W.3d 498 (2000); *Luttrell v. City Of Conway*, 339 Ark. 408, 409, 5 S.W.3d 464 (1999); *Morse v. Sentry Life Ins. Co.*, 332 Ark. 605, 967 S.W.2d 557 (1998). Thus, as in *City of Hector v. Arkansas Soil & Water Conserv. Comm'n*, *supra*, we cannot reach the issue.

We note that appellants did not ask the Commission to conduct a formal quasi-judicial hearing on review of the Executive Director's Final Determination. Rather, the appellants asked the Commission to reverse the agency's adjudicatory process and allow the taking of additional evidence at a new set of hearings before a new referee. Appellant has, therefore, failed to demonstrate that the

informal nature of the hearings that were conducted violated their substantial rights.

B. Notice

The second procedural irregularity asserted by appellants is the lack of adequate notice of the hearings before the Executive Director. Appellants fail to demonstrate any inadequacy in the notice of the proceedings in this matter. The Administrative Procedure Act requires that all parties must be given reasonable notice of hearings in cases of administrative adjudication. Ark. Code Ann. § 25-15-208(a)(1)-(2) (Repl. 1996). In the case of a water-plan compliance hearing, the Commission has determined that the Executive Director must give ten days' notice to the applicant and any other party who has requested notice and must publish notice of the hearing in a newspaper as required by Ark. Code Ann. § 15-22-206. S.W.C.C. Rule 604.3. Arkansas Code Annotated section 15-22-206(a)(1)(D) (Repl. 2000) sets out the following guidelines for newspaper publication of notice:

> If the purpose of the meeting is with respect to waters in more than one (1) county, the meeting shall be held in one (1) of those counties and notice shall be published in one (1) or more newspapers which together have general circulation in all of the counties involved.

Appellants argue that they were given inadequate notice of the March 25, 1999 hearing that took place in Little Rock, because it was not published in a newspaper with general circulation in Saline County and the notice that was published in Hot Spring County failed to mention all of the counties that would be affected by the water proposal to be discussed. We hold that appellants were not prejudiced by the inadequate notice of the March 25, 1999 hearing because they were not deprived of their opportunity for a hearing. The commission conducted two additional hearings, and appellants received notice of both hearings. Most notably, notice of the hearing conducted on July 28, 1999, was published in the *Benton Courier* on July 16, 1999, twelve days prior to the hearing. The statutes cited above require only that the Commission provide reasonable notice of hearings. The Commission's own rules require that notice be published at least ten days prior to the hearing. The Executive Director complied with this rule, and notice was published twelve days prior to the hearing. Consequently, we conclude that their lack-of-adequate-notice argument is without merit.

C. *Timing of Director's Decision*

Appellants next argue that the proceedings were flawed because the Executive Director had already reached a decision long before the July 28 hearing or the publication of notice on July 16. We do not reach this argument as it was not raised below. It is well settled that an appellant may not change the grounds for objection on appeal but is limited by the scope and nature of his objections and arguments presented at trial. *Ayers v. State*, 334 Ark. 258, 264, 975 S.W.2d 88, 91 (1998). "It is essential to judicial review under the Arkansas Administrative Procedure Act that issues must be raised before the administrative agency appealed from or they will not be addressed by this court." *Wright v. Arkansas State Plant Bd.*, 311 Ark. 125, 132, 842 S.W.2d 42 (1992).

Although appellants argued before the Commission that the staff had already issued its recommendation of approval before notice of the July 28 hearing issued, at no point did appellants assert that the Executive Director had already reached a final determination prior to the hearing. According to Commission Rule 604.7, it is the Executive Director who approves or disapproves an application for a water-plan compliance determination, not the staff.[3] Because this argument was not presented to the Commission, we will not address it on appeal. *Wright v. Arkansas State Plant Bd.*, *supra.*

D. Ex Parte *Communications*

Lastly, appellants assert that the proceedings below were procedurally flawed because the Executive Director accepted and relied upon *ex parte* communications in rendering his decision. Arkansas Code Annotated section 25-15-209(a) (Repl. 1996) states:

> Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a

[3] We note that the rules of the Commission contemplate that the staff will always recommend approval or disapproval of an application before notice of the hearing is issued. According to Rule 604.4, the notice of hearing must contain "[t]he Commission staff's recommendation and reasons therefor." The argument that the staff has already reached a decision as to the merits of the application is, therefore, not synonymous with the argument that the Executive Director has already decided whether to approve the application.

> decision or to make final or proposed findings of fact or conclusions of law in any case of adjudication shall not communicate, directly or indirectly, in connection with any issue of fact with any person or party, nor in connection with any issue of law, with any party or his representative, *except upon notice and opportunity for all parties to participate.*

(Emphasis added.) Appellants argue that the Executive Director improperly accepted and relied upon unsworn statements made by engineers and witnesses at the hearings and upon letters and calls received by the Executive Director outside of the hearings.

First, appellants suggest that the unsworn statements given by engineers and officials at the public hearings were improper *ex parte* communications. However, as noted, Ark. Code Ann. § 25-15-209(a) prohibits *ex parte* communications *except upon notice and opportunity for all parties to participate.* The statements of which appellants complain were made at public hearings for which they received notice and in which they actually participated. Similarly, the multiple letters addressed to the Executive Director expressing support for the Malvern Project were read into the record at the public hearings, ensuring that all interested parties were aware of the letters and had opportunity to respond.

Next, appellants claim that the Executive Director improperly received *ex parte* communications regarding the Malvern Project in the form of third-party letters and telephone calls that were received by him outside of the hearings.[4] We are unable to determine whether the alleged third-party communications warrant reversal of the Commission's decision because the content of these communications was never proffered or abstracted for our review.

"[I]n cases of alleged irregularities in procedure before the agency not shown in the record, testimony may be taken before the [circuit] court. The court shall, upon request, hear oral argument and receive written briefs." Ark. Code Ann. § 25-15-212(g) (Repl. 1999). Appellants had the opportunity before the circuit court to develop a record with evidence of the content of any alleged third-party communications received by Executive Director Young. *See Arkansas Alcohol Bev. Control Div. v. Cox*, 306 Ark. 82, 811 S.W.2d

[4] Executive Director Young stated at the July 28, 1999 hearing that the phone at his office "started ringing, starting with your [Saline County's] State Representative Kidd," following a newspaper account of a July 2, 1999 meeting of the Quad County Facilities Board of the Town of Tull.

305 (1991). They failed to do so. It is the appellant's burden to bring up a record sufficient to demonstrate error. *Hankins v. Department of Fin. & Admin.*, 330 Ark. 492, 954 S.W.2d 259 (1997). Failure to do so precludes our review. *Id.*; *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000). Similarly, if a record of the communications at issue was made, it was not abstracted — a deficiency that likewise prevents review. *See Woolsey v. Arkansas Real Estate Comm'n*, 263 Ark. 348, 565 S.W.2d 22 (1978). For these reasons, we hold that appellants have failed to demonstrate that their substantial rights have been denied as a result of procedural error below.

We are unable to address appellants' arguments to the extent they assert that the procedural irregularities discussed previously resulted in a deprivation of due process or that the Commission failed to adopt appropriate and reasonable procedures for adjudication. Appellants did not present these arguments to the Commission; thus, we are precluded from addressing them on appeal. *See Wright v. Arkansas State Plant Bd.*, *supra.*

III. Appearance of Bias

For their second point on appeal, appellants contend that the performance of administrative, regulatory, and adjudicative duties by the Commission's Executive Director and staff creates "bias and or at least the appearance of bias." Appellants point to the statements of Mr. Young that he instructed his staff to get the City of Malvern, the Salem and Southwest Water Users Associations, and the Town of Tull to work cooperatively together and come forward with one project "that essentially doubled the capacity of what each one of them had proposed separately." According to appellants, these duties and responsibilities of the director and staff are inconsistent with the director's duty to be a fair adjudicator when issuing a final determination of water plan compliance, thereby creating at least an appearance of bias.

Any party who believes a presiding officer is biased or partial "may file an affidavit of personal bias or disqualification" before the Commission and the Commission is required to rule upon the affidavit if it is "timely, sufficient, and filed in good faith." Ark. Code Ann. § 25-15-213(2)(C) (Repl. 1996). Appellants filed no such affidavit of personal bias or disqualification in this matter. In the absence of a filed affidavit or a ruling thereon, we cannot reach the issue of whether the Commission was biased against the

appellants to such an extent as to effectively deny them a fair opportunity to be heard. *See City of Hector v. Arkansas Soil & Water Conserv. Comm'n*, 47 Ark. App. at 180, 888 S.W.2d at 313.

IV. Other Grounds

We do not address appellants' remaining grounds for reversal of the Commission's Final Determination because they have not been properly developed or preserved. First, appellants argue that the Commission was required to determine the status of the Southwest and Salem Water Users Associations and whether those entities are entitled to receive funding from the State of Arkansas as participants in the Malvern Project.[5] Specifically, appellants contend that Article 16, section 13, of the Arkansas Constitution and Ark. Code Ann. §§ 15-22-505(5), -506(a) (Repl. 2000), prohibit the disbursement of public funds to private entities, such as the Southwest and Salem Water Users Associations. Appellants also suggest that the Quad County Facilities Board for the Town of Tull "may be a sham entity intended to facilitate the transfer of public funds" to the Salem and Southwest Water Users Associations. We do not reach the merits of this argument as the abstract does not reflect that the argument was ever made before the Commission. Issues not raised to the Commission will not be addressed on appeal. *Wright v. Arkansas State Plant Bd., supra.* Furthermore, those issues that were raised before the Commission but were not properly abstracted will likewise not be addressed on appeal. *Woolsey v. Arkansas Real Estate Comm'n, supra.*

Another point of appeal raised by the appellants is their claim that the Commission exceeded its authority by failing to refer questions pertaining to the environmental impact of the Malvern Project to the Arkansas Department of Environmental Quality and the Arkansas Pollution Control and Ecology Commission. We decline to address the merits of this claim because appellants made only a bare reference to this issue in their brief before the Commission. No attempt was made to flesh out the argument or properly develop it for review. We will not address an issue that has not been properly developed before the Commission. *AT&T Communications*

[5] The Saline County Quorum Court passed ordinances in 1998 to establish public facilities boards to assist in providing water to customers formerly served by the Southwest and Salem Water Users Associations. The Saline County Quorum Court subsequently abolished those boards on August 17, 1999.

of the S.W. v. Arkansas Public Serv. Comm'n, 344 Ark. 188, 40 S.W.3d 273 (2001).

Furthermore, appellants' brief on appeal alleges in a conclusory manner that the Commission should have referred environmental issues to the other two agencies for determination, without citation to any authority or development of the argument. This court does not consider arguments that are unsupported by convincing argument or sufficient citation to legal authority. *Arkansas Public Defender Comm'n v. Greene County Cir. Court*, 343 Ark. 49, 32 S.W.3d 470 (2000); *Judicial Discipline & Disab. Comm'n v. Thompson*, 341 Ark. 253, 16 S.W.3d 212 (2000). For these same reasons, we are precluded from addressing appellants' argument that the Commission's Executive Director was laboring under a conflict of interest due to his membership on the Arkansas Pollution Control and Ecology Commission.

Finally, we cannot address appellants' argument that the Pulaski County Circuit Court erred in denying their September 13, 2000 motion and September 18, 2000 amended motion to enforce an agreed stay order entered by the circuit court on April 3, 2000. The abstract on appeal must contain, at a minimum, the pleadings and documents that are necessary to an understanding of the issues raised. Sup. Ct. R. 4-2(a)(6). Appellants' abstract does not contain either of the motions that they filed to enforce April 3, 2000 order. We are therefore precluded from addressing this point on appeal. *See Woolsey v. Arkansas Real Estate Comm'n, supra.*

Affirmed.

Keyono COOK *v.* STATE of Arkansas

CR 01-0224 45 S.W.3d 820

Supreme Court of Arkansas
Opinion delivered June 14, 2001

Julia B. Jackson, for appellant.

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant, Keyono Cook, was convicted of capital felony murder, aggravated robbery, and theft of property. The jury sentenced him to life imprisonment without parole plus twenty-seven years in the Arkansas Department of Correction. Mr. Cook's only point on appeal has to do with the admissibility of two documents. He contends that the documents were not relevant, that their probative value was substantially outweighed by their prejudicial effect, and that they

were introduced solely to prove that Mr. Cook was a bad person. We disagree and affirm.

On April 13, 1999, Mr. Cook entered a Western Sizzlin with the purpose of robbing the restaurant. During the robbery, he shot and killed the manager, David Nichols. Three days later, a detective with the Little Rock Police Department stopped Mr. Cook's brother and co-defendant, Denaro Cook, who was driving a vehicle identified as the one used in the robbery. With Denaro's permission, the detective searched the vehicle and found a black notebook on the front seat. On top of the notebook he found a document entitled "Plan A and Plan B." Inside the notebook, on top of other papers, he found a rap song entitled "Give Up the Strilla." Mr. Cook admitted both to his involvement in the robbery and to being the author the two documents. Over his objections, both documents were admitted into evidence at trial.

The document entitled "Plan A and Plan B," was handwritten as follows:

Plan A	Plan B
look around first and make sure don't nobody see	
1) Wait by pay phone	Wait across the street
2) See Target/walk toward him	See Target/run across the street
3) Put strap to his back-Go back in	Put strap to his back-Go back in
4) Take him to the office	Take him to the office
5) Let him open the door	Let him open the door
6) Make him give all the money	including change
7) Tie him up and make	him go to the freezer
8) get the keys and	go out through the back door
9) lock the door back	and throw the keys in the next 3 dump
10) walk down to the end and make sure you	of the alley and take off clothes don't drop s**t

Plan A + Plan B = Done Deal

Mr. Cook authored the following handwritten rap song:

Give Up (The Strilla) By: Buck - shot

Look out 4 this muthaf**n killa
on the for realla n**a, you bets to give up the strilla

or getta, muthaf**n slugg assigned to yo a**
or you can do the s**t the easy way, give up the cash
as bad as my muthaf**n a** is doin,
you refuse, you loose, you snooze, you made the news
d**n, dude you cruel, that's what my peoples say
I ain't cruel, I choose, to be on a paper chase
gone of that hay, all about my feddy.
If I ain't got no strapp, my second choices my michete
I'm ready to do yo a** up n**a
And give up, give up, the f**n strilla, 4 realla
Chorus: Give up, Give up, Give up the Strilla.
If you don't, you don't. I'ma have to kill ya.
I creepin, keepin thing on the low.
Betta gett ready n**a, Im fits to pull a kickdoe.
Maintain to explain the game main, ain't a d**n thang
change, Buck-shots my muthaf**n name
all about my strilla and my feddy pimp
playin the biggest n**as, for some muthaf**n wimps
attempt to get rich on these streets
for n**az wit beef, I brings the Heast
Step back Hoe, if you didn't already know
I comes to yo hood, and crank up the show
and slowly but slowly unleash the beast
f**n hoes, killin n**as, and anybody with cheese
I love money like my muthaf**n fam-il-y
I want the money from you, and everybody around me
I'ma make yo funky a** die slow
but befo you die give up the strilla Hoe.[1]

I. Standard of Review

In matters relating to the admission of evidence under Arkansas Rules of Evidence 401, 403, and 404(b), a trial court's ruling is entitled to great weight and will not be reversed absent an abuse of discretion. *Arthur v. Zearley*, 337 Ark. 125, 138, 992 S.W.2d 67, 74 (1999) (Rule 401); *Greene v. State*, 317 Ark. 350, 355, 878 S.W.2d 384, 387 (1994) (Rule 403); and *Abernathy v. State*, 325 Ark. 61, 64, 925 S.W.2d 380, 38 (1996) (Rule 404(b)).

[1] Mr. Cook goes by the nickname "Buck". In street slang, "strilla", "feddy", "beef", and "cheese" mean money. A "strap" is a gun, and a "slug" is a bullet.

II. Rule 401 — Relevancy

" '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." Ark. R. Evid. 401. Mr. Cook argues that the two documents were not relevant because they were remote in time and the events described in the documents were not similar to the actual crime. We disagree.

The two documents were found three days after the crime on the front seat of the vehicle used in the crime. Both documents were written by Mr. Cook and both describe aggravated robbery scenarios. Whether Mr. Cook intended to commit aggravated robbery is a material issue in the case; so, the documents make the existence of his intent to commit aggravated robbery more probable than it would be without the evidence. Under these facts, we cannot say the trial court abused its discretion in finding the two documents relevant under Rule 401.

III. Rule 403 — Balancing Probative Value and Prejudicial Effect

"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. Mr. Cook contends that the two documents were prejudicial because each describes criminal activity, but they were not probative because the State offered the documents to prove intent, and intent to kill is not an element of capital felony murder.

In this case, the criminal activity that Mr. Cook claims makes the documents prejudicial also makes them probative of his intent to commit aggravated robbery, the underlying felony for his capital felony murder charge. Here, we are dealing with capital felony murder where the murder is perpetrated "in the course and furtherance of" aggravated robbery. The culpable intent or *mens rea* relates to the crime of the underlying felony — aggravated robbery — and not the murder itself. *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999); *Dixon v. State*, 319 Ark. 347, 891 S.W.2d 59 (1995). "Plan A and Plan B" was a ten-step plan to commit an

aggravated robbery. The rap song, "Give Up the Strilla," discussed using a "strap" (or gun) to force a victim to "give up the cash" — again, an aggravated robbery. Because both documents were probative of Mr. Cook's intent to commit aggravated robbery, the trial court did not abuse its discretion in holding that the prejudicial effect did not substantially outweigh the probative value of the evidence.[2]

IV. Rule 404(b) — Prior Bad Acts

Arkansas Rule of Evidence 404(b) states:

> (b) *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a 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, 952 S.W.2d 110 (1999). The list of exceptions to inadmissibility in Rule 404(b) is not an exclusive list, but instead, it is representative of the types of circumstances under which evidence of other crimes or wrongs or acts would be relevant and admissible. *Williams v. State*, 343 Ark. 591, 602, 36 S.W.3d 324, 331 (2001).

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[2] This court has previously admitted a rap song as probative of intent. *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998). Other jurisdictions have also admitted songs and song lyrics as proof of intent. *See State v. Koskovich*, 776 A.2d 144 (N.J. 2001) available in 2001 WL 618579 (N. J. 2001) (admitting violent song lyrics as proof of intent); *State v. Nance*, 533 N.W.2d 557, 561 (Iowa 1995) (admitting evidence that defendant said words, "one to the cranium," from a rap song minutes before shooting the victim.); *State v. Green*, 738 N.E.2d 1208, 1217 (Ohio 2000) (admitting evidence that defendant made up a rap song describing the crime with the words "I shot him five times, and he dropped, he tried to run, so I shot him"); *Appellate Court of Ill. v. Spraggins*, 723 N.E.2d 359, 360 (Ill. App. 1999) (allowing the introduction of a rap song defendant sang in jail in which he substituted words from the original song with his own wording indicating his intent to kill a witness against him.); *Green v. State*, 934 S.W.2d 92, 104 (Tex. App. 1996) (allowing testimony of letter written while defendant was in prison including an inculpating phrase from a rap song.); *State v. Deases*, 476 N.W.2d 91, 93 (Iowa App. 1991) (allowing evidence that defendant wrote a rap song about killing the victim).

In *Williams*, we reiterated the difference between the requirements for the admission of evidence to prove *modus operandi* and the test for admissibility under one of the exceptions to Rule 404(b). *Id.* at 599, 36 S.W.3d at 329. The two evidentiary concepts are different. The test for admission of prior bad acts under Rule 404(b) is whether the evidence offered has independent relevance to a fact of consequence in the case. *Id.* at 602, 36 S.W.3d at 331. Whereas, the test for the admission of evidence to prove identity using *modus operandi* has two requirements: "(1) both acts must be committed with the same or strikingly similar methodology; and (2) the methodology must be so unique that both acts can be attributed to one individual." *Id.* at 599, 36 S.W.3d at 329. *See Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000).

Mr. Cook again asserts that the two documents should not have been admitted into evidence because (a) the criminal activity described in each document is not substantially similar to the crime here, and (b) the State failed to prove that the documents were not remote in time. First, the degree of similarity between the prior bad acts and the present crime required for admission under Rule 404(b) may vary with the purpose for which the evidence is admitted. *Sasser v. State*, 321 Ark. 438, 447, 902 S.W.2d 773, 778-79 (1995) (citing 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 112, n. 4 and accompanying text (2d ed.1994) ("To be probative, prior criminal acts must require an intent similar to that required by the charged crime, although it is usually said that the prior crime need not closely resemble the charged crime."); 1 John W. Strong, *McCormick on Evidence* § 190, n. 31 and accompanying text (4th ed. 1992) ("The similarities between the act charged and the extrinsic acts [admitted to show the act charged was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge] need not be as extensive and striking as is required ... [to show *modus operandi*]")). Moreover, the trial judge is afforded considerable leeway when determining whether the circumstances of prior bad acts are sufficiently similar to the present crime of capital felony murder to justify proof of the former as probative of the defendant's intent to commit the predicate offense of the latter. *Sasser v. State, supra.* Thus, the trial court did not abuse its discretion in determining that because the two documents described the commission of an aggravated robbery and were authored by Mr. Cook, they were similar enough to the crime charged to meet Rule 404(b) requirements.

In support of his timeliness argument, Mr. Cook states that there was no proof as to when "Plan A and Plan B" was

authored. He also notes that one of the witnesses who testified on his behalf dated the song, "Give Up the Strilla," as being three to four years old. We have often recognized the superior position of the trial judge to determine the credibility of a witness in a suppression hearing. *Wright v. State*, 335 Ark. 395, 404, 983 S.W.2d 397, 401 (1999). The trial judge was not required to accept the credibility of Mr. Cook's witness; rather, evaluation of the credibility of that witness for admissibility purposes lay within the trial judge's sound discretion. Further, the witness testified during trial, thereby allowing the jury to consider the testimony when weighing the credibility of the evidence. Regardless of when the song or the two-step plan was written, other factors may be considered when evaluating timeliness. Both documents were found in the getaway vehicle three days after the crime. The song was found on top of other papers inside a notebook that was directly underneath the "Plan A and Plan B" document. Given the circumstances of the case at bar, we cannot say the trial court abused its discretion in admitting the rap song written by Mr. Cook and the "Plan A and Plan B" document, also authored by him. Both documents were independently relevant proof of Mr. Cook's intent to commit the underlying felony — aggravated robbery. We therefore conclude that both documents were admissible under the intent exception to Rule 404(b).

V. 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.

SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY *v.* Terry EASTER, Rhonda Johnson, Roy Johnson, and Ronald Taylor

01-68 45 S.W.3d 380

Supreme Court of Arkansas
Opinion delivered June 14, 2001

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Constance G. Clark* and *Laura J. Andress*, for appellant.

Osborne & Baker, by: *Barry D. Baker*, for appellees Roy and Rhonda Johnson.

Roy, Lambert & Lovelace, by: *James H. Bingham*, for appellee Ronald Andrew Taylor.

RAY THORNTON, Justice. Appellant, Southern Farm Bureau Casualty Insurance Company ("Farm Bureau"), brought this declaratory judgment action, seeking a declaration that it owed neither a duty to pay, nor a duty to defend, an action brought by third parties injured in an automobile accident with a vehicle driven by appellee, Terry Easter ("Easter"), its insured, because of certain exclusions from coverage contained in the policy. Farm Bureau moved for summary judgment, asking the court to find the policy exclusions valid as a matter of law, but the trial court did not grant this motion. Appellees, Roy and Rhonda Johnson ("the Johnsons"), were passengers in Easter's vehicle, and appellee, Ronald Taylor ("Taylor"), was the driver of the car involved in the collision with Easter's truck. Appellees contended that they were injured in the collision and filed a motion for summary judgment on the basis that the exclusionary clauses were void because of public policy. The trial court granted this motion. We conclude that the trial court was correct in denying appellant's motion for summary judgment, but erred in granting summary judgment to appellees.

Easter, the owner of a pickup truck, was insured by a liability policy issued by Farm Bureau. On November 12, 1998, Easter squealed his tires as he passed through a parking lot in Rogers and

attracted the attention of two police officers as he exited the lot, running a number of stop signs with the officers in pursuit, before colliding with a car driven by Taylor. Taylor and Roy and Rhonda Johnson, who were passengers in Easter's truck, were injured in the collision. The police apprehended and arrested Easter at the scene of the accident, charging him with numerous offenses.

On December 15, 1998, the Johnsons filed a tort claim against Easter in Benton County Circuit Court, claiming that Easter's negligence was the proximate cause of the collision and seeking damages for personal injuries they allegedly sustained in the accident. Taylor filed a similar claim against Easter.

On April 9, 1999, Farm Bureau filed this action for a declaratory judgment, seeking a determination that it had neither a duty to defend Easter, nor a duty to pay any judgment against him, on the grounds that the policy it issued to Easter contained exclusions for bodily injury caused by intentional acts of the insured and for bodily injury while the insured is involved in the commission of a felony or while seeking to elude lawful apprehension or arrest by any law enforcement official. These exclusions provide, as follows:

> COVERAGE EXCLUSIONS
>
> We will not pay for:
>
> 1. bodily injury or property damage caused by intentional acts or at the direction of you or any covered person. The expected or unexpected results of these acts are not covered.
>
> * * *
>
> 13. bodily injury or property damage while you or anyone using your auto with your permission is involved in the commission of a felony; or while seeking to elude lawful apprehension or arrest by any law enforcement official.

Notwithstanding these exclusions, appellees contend that the following language contained in the policy limits the applicability of these exclusionary clauses:

> When certified under any law as proof of future financial responsibility, and while required during the policy period, this policy shall comply with such law to the extent required but not more than our limit of liability.

The Johnsons and Taylor filed separate motions for summary judgment, asserting that the exclusionary clauses relied upon by Farm Bureau are void as against the public policy of our state and do not apply as a matter of law to the facts of this case. At the conclusion of the May 11, 2000, hearing on motion for summary judgment, the trial court granted the appellees' motions for summary judgment, determining that, as a matter of law, the exclusionary clauses are in direct violation of the public policy of requiring insurance coverage of motor vehicles before such vehicles may be licensed.[1]

The issue on appeal is whether the trial court erred in granting summary judgment to appellees on the basis that the two exclusions contained in the policy were void because they violate principles of public policy.

At the outset, we recognize that Ark. Code Ann. § 27-22-104 (Supp. 1999) requires minimum liability insurance coverage for a vehicle operated within our state,[2] and a violation of that requirement is a Class A misdemeanor under Ark. Code Ann. § 27-22-105 (Supp. 1999).

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[1] Section 1(a) of Act 988 of 1991 addresses the mandatory liability insurance requirements and provides that the General Assembly has determined that there is a large number of motor vehicles within this state that are not licensed and are in violation of Arkansas' motor vehicle licensing law and that the owners of these vehicles "have not complied with the mandatory insurance requirements, thereby increasing the potential financial catastrophe to others involved in the accident with them." *Id.*

[2] Ark. Code Ann. § 27-22-104 provides, in relevant part:

(a) (1) It shall be unlawful for any person to operate a motor vehicle within this state unless the vehicle is covered by a certificate of self-insurance under the provisions of § 27-19-107, or by an insurance policy issued by an insurance company authorized to do business in this state.

(2) Failure to present proof of insurance coverage at the time of arrest and a failure of the vehicle insurance database to show current insurance coverage at the time of the traffic stop creates a rebuttable presumption that the motor vehicle is uninsured.

(b) The policy shall provide as a minimum the following coverage:

(1) Not less than twenty-five thousand dollars ($25,000) for bodily injury or death of one (1) person in any one (1) accident;

(2) Not less than fifty thousand dollars ($50,000) for bodily injury or death of two (2) or more persons in any one (1) accident; and

(3) If the accident has resulted in injury to or destruction of property, not less than twenty-five thousand dollars ($25,000) for the injury to or destruction of property of others in any one (1) accident.

Id.

We summarized our standard of review for summary-judgment appeals in *Norris v. State Farm Fire & Casualty Company*, 341 Ark. 360, 16 S.W.3d 242 (2000), where we stated:

> In reviewing summary judgment cases, we determine whether 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 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 not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id. (citing Ark. R. Civ. P. 56; *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997)).

In light of our standard of review, we must first determine whether there are unresolved questions of fact that must be addressed before the applicability and validity of the exclusionary clauses can be resolved.

We consider each of the exclusionary clauses separately, beginning with the exclusion for bodily injury that occurs during the commission of a felony or while seeking to elude arrest or apprehension. Unfortunately, the facts are not resolved as to the issue whether either of these triggering circumstances actually occurred. Upon the arrival of the police at the scene of the accident, Easter was charged with multiple offenses, including reckless driving, fictitious vehicle tags, no proof of insurance, felony fleeing, driving while intoxicated, and disobeying a stop sign. These charges, if established, would appear to meet the criteria expressed for exclusion from coverage by the exclusionary clause under consideration, unless that clause is unenforceable on public policy grounds. However, the record reflects that all of these charges were *nol-prossed*, except the charge of felony fleeing, which, through a plea agreement with the State that was entered into by Easter, was amended and reduced to a misdemeanor charge of reckless driving. Easter was sentenced to six months unsupervised probation, conditioned upon his committing no new offenses, as well as seven days in the Benton County Jail, with credit for one day time served, and was assessed court costs of $150.00 and fines of $150.00.

Under these circumstances, a disputed issue of fact remains concerning the applicability of the exclusionary clause for bodily injury that occurs during the commission of a felony or seeking to

elude lawful apprehension or arrest. However, the trial court did not resolve this material question of fact. Only if the trial court finds that the facts presented in this case trigger the applicability of the exclusionary provision does it become necessary for the trial court to decide the subsequent question whether the policy provision excluding coverage for bodily injury or property damage based on those facts is invalid because of public policy considerations relating to our mandatory liability insurance laws. These questions should be resolved by the trial court.

We next address the issue posed by the other cited exclusionary clause relating to bodily injury or property damage caused by intentional acts. That clause further provides that both expected or unexpected results of such acts are excluded from coverage. We note that we have consistently limited the exclusion of accidental or unexpected results from coverage of liability policies. *See Norris, supra; Talley v. MFA Mut. Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981). However, in the case before us, it is clear that factual determinations must be made by the trial court before the validity of the exclusionary clause for an intentional act can be addressed. The trial court noted that genuine issues of material fact remained for decision at the end of the May 11, 2000, hearing on motion for summary judgment:

> THE COURT: Well, first of all, I do not think you can decide based on what we have this issue about the intentional act exclusion. I think it is an issue of fact as to whether or not he intentionally caused a collision with the automobile here. Whether or not he intentionally ran a stop sign is one issue, but the other issue is whether or not he intentionally caused a collision. I do not think you can imply that he intentionally caused a collision from the fact that he may have intentionally ran the stop sign, that he may have intentionally fled from the police as far as that's concerned.

It is clear from these comments that the trial court recognized that there were unresolved issues of material fact pertaining to the question whether there was an intentional act that would trigger the intentional act exclusion at issue in this case. The trial court recognized that there remained unresolved questions as to whether Easter intentionally caused a collision. If, upon further development of the case, it is determined that Easter intentionally caused the collision, thereby triggering this exclusionary clause, the remaining issue is whether the public policy of the state invalidates that exclusion. However, notwithstanding the trial court's recognition of this unresolved factual issue, it granted summary judgment to appellees.

Because there were unresolved genuine issues of material fact concerning whether the collision was an intentional act, we conclude that summary judgment was erroneously granted.

The order granting summary judgment must be reversed because there remain genuine issues of material fact relating to each of the exclusionary clauses, and, consequently, until such issues are resolved, we cannot decide the validity of the two exclusionary clauses under the public policy consideration of requiring liability insurance for the benefit of the public, as well as for the benefit of the named insured.

Reversed and remanded.

ARKANSAS GAME and FISH COMMISSION *et al. v.*
The Honorable John Norman HARKEY

00-1348 45 S.W.3d 829

Supreme Court of Arkansas
Opinion delivered June 14, 2001

James F. Goodhart and *James B. Watson*; and *Hill, Gilstrap, Perkins & Trotter, PC*, by: *G. Alan Perkins*, for petitioners.

Hurst Law Offices, by: *Q. Byrum Hurst, Jr.*, for respondent.

JIM HANNAH, Justice. Based upon an asserted lack of venue, the Arkansas Game and Fish Commission and certain commissioners (collectively referred to as "the Commission") seek a writ of prohibition to stop the Stone County Chancery Court from hearing a complaint for declaratory judgment and for injunctive relief filed against the Commission and certain commissioners. The Commission argues that such an action must be brought in Pulaski County pursuant to Ark. Code Ann. § 16-60-103(3) (1987), which provides that all actions against state boards, state commissioners, or state officers on account of official acts must be brought in Pulaski County, and Ark. Code Ann. § 16-60-101(d) (1987), which provides that "all actions against the board, commissioner, or state officer for or on account of any official act done or omitted to be done shall be brought and presented in the county where the defendant resides." The original plaintiffs, as respondents for Judge John N. Harkey, rely on Ark. Code Ann. § 25-15-207 (Repl. 1996) under the Arkansas Administrative Procedure Act, which provides that the validity or applicability of a rule of an administrative agency may be the subject of a declaratory-judgment action in circuit court in the county in which the plaintiff resides, or does business, or in Pulaski County. The issue of whether Ark. Code Ann. § 25-15-207 applies was rendered moot by respondents when they transferred the case from circuit court to chancery court because this statute requires the action be in circuit court. The equitable relief sought could only be obtained in chancery court in Pulaski County under venue set out in Ark. Code Ann. § 16-60-103 and Ark. Code Ann. § 16-106-101(d). The writ of prohibition is granted.

Facts

This case arises from adoption of hunting regulations by the Commission that prohibited the hunting of deer with dogs during the modern-gun season in certain deer-management zones during the 2000-2001 deer season. Plaintiffs below brought an action for declaratory judgment and injunctive relief in Stone County Circuit Court alleging that the regulations prohibiting the use of dogs were constitutionally deficient. The Commission filed a motion to dismiss asserting a lack of venue because, pursuant to statute, such suits must be brought in Pulaski County. Meanwhile, plaintiffs filed a petition for stay of enforcement in the Stone County action, which sought to enjoin or stay enforcement of the new regulations during the hunting season. A hearing was held on November 20, 2000, to consider a number of matters including the motion to dismiss and the petition for a stay of enforcement. At the hearing, counsel for the Commission raised the issue that the circuit court did not have jurisdiction to grant an injunction. The trial court asked whether plaintiffs desired to transfer to chancery. An oral motion to transfer was made by plaintiffs and granted by the trial court. From that point on the proceedings were in chancery. After hearing argument, the trial court took the motion to dismiss based on venue under advisement and granted the injunction or stay of enforcement of the rules at issue. The Commission then filed a petition for a writ of prohibition in this court alleging that the trial court was proceeding wholly without authority.

Mootness

We note that the deer-hunting season at issue ended in December of last year. The case would thus appear to be moot. However, as discussed in *Arkansas State Game and Fish Commission v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001), this is a case that fits under the exception for "cases that are capable of repetition yet evading review, being cases in which the justiciable controversy will necessarily expire or terminate prior to adjudication." *Id. (citing Cook v. State*, 333 Ark. 22, 968 S.W.2d 589 (1998)). *See also, Wright v. Keffer*, 319 Ark. 201, 890 S.W.2d 271 (1995). Because it is likely this situation will arise again, we will address the petition.

Writ of Prohibition

Petitioners seek a writ of prohibition to stop the chancery court from proceeding in this case based upon a lack of venue. The purpose of the writ of prohibition is to prevent a court from exercising a power not authorized by law when there is no adequate remedy by appeal or otherwise. *Patterson v. Isom*, 338 Ark. 234, 992 S.W.2d 792 (1999); *Young v. Smith*, 331 Ark. 525, 964 S.W.2d 784 (1998). *See also, State v. Nelson, Berry Pet Co.*, 246 Ark. 210, 438 S.W.2d 33 (1969). As has long been the law, a writ of prohibition is extraordinary relief which is appropriate only when the trial court is wholly without jurisdiction. *Arnold v. Spears*, 343 Ark. 517, 36 S.W.3d 346 (2001); *Bassett v. Bourland*, 175 Ark. 271, 299 S.W. 13 (1927). While jurisdiction is the power and authority of the court to act, venue is the place where the power to adjudicate is to be exercised. Venue has thus often been characterized as procedural rather than jurisdictional. *Mark Twain Life Ins. Corp. v. Cory*, 283 Ark. 55, 670 S.W.2d 809 (1984). However, even though procedural, this court has a long history of granting the writ when venue is improper as to a party. This is so because this court characterizes the venue issue as one of jurisdiction over the person, the improper assertion of which, in that instance, justifies issuance of the writ. *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995); *Prairie Implement Co. v. Circuit Court*, 311 Ark. 200, 844 S.W.2d 299 (1992); *International Harvester Co. v. Brown*, 241 Ark. 452, 408 S.W.2d 504 (1966).

Venue

Respondents argue venue was proper under the Administrative Procedure Act. Arkansas Code Annotated § 25-15-207 "Actions for declaratory judgments" provides:

> (a) The validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule, or its threatened application, injures or threatens to injure the plaintiff in his person, business, or property.
>
> (b) The action may be brought in the circuit court of any county in which the plaintiff resides or does business or in the Circuit Court of Pulaski County.
>
> (c) The agency shall be made defendant in that action.

> (d) A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

However, appellants assert they may not be sued in Stone County because Ark. Code Ann. § 16-60-103(3) and Ark. Code Ann. § 16-106-101(d) require suit in Pulaski County. Section 16-60-103(3) provides in pertinent part:

> The following actions must be brought in the county in which the seat of government is situated:
>
> . . .
>
> (3) All actions against the State and all actions against State boards. State Commissioners, or State Officers on account of their official acts....

Section 16-106-101(d) provides in pertinent part:

> ...all actions against the board, commissioner, or state officer for or on account of any official act done or omitted to be done shall be brought and prosecuted in the county where the defendant resides.

When the plaintiffs below moved to transfer the case to chancery, the Commission did not object. One might question whether the issue was thereby waived. It was not. The chancellor clearly did not believe there had been a waiver. Immediately after granting the motion, the chancellor stated, "Now that brings us down to the issue of whether venue is in Stone County or is in Pulaski County...." This was correct. The issue of venue had not been resolved by the transfer and was still pending. Venue is the geographic area where an action may be brought, such as a county. *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994). There is nothing about a transfer from circuit court to chancery court within a single venue that altered the petitioners' claim that venue in that county was improper. It is true that venue may be waived. If a party objecting to venue invokes the jurisdiction of the court by an act such as filing a third-party complaint, the objection to venue is thereby waived. *Arkansas Game & Fish Commission v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987). *See also, Waterman v. Jim Walter Corp.*, 245 Ark. 218, 431 S.W.2d 748 (1968). In fact, absent an objection, a trial court has the power to render a binding judgment even though venue is not proper. *Tortorich v. Tortorich*, 333 Ark. 15, 968 S.W.2d 53 (1998); *Prairie Implement Co. v. Circuit Court*, 311

Ark. 200, 844 S.W.2d 299 (1992). Here, however, a motion to dismiss based on a lack of venue was filed as the responsive pleading to the complaint and has preserved the issue to this time.

Arkansas Code Annotated § 25-15-207 by its express terms requires the declaratory-judgment action be in circuit court. The respondents made an oral motion to transfer this action from circuit court to chancery court during the hearing on November 20, 2000, because respondents were seeking an injunction, and circuit court does not have jurisdiction to issue an injunction. This court recently discussed the issue of the type of stay requested by the respondents in the context of duck-hunting regulations and found it was an injunction. *Sledge*, *supra*. Upon making the motion, the court stated, "Granted and it's now in chancery."

Article I of the Arkansas Constitution provides in relevant part that "[t]he seat of government of the State of Arkansas shall be and remain in Little Rock where it is now established." This court takes judicial notice that the official residence of the Arkansas Game and Fish Commission and its director is in Pulaski County. *See Liquefied Petroleum Gas Board v. Newton*, 230 Ark. 267, 322 S.W.2d 67 (1959). Pursuant to Sections 16-60-103 and 16-106-101, venue for this action lies in Pulaski County. The chancellor is without authority to act in this case, and the writ of prohibition is proper.

Writ of prohibition granted.

GLAZE, J., concurs.

Special Justices MARTHA HARRIMAN and JIM BURNETT join in this opinion.

BROWN and THORNTON, JJ., not participating.

TOM GLAZE, Justice, concurring. I concur, but write only to emphasize this court, in *Arkansas Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987), recognized the venue statute, Ark. Code Ann. § 16-60-103 (1987), applied in a suit against the Arkansas Game and Fish Commission.[1] In doing so, the

[1] The *Lindsey* opinion mistakenly cited Ark. Stat. Ann. § 27-602 (Repl. 1979), instead of Ark. Stat. Ann. § 27-603 (Repl. 1979), which is now codified at Ark. Code Ann. § 16-60-103 (1987). Section 27-603 and § 16-60-103 read the same and provide actions against state boards, state commissioners, or state officers are to be brought in Pulaski County.

Lindsey court stated that all actions against the Commission must be filed in Pulaski County.[2] As we also held recently in *Valley v. Bogard*, 342 Ark. 336, 28 S.W.3d 269 (2000), all actions against state officers which bring into play their official acts must be brought in Pulaski County. The underlying reasoning for establishing venue in Pulaski County is that it would not be practical or good public policy to permit state officials to be drawn away from their official duties and their official residence by suits filed in distant counties arising in connection with their official acts. *See Forrest City Machine Works v. Colvin*, 257 Ark. 889, 521 S.W.2d 206 (1975).

In short, I join in the majority court's granting the Commission's petition for writ of prohibition because this court has held venue is in Pulaski County when suit is brought against the Arkansas Game and Fish Commission. The Commission steadfastly objected to venue in Stone County and did nothing to waive venue.

Ronald J. DWORSHAK *v.* STATE of Arkansas

CR 01-604 45 S.W.3d 386

Supreme Court of Arkansas
Opinion delivered June 14, 2001

Lynn F. Plemmons, for appellant.

No response.

[2] The *Lindsey* court, however, held the Commission waived the issue of improper venue when it voluntarily asked affirmative relief by filing a third-party complaint.

PER CURIAM. Appellant, Ronald J. Dworshak, by and through his attorney, has filed a motion for a rule on the clerk. His attorney, Lynn F. Plemmons, admits in his motion that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by an attorney for a criminal defendant, is good cause to grant the motion. *See In re Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*).

The motion is therefore granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Timothy HOUFF *v.* STATE of Arkansas

CR 01-595 45 S.W.3d 386

Supreme Court of Arkansas
Opinion delivered June 14, 2001

Kelly J. Adkins, for appellant.

No response.

PER CURIAM. Appellant Timothy Houff, by and through his attorney, Kelly J. Adkins, has filed a motion for rule on the clerk. The record reflects that Appellant was convicted of two counts of residential burglary, one count of breaking and entering, and one count of theft of property after a bench trial that was held on September 11, 2000. On October 2, 2000, Appellant was orally sentenced to serve a total of forty-two months in the Arkansas Department of Correction. Appellant filed a notice of appeal on October 3, 2000. The judgment and commitment order, however, was not filed until October 18, 2000. Pursuant to Ark. R. App. P.-Crim. 2(b)(1), the notice of appeal is treated as timely filed on October 19, 2000.

On November 29, 2000, the trial court entered an order extending the time to file the record on appeal until May 17, 2001. The record was not tendered with this court's clerk until May 21, 2001. Appellant's counsel admits that the record was not timely filed; however, she does not accept responsibility for tendering the record late. Instead, she states only that the record was not ready until the afternoon of May 16, and that she was out of town on May 17.

This court will grant a motion for rule on the clerk in criminal cases when the attorney admits that the record was not timely filed due to an error on his or her part. *Beavers v. State*, 341 Ark. 649, 19 S.W.3d 23 (2000) (*per curiam*) (citing *Tarry v. State*, 288 Ark. 172, 702 S.W.2d 804 (1986) (*per curiam*)). A statement that it was someone else's fault or no one's fault will not suffice. *Id.* The attorney is responsible for filing the record and cannot shift that responsibility to the trial judge, the court reporter, the clerk of the lower court, or anyone else. *Id.* Because Ms. Adkins fails to accept responsibility for not filing the record within the required time, Appellant's motion must be denied.

Appellant's attorney shall file within thirty days from the date of this *per curiam* order a motion and affidavit in this case

accepting full responsibility for not timely filing the notice of appeal. Upon filing same, 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. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*).

Ramona MOIX-McNUTT *v.* Robert J. BROWN

01-283 45 S.W.3d 384

Supreme Court of Arkansas
Opinion delivered June 14, 2001

McNutt Law Firm, by: *Mona J. McNutt*, for appellant.

Cross, Gunter, Witherspoon & Galchus, P.C., by: *M. Stephen Bingham*, for appellee.

PER CURIAM. Appellant Ramona Moix-McNutt moves to supplement the record in this matter with the following items:

(a) A subpoena filed September 19, 2000, summoning the Honorable James G. Mixon to deposition.

(b) Appellee Brown's motion to stay discovery pending a decision on his motion to dismiss. The motion for stay was filed September 25, 2000.

(c) Appellant Moix-McNutt's response to the motion for stay. The response was filed on September 26, 2000.

Though Moix-McNutt designated the entire record in her notice of appeal, she claims that these items were not included. She further claims that discovery was stayed by order of the trial court.

Appellee Brown responds and asserts that the subpoena for Judge Mixon scheduling his deposition was not required to be included in the record. He further contends that the motion for stay and response were included in the record and, thus, a motion to supplement the record is not necessary. Finally, he claims that no order for a stay of discovery was entered by the trial court, but, rather, the appellant voluntarily postponed Judge Mixon's deposition.

Appellant Moix-McNutt replies that her copy of the record does not include the motion for stay and the response because her copy does not include pages 51 to 61. Moreover, she maintains that she only agreed to postpone Judge Mixon's deposition after the trial judge requested that she do so. She says that she expected the "request" to be entered as an order of the court and denies that she voluntarily postponed the deposition. She attaches to her reply letters from her counsel and a legal assistant that state that the trial court requested the postponement.

With respect to the motion for stay and the response, appellee Brown is correct that these items are in the record on file with the Clerk of this court. Accordingly, the motion to supplement the record with these items is denied.

With respect to the subpoena of Judge Mixon and the allegation that the trial court requested that the deposition of Judge Mixon be postponed, we remand the matter to the trial court to settle the record pursuant to Ark. R. App. P.—Civ. 6(d) and 6(e).

Kimberly BEAVERS *v.* STATE of Arkansas

CR 00-615 46 S.W.3d 532

Supreme Court of Arkansas
Opinion delivered June 21, 2001

Alvin D. Clay, for appellant.

Mark Pryor, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

W.H. "DUB" ARNOLD, Chief Justice. Appellant, Kimberly Beavers, was convicted as an accomplice to Joseph Hill and Tavoris Thomas of aggravated robbery and theft of property for the June 11, 1997, robbery of the Golden Corral Restaurant. She was sentenced pursuant to a sentence enhancement provision to life imprisonment in the Arkansas Department of Correction. We affirm her conviction and sentence.

Prior to being charged in the present case, appellant was charged on July 9, 1997, with capital murder and aggravated robbery for an offense that occurred at the Back Yard Burger on July 1, 1997. The State elected to prosecute the Back Yard Burger offense prior to the present offense, which occurred at the Golden Corral. Appellant was convicted by a jury in the Back Yard Burger case of first-degree murder and aggravated robbery. She was sentenced to two consecutive ten-year sentences in the Arkansas Department of Correction.

In the present case, the State used the two convictions in the Back Yard Burger case to enhance appellant's sentence. The felony information was amended on September 1, 1999, to include an allegation that appellant had previously been convicted of two serious felonies involving violence and that her sentence should be enhanced pursuant to Ark. Code Ann. § 5-4-501(d) (Repl. 1997). Appellant objected to the sentence enhancement, but the trial court determined that the enhancement was proper and, after appellant was convicted by a jury, the court sentenced appellant to life in the Arkansas Department of Correction on the aggravated-robbery count and merged the misdemeanor theft-of-property count. It is from this judgment and conviction that appellant now appeals.

For her appeal, appellant asserts the following points for reversal:

1) The trial court erred in failing to allow appellant to use prior testimony of a witness for rehabilitation after the State used prior testimony to impeach the witness;

2) The trial court erred in allowing the State to use two prior convictions to enhance appellant's sentence where the two prior convictions resulted from offenses committed after the present offense;

3) There was insufficient evidence to support the conviction of appellant since the only evidence connecting appellant to the offense was a statement by a co-defendant who later recanted his statement.

I. Sufficiency of the Evidence

Double jeopardy considerations require this Court to consider a challenge to the sufficiency of the evidence before other points are 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); *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998). When a defendant makes a challenge to the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State. *See Jones v. State, supra; Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998); *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998). Evidence, whether direct or circumstantial, is sufficient to support a conviction if it is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *See Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998). On appeal, this court does not weigh the evidence presented at trial, as that is a matter for the fact-finder; nor do we assess the credibility of the witnesses. *See id.*

In the instant case, the appellant asserts that the trial court erred in denying her motion for a directed verdict. However, appellant failed to properly preserve the motion for appeal. At the close of the State's case, defense counsel made the following motion:

> DEFENSE COUNSEL: Judge, at this time we'd make a motion for directed verdict based upon the insufficiency of the evidence. We don't feel that the State has established a prima facie case of theft of property and aggravated robbery.

In *Conner v. State, supra*, this Court said that:

> [i]n order to preserve a challenge to the sufficiency of the evidence, an appellant must make a specific motion for a directed verdict which advises the trial court of the exact element of the crime that the State has failed to prove. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998); *Dulaney v. State*, 327 Ark. 30, 937 S.W.2d 162 (1997). In contrast, a general motion that merely asserts that the State has failed to prove its case in inadequate to preserve the issue for appeal. *See, e.g., Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582

> (1997)(claiming that the Stated failed "to prove a prima facie case")[.]

Id., 334 Ark. at 464, 982 S.W.2d at 658. We hold that, having failed to make a specific motion for directed verdict, the appellant's sufficiency challenge was not properly preserved for appeal.

II. Prior Testimony of a Witness

The appellant asserts that the trial court erred in failing to allow her defense counsel to use former testimony to "rehabilitate" the witness, Joseph Hill, who was the appellant's codefendant in this case and another separate but related case (the Back Yard Burger case), after the State impeached Hill with his testimony from a former trial.

Joseph Hill had previously entered into a plea agreement with the State whereby he agreed to testify truthfully at appellant's trials in exchange for a life sentence in the Back Yard Burger case and the present case. He did testify in the Back Yard Burger case and made statements that appellant was involved in the offense committed at the Golden Corral (the instant case). He was later called as a witness in the State's first attempt to prosecute this case, which resulted in a mistrial. At that trial, Mr. Hill first attempted to exercise his Fifth Amendment rights, but then testified that appellant was not involved in the offense at the Golden Corral.

The State anticipated that Mr. Hill would again attempt to exercise his Fifth Amendment rights at the present trial and requested that the trial court treat him as "unavailable," should he attempt to exercise his rights and allow the State to use his testimony from the Back Yard Burger case. Over the appellant's objection, the trial court allowed the State to call Joseph Hill and to use his prior testimony if he refused to testify. When Mr. Hill was called by the State, he did exercise his Fifth Amendment rights, and appellant was permitted to cross-examine him before the State could use the prior testimony.

During cross-examination, Mr. Hill testified that appellant was not involved in the aggravated robbery and theft of property at the Golden Corral, just as he had testified at the previous trial, which had ended in a mistrial. During re-direct examination, the trial court permitted the State, over the appellant's objection, to use Mr. Hill's testimony from the Back Yard Burger case to impeach

him. When appellant attempted during re-cross-examination to use the testimony of Mr. Hill from the mistrial to attempt to rehabilitate him, the State objected and the trial court refused to allow appellant to use this prior testimony of Mr. Hill. Appellant asserts that the trial court erred in this regard. We disagree and hold that, as the witness's testimony was not in conflict with his second statement made in the first Golden Corral trial, it would not have been admissible. Further, the appellant, having obtained the testimony of the witness allegedly absolving her of responsibility for the crimes and a statement that the witness testified the same way in the first Golden Corral trial, is unable to show prejudice.

Appellant asserts that Hill, having pled guilty to the charges regarding the Back Yard Burger robbery and murder, as well as the Golden Corral robbery, had effectively waived his Fifth Amendment privilege against self-incrimination. Appellant's point is well-taken, and the trial court appears to have ruled in the appellant's favor in allowing cross-examination as the situation developed. *See Namet v. United States*, 373 U.S. 179 (1963)(a "plea of guilty to [a particular] charge would erase any testimonial privileges as to that conduct."); *Reina v. United States*, 363 U.S. 507 (1961)("Ordinary rule is that once a person is convicted of a crime he no longer has privilege against self-incrimination.")

The issue then becomes what, if any, former testimony would be allowed. Rule 802 of the Arkansas Rules of Evidence provides that "[h]earsay is not admissible except as provided by law or by these rules." However, Rule 801(d) provides, in pertinent part, the following:

> (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. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000); *Henderson v. State*, 311 Ark. 398, 844 S.W.2d 360 (1993). For this rule to apply, the prior consistent statement must be made before a motive to falsify has

arisen or before the witness would foresee its effects upon the fact issue. *See Henderson v. State, supra.*

After Hill indicated that he would not testify in this case, appellant's counsel cross-examined him, and he explained the testimony in the Back Yard Burger case that inculpated the appellant in both that case and the Golden Corral case. In addition to testifying *about* his testimony in the Back Yard Burger case, Hill also *testified* regarding the Golden Corral robbery in the following manner:

> DEFENSE COUNSEL: Do you recall testifying in another proceeding involving Golden Corral, case number 97-3182, the last time you were here?
>
> WITNESS: No sir.
>
> DEFENSE COUNSEL: Okay. Do you ever recall testifying that Ms. Beavers did not drive you to the Golden Corral?
>
> WITNESS: Can you repeat the question?
>
> DEFENSE COUNSEL: Do you ever recall giving testimony that Ms. Beavers did not participate in the robbery of the Golden Corral the last time that you were here?
>
> WITNESS: Yes, sir.
>
> DEFENSE COUNSEL: That testimony was different from the testimony that you initially gave, wasn't it?
>
> WITNESS: Yes, sir.
>
> DEFENSE COUNSEL: And the last time you were here, you said that Ms. Beavers had absolutely nothing to do with it, is that correct?
>
> WITNESS: Yes, sir.
>
> DEFENSE COUNSEL: In fact, in your second statement, the one after the first, you said that you got to the Golden Corral on your own, didn't you?
>
> WITNESS: Yes, sir.

DEFENSE COUNSEL: And that statement was certainly different from the first, wasn't it?

WITNESS: Yes, sir.

DEFENSE COUNSEL: In the second statement, you said that you drove the car, didn't you?

WITNESS: Yes, sir.

* * *

DEFENSE COUNSEL: In the second statement, you basically said that you were lying in that initial statement, is that correct?

WITNESS: Yes, sir.

DEFENSE COUNSEL: You said you were lying because Ms. Beavers did not drive the car and she did not participate in the aggravated robbery. Those were your words, correct?

WITNESS: Yes, sir.

With the witness having testified to the version of events consistent with his testimony (recantation) in the first trial of this matter, there then existed no reason for the appellant to use the testimony. Moreover, appellant's counsel questioned Hill who, as a result, testified that the appellant did not participate in the Golden Corral robbery. It seems clear that appellant obtained the exact testimony she wanted; Hill testified that she did not participate in the Golden Corral robbery.

A party cannot complain of getting what they want. *See Echols v. State*, 326 Ark. 917, 956, 936 S.W.2d 509, 528 (1996), *cert. denied*, 520 U.S. 1244 (1997). Here, the jury heard and was able to evaluate the State's evidence and that of the appellant as to how the Golden Corral robbery occurred. Even assuming that Hill's former testimony in the Back Yard Burger case was only admissible to impeach the version he gave at the second trial, appellant's counsel did not request any limiting instruction, and the jury could consider the former testimony as substantive evidence. *See* Ark. R. Evid. 105; *Frazier v. State*, 323 Ark. 350, 915 S.W.2d 691 (1996).

In short, because appellant was able to obtain the testimony she wanted, that being that she did not participate in the

Golden Corral robbery, she is unable to show how the rulings by the trial court on this point prejudiced her in any way. We, therefore, find no error on this point.

III. Convictions for Offenses that Occurred after the Charged Offense used for Enhancement

The appellant argues that she is not subject to the enhanced range of punishment under Ark. Code Ann. § 5-4-501(d)(1) because the offenses on which her prior violent felony convictions are based occurred *after* the offense for which she was convicted in the instant case. This argument is without merit.

In this case, the State sought enhanced punishment under the provisions of Ark. Code Ann. § 5-4-501. The State put the appellant on notice that it would seek sentence enhancement under both the subsection involving multiple felonies and the more severe subsection involving multiple violent felonies. *See* Ark. Code Ann. § 5-4-501(a)(1) and (d)(1).

There is no question that the appellant's convictions for murder and aggravated robbery stemming from the Back Yard Burger case, occurred *after* the Golden Corral robbery, which is the subject of *this* case. We have held that the provisions of the Arkansas Habitual Criminal Statute, to which Ark. Code Ann. § 5-4-501(d)(1) is a relatively recent addition, are not deterrent, but punitive in nature, so that a prior conviction, *regardless of the date of the crime*, may be used to increase punishment. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991); *see also Washington v. State*, 273 Ark. 482, 621 S.W.2d 216 (1981).

The appellant's sentence was enhanced under Ark. Code Ann. § 5-4-501(d)(1), which states the following:

> (d)(1) A defendant who is convicted of a felony involving violence enumerated in subdivision (d)(2) of this section and who has previously been convicted of two (2) or more of the felonies involving violence enumerated in subdivision (d)(2) of this section shall be sentenced to an extended term of imprisonment, without eligibility except under § 16-93-1302 for parole or community punishment transfer[.]

The statute plainly speaks in terms of the *conviction* date of the offenses and not the dates of the actual crimes. The date of the

offense is immaterial, and this has been evidenced in other aspects of sentencing, as well. *See Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999)(use of prior-violent-felony evidence admissible regardless of whether it pre- or postdated the offense being tried.)

In short, with the date of the offense being immaterial to the application of the code provision that permits enhancement for prior convictions with offenses committed subsequent to the charged offense, we hold that the trial court did not err in enhancing appellant's sentence accordingly.

IV. Rule 4-3(h) Compliance

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

Affirmed.

Linda TAYLOR *v.* Chris TAYLOR

00-926 47 S.W.3d 222

Supreme Court of Arkansas
Opinion delivered June 21, 2001

Lambda Legal Defense & Education Fund, Inc., by: *Patricia M. Logue* and *David S. Buckel*; and *Sullivan Law Firm, P.L.L.C.*, by: *Gary L. Sullivan*, for appellant.

No response.

TOM GLAZE, Justice. This custody case began in 1998, when Linda Taylor was granted a divorce from Chris Taylor. Originally, the chancery court awarded the Taylors joint custody of their two minor children, Jessica and Megan. Megan is the youngest child, and suffers from a developmental disability that

appears to be either a form of autism or attention deficit disorder. In 1999, Chris Taylor petitioned for custody of the girls. He alleged that Linda was engaged in a romantic relationship and cohabitating with Christina Richards. Apparently, Linda had been romantically involved with Richards since the divorce, and the two had purchased a home together.

On August 5, 1999, the chancery court issued a temporary custody order, which contained a non-cohabitation clause that ordered Linda not to permit Christina Richards to remain in residence or to be an overnight guest in the home when the children were present. After the temporary custody order issued, Linda made arrangements for Christina to continue to live in the home and provide care for the children on the nights that Linda worked overnight shifts.

Before the hearing on Chris Taylor's petition for custody, he also moved for the chancellor to hold Linda in contempt of the temporary order. Linda filed a petition for custody to remain with her and moved for a modification of the temporary order to allow Christina Richards to live in the home with her and the children, and continue in her role as a secondary caregiver. Linda also filed a motion for a continuance to allow time for further testing of Megan's developmental disorder to determine whether it was a form of autism. No continuance was granted.

On April 10, 2000, at a hearing on the motions and custody petitions, the court heard evidence from each party, as well as the expert testimony of Dr. Deyoub, a clinical psychologist appointed by the court at Linda's request. Linda attempted to present evidence from two other experts, Dr. Cheralyn Powers, a clinical psychologist, and Anna Vollers, an expert in the care of autistic children. Powers's and Vollers's testimonies were largely foreclosed by the chancellor's rulings on objections from opposing counsel, but Linda proffered her experts' testimonies.

At the conclusion of the hearing, the chancellor adopted Dr. Deyoub's recommendation that primary custody remain with Linda, conditioned upon Christina Richards's removal from the household. Although the court ruled from the bench that Christina must move out immediately, the court modified that ruling, upon Linda's request, to allow an additional thirty days for compliance. The court held Linda in contempt for violating the non-cohabitation clause in its temporary custody order, but withheld punishment pending her compliance with the final order. Despite the

grant of custody in her favor, Linda appealed the custody order, including procedural and evidentiary rulings of the chancellor and his finding of contempt. Linda's arguments are the only ones submitted for review, since Chris Taylor chose not to respond or participate in this appeal.

First, it is important to note the level of deference that a reviewing court will give a chancery court in its *de novo* review of child custody cases. The chancellor's findings will not be reversed unless they are clearly erroneous. *See Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999). This court has held that there is no other case in which the superior position, ability, and opportunity of the chancellor to observe the parties carries a greater weight than one involving the custody of minor children. *See, e.g., Jones v. Strauser*, 266 Ark. 441, 585 S.W.2d 931 (1979). The best interest of the child is the polestar in every child-custody case; all other considerations are secondary. *Id.*

On appeal, Linda argues that Christina's presence in the household is in the best interests of the children. However, this argument appears largely moot because the custody order allows Christina to remain as a caretaker for the children on the nights that Linda has to work, conditioned upon the approval of Dr. Deyoub and Chris Taylor. The circumstance with which the chancellor took issue was Christina's continued presence as a resident in the household, not Christina's caretaker abilities. Arkansas's appellate courts have steadfastly upheld chancery court orders that prohibit parents from allowing romantic partners to stay or reside in the home when the children are present. *See Campbell*, 336 Ark. at 389 (this court and the court of appeals have never condoned a parent's promiscuous conduct or lifestyle when such conduct has been in the presence of a child); *see also Ketron v. Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1995). The *Campbell* court stated that the purpose of the overnight-guest order is to promote a stable environment for the children and is not imposed merely to monitor a parent's sexual conduct. 336 Ark at 389. Linda does not seek to overturn these decisions, but instead tries to distinguish them from the facts here. For example, Linda asserts no evidence has been presented that she has engaged in promiscuous or illicit behavior with Christina Richards in the presence of the children. Linda's argument, however, misses the point. As emphasized by our court's earlier decisions, the trial court's use of the non-cohabitation restriction is a material factor to consider when determining custody issues. *Id.* Such a restriction or prohibition aids in structuring the home place so as to reduce the possibilities (or opportunities) where children may be

present and subjected to a single parent's sexual encounters, whether they be heterosexual or homosexual.[1]

Linda has failed to demonstrate how the chancellor erred in finding that it was against the children's best interests for her to remain living in an admittedly romantic relationship with Christina while residing in the home with the children present. Once again, Arkansas case law simply has never condoned a parent's unmarried cohabitation, or a parent's promiscuous conduct or lifestyle, when such conduct is in the presence of a child. *See Campbell, supra*, and the cases cited therein. The chancellor here acted within his authority and was not clearly erroneous in determining that it was not in the children's best interests for their primary custodian to continue cohabitating with another adult with whom she admitted being romantically involved.

In her next argument on appeal, Linda alleges certain procedural and evidentiary errors that she contends the chancellor committed. First, Linda contends that the chancellor erred in refusing to grant a continuance. Linda desired to delay the final custody hearing until Megan could undergo scheduled diagnostic testing to better determine whether the source of her developmental disorder was a form of autism. Although there is no ruling in the record, the chancellor conducted the final hearing as scheduled on April 10, 2000. The grant or denial of a continuance is at the discretion of the trial court, and is only reviewed for abuse of that discretion. *See Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995). Linda concludes that, given the relevance of the issue of the care required by Megan, it was an abuse of discretion to deny the continuance. However, she fails to demonstrate how more evidence as to Megan's care would have affected the court's consideration on the cohabitation issue or the outcome of the decision on that issue. *Id.*

Linda further argues that the chancellor abused his discretion in sustaining an objection to expert testimony by Anna Vollers, the Director of the Arkansas Autism Society, on autistic disorders and the care required for autistic children. When counsel for Chris Taylor objected on the basis of relevance, Linda argued that the

[1] In oral argument, Linda attempted to raise an Equal Protection issue that children would fare as well with homosexual couples as they would with heterosexual ones, but that argument was not raised and ruled on below. Linda was required to raise those constitutional arguments and obtain a ruling at trial in order to argue them on appeal. *See Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999); *Stewart v. Winfrey*, 308 Ark. 277, 282, 824 S.W.2d 373, 376 (1992).

testimony was relevant to the determination of Megan's best interest in the level of care and supervision an autistic child required, and the advantages of being cared for by two adults in the home. Based upon the lack of a final diagnosis of Megan's condition, the chancellor excluded Linda's expert from testifying, but allowed her to proffer that testimony for the record.

Evidentiary rulings are a matter of discretion, and are reviewed only for abuse of that discretion. *See Ozark Auto Transportation, Inc. v. Starkey*, 327 Ark. 227, 937 S.W.2d 175 (1997). Although two regular caregivers may be desirable in any child custody case, Linda fails to demonstrate how this evidence was relevant to the cohabitation decision, especially in light of the fact that the chancellor was open to the possibility of Christina providing care for the children on the nights that Linda works.

Linda next addresses her argument to the chancellor's exclusion of testimony by a clinical psychologist, Dr. Powers, an expert in the area of same-sex parenting. The chancellor sustained Chris Taylor's objection to Dr. Powers's use of research and statistics compiled by others in her testimony, but the court permitted Linda to proffer the evidence. She again argues that the chancellor abused his discretion by refusing her efforts to refute Dr. Deyoub's opinions on same-sex parenting, by allowing Dr. Powers to testify as to research by others. Linda's argument on appeal, that expert testimony may be based upon facts reasonably relied on by experts in the field or upon learned treatises, is correct. *See* Ark. R. Evid. 703, 803(18). However, in view of the fact that Linda retained primary custody, and because the focus of the court's ultimate ruling was not on what type or level of childcare was desirable or required, but upon Christina Richards's continued cohabitation in the household, the chancellor's exclusion of expert testimony on same-sex parenting was not prejudicial error.

Finally, Linda argues that the chancellor's finding of contempt was in error because she had complied with the non-cohabitation clause contained in the temporary custody order by making arrangements so that she and Richards never slept in the home on the same night. From Linda's and Christina's own admissions at the final hearing, and despite the living arrangements that she devised in reaction to the non-cohabitation order, Linda still considered Christina to be a resident of the household and allowed her to remain living there overnight in the presence of the children, three nights a week when Linda worked overnight shifts.

As the chancellor noted in finding Linda in contempt of his order, the temporary order clearly mandated that Christina be removed from the same household as the children and forbade Linda from sharing the residence and living arrangements with Christina when the children were present. Christina's continued residence in the home was a violation of the express terms of the non-cohabitation clause, and the chancellor did not err in holding Linda in contempt. It is important to note that the custody order conditions Linda's continued custody on compliance with this provision and allows custody to revert to Chris Taylor should he demonstrate that Linda has failed to comply with the non-cohabitation order.

Affirmed.

Vincent Anthony SANSEVERO *v.* STATE of Arkansas

CR 00-1397 45 S.W.3d 840

Supreme Court of Arkansas
Opinion delivered June 21, 2001

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

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

ROBERT L. BROWN, Justice. In this appeal, appellant Anthony Vincent Sansevero raises the sole issue of whether the evidence presented by the State was insufficient to convict him of battery in the second degree. We agree that it was,

and we reverse the judgment of conviction for second-degree battery and remand.

On July 22, 1999, the victim, eleven-year-old K.S., was babysitting in Little Rock for the children of Karen McCammon, who are named Robert and Marie. At the time, Robert was age six and Marie was age four. K.S. stated that it was her first time to babysit in another person's home, but added that the McCammon's house was very near to her home. K.S. testified that she was babysitting in the daytime, while Ms. McCammon went to a doctor's appointment for approximately an hour.

Ms. McCammon left for her doctor's appointment at about 8:22 a.m., and K.S. and the two children sat down to watch television. The doorbell rang, and K.S. answered the door. It was a man, and he asked for a drink of water from the hose outside. K.S. agreed and closed the door. About five minutes later, a man rang the doorbell again. It was Sansevero. He also asked for water, and this time K.S. went to the kitchen to get him some water. She returned to the door and gave him a plastic cup filled with water. At that time, Sansevero asked if he could use the telephone. K.S. replied, "No, I'm sorry." Sansevero then pushed his way past K.S. into the house and locked the door behind him. He grabbed K.S. by the neck and pushed her up the stairs and into a bedroom. K.S. testified that she did not scream or yell, and that the children did not see her being pushed up the stairs.

Once in the bedroom, Sansevero closed the door. K.S. stated that she was crying at this point. He ordered her to take off her clothes, and she said, "No." He then ordered her again to take off her clothes and tried to do so himself but was not able to get her clothes off. He then hit her across the face. Sansevero next asked, "Where do your parents keep the money?", and she responded, "I don't know. This isn't my house." K.S. stated that Sansevero went downstairs at that time, and she followed because she was not sure what he was going to do and the children were downstairs. He forced her a second time up the stairs, and this time, he undressed her and raped her.

During the rape, one of the children, Robert, came to the bedroom door and asked K.S. to play a video tape for the children. K.S. stated that when Robert knocked on the door, Sansevero got off of her and began to put his clothes back on. Sansevero told K.S. to get dressed and to clean up. While she was getting dressed, Sansevero told her, "If you tell anybody, I'm going to kill you."

K.S. testified that she went downstairs to sit with the children. When Sansevero came down, he repeated the threat and said, "If you tell anyone, I'll find you and I'll kill you." He then left.

Ms. McCammon arrived home approximately five to ten minutes later and took K.S. home. K.S. told her mother what had happened, and her father called the Little Rock Police Department. K.S. subsequently gave the clothes she was wearing to police officers and went to Arkansas Children's Hospital for a sexual-assault examination. At the crime scene, police officers obtained evidence, including the plastic cup that Sansevero drank from. The police officers were able to lift fingerprints from that cup, which matched the fingerprints of Sansevero. The investigation also revealed other DNA evidence, including semen, linking Sansevero to the crime. He was arrested and charged with rape, residential burglary, terroristic threatening, and second-degree battery. Enhancement of any sentence was requested due to his having been convicted of more than four previous felonies.

Sansevero was tried by a jury and convicted on all counts. Proof of five prior convictions was introduced, and he was sentenced to life imprisonment for rape, forty years for residential burglary, fifteen years for terroristic threatening, and fifteen years for battery in the second degree.

Sansevero only appeals his conviction for second-degree battery. He argues that there was insufficient evidence to support a conviction for battery in the second degree because the State failed to prove by substantial evidence that he knew the victim was less than thirteen years of age at the time of the offense. This charge arose from the testimony of K.S. that when she resisted his orders to take off her clothes, he slapped both sides of her face with his hand, causing bruising. Sansevero contends that he was charged with causing physical injury to K.S., who he knew to be twelve years of age or younger. He denies that he knew K.S.'s age.

Second-degree battery is defined in Ark. Code Ann. § 5-13-202(a)(4)(C) (Supp. 1999), and reads in pertinent part:

> (a) A person commits battery in the second degree if:
>
> . . . .
>
> (4) He intentionally or knowingly, without legal justification, causes physical injury to one *he knows to be*:

. . . .

> (C) An individual sixty (60) years of age or older or *twelve (12) years of age or younger*[.]

(Emphasis added.) The jury was instructed on this specific definition of battery and returned a guilty verdict. No evidence was presented by the State that Sansevero knew K.S. was twelve years old or younger.

Sansevero directs this court's attention to an opinion by the court of appeals in *Hubbard v. State*, 20 Ark. App. 146, 725 S.W.2d 579 (1987). In *Hubbard*, the issue presented was whether the defendant knew the victim to be sixty years of age or older under the second-degree battery statute. The court of appeals concluded that the State had to prove that the defendant had actual knowledge of the victim's age under the language of the statute. The court said:

> The plain wording of § 41-1602(1)(d)(iii) [now § 5-13-202(a)(4)(C)] imparts that knowledge on the part of the defendant must be personal to him. The statute does not provide a substitute or explanatory equivalent. We believe the test is whether from the circumstances in the case at bar, appellant, not some other person or persons, knew that his victim was sixty years of age or older. A different result by this court could have been reached had the General Assembly defined "knows to be" in the above statute to include one who has information that would lead an ordinary, prudent person faced with similar information to believe that the information is fact.

Hubbard, 20 Ark. App. at 148-149, 725 S.W.2d at 580-581.

The State counters this by arguing that K.S.'s physical appearance, standing alone, was circumstantial evidence of her age and constituted substantial evidence that Sansevero knew that K.S. was twelve or younger. The State cites the court to *Clark v. State*, 246 Ark. 876, 440 S.W.2d 205 (1969), where Justice Fogleman, in a concurring opinion, wrote that age may be proved in many different ways such as by the appearance of the individual to the jury. The State contends that the jury could infer that Sansevero knew of the victim's age when he battered her based on her appearance and her obvious youth. *See also Hadley v. State*, 322 Ark. 472, 910 S.W.2d 675 (1995) (jury's observation of defendant at trial was sufficient circumstantial evidence that he was more than sixteen years old).

It falls our lot to interpret the language of § 5-13-202(a)(4)(C) and specifically what the General Assembly intended by the phrase "knows to be." We strictly construe criminal statutes and resolve any doubts in favor of the defendant. *Hagar v. State*, 341 Ark. 633, 19 S.W.3d 16 (2000); *Graham v. State*, 314 Ark. 152, 861 S.W.2d 299 (1993). It is also axiomatic that in statutory interpretation matters, we are first and foremost concerned with ascertaining the intent of the General Assembly. *State v. Havens*, 337 Ark. 161, 987 S.W.2d 686 (1999). In cases of statutory interpretation, we give words their ordinary and usually accepted meaning. *Hagar v. State, supra; Bush v. State*, 338 Ark. 772, 2 S.W.3d 761 (1999). In the case before us, the General Assembly has expressly provided that in order to commit second-degree battery, it is necessary that Sansevero knew K.S. to be age twelve or younger. The language of the statute is clear and unmistakable and differs significantly from statutes such as the rape statute which merely provide that the victim be a certain age and not that the defendant know what that age is. *See, e.g.,* Ark. Code Ann. § 5-14-103(a)(4) (Repl. 1997). Moreover, the General Assembly has expressly provided that with respect to sexual offenses involving children below the age of fourteen, it is no defense that the defendant did not know the age of the child. *See* Ark. Code Ann. § 5-14-102(b) (Repl. 1997). No comparable language is contained in the second-degree battery statute.

We take note of the fact that since the court of appeals handed down *Hubbard v. State, supra*, in 1987, the General Assembly has amended § 5-13-202 in three legislative sessions. Despite this focus on the statute, the General Assembly has failed to address the issue of the "knows to be" language which was pointed out to that body in the *Hubbard* decision. Hence, we can only conclude that the General Assembly has intended to retain the "knows to be" language, as interpreted in *Hubbard*.

We, therefore, hold that the State failed to establish proof of an essential element of the second-degree battery offense, which was Sansevero's actual knowledge of the age of K.S. We modify the conviction to battery in the third degree, a Class A misdemeanor, which has no knowledge-of-age requirement, and assess the maximum term of one year imprisonment in the county jail. *See* Ark. Code Ann. §§ 5-4-401(b)(1), 5-13-203 (Repl. 1997). We credit Sansevero, however, with the time served of 390 days, leaving no time to be served on this judgment of conviction.

This appeal did not involve Sansevero's convictions for rape, residential burglary, and terroristic threatening. Thus, the sentences

assessed in connection with those convictions will remain in place. The judgment of conviction for second-degree battery is reversed and modified and this matter is remanded for entry of a judgment consistent with this opinion.

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

Reversed and remanded.

CITY of VAN BUREN, Arkansas *v.* Curtis SMITH

01-73 46 S.W.3d 527

Supreme Court of Arkansas
Opinion delivered June 21, 2001

Hardin, Jesson & Terry, PLC, by: *J. Rodney Mills* and *J. Leslie Evitts, III*, for appellant.

Ray Hodnett, for appellant.

ANNABELLE CLINTON IMBER, Justice. Curtis Smith, a fifteen-year veteran of the Van Buren Fire Department, was discharged from his position as a firefighter on January 29, 1999, by the Mayor of Van Buren. The City of Van Buren asserted that Mr. Smith's termination was the result of three separate events that occurred on January 27, 1999, in which Mr. Smith acted inappropriately toward superior officers and thereby violated department rules. The termination was upheld by the Van Buren Civil Service Commission. On appeal to the circuit court, the circuit judge took additional testimony and found that, while Mr. Smith had violated the department's rules and regulations, his inappropriate behavior on January 27, 1999, was not the actual reason for the termination, but merely a pretext; rather, Mr. Smith's termination actually resulted from his public criticism of the Van Buren Police Department's handling of a drowning incident in October of 1998. In reversing the decision of the Van Buren Civil Service Commission,

the circuit court held that Mr. Smith should have been suspended for thirty days without pay and that he should be reinstated as a fireman. It is from this order that the City of Van Buren appeals. We affirm the circuit court.

I. Standard of Review

We review the findings of the circuit court to determine whether they are clearly against the preponderance of the evidence. *Tovey v. City of Jacksonville*, 305 Ark. 401, 808 S.W.2d 740 (1991); *Dalton v. City of Russellville*, 290 Ark. 603, 607, 720 S.W.2d 918 (1986). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Foundation Telecommunications v. Moe Studio*, 341 Ark. 231, 16 S.W.3d 531 (2000).

II. Sufficiency of the Evidence

For its first point on appeal, the City of Van Buren argues that the preponderance of the evidence does not support the circuit court's decision to reverse the civil service commission and reinstate Mr. Smith as a firefighter. "A right of appeal by the city or employee is given from any decision of the commission to the circuit court within whose jurisdiction the commission is situated." Ark. Code Ann. § 14-51-308(e)(1)(A) (Repl. 1998). The circuit court reviews decisions of the civil service commission *de novo* and has jurisdiction to modify the punishment fixed by the commission even if the court agrees that the officer violated department rules and regulations. *City of Little Rock v. Hall*, 249 Ark. 337, 459 S.W.2d 119 (1970). *See also Tovey v. City of Jacksonville, supra.* The circuit court may modify the punishment even if the evidence it relies upon in doing so was not presented to the commission. *City of Little Rock v. Hall, supra.*

According to testimony before the Van Buren Civil Service Commission, Mr. Smith attended a training meeting conducted by Captain Teasie Harris on January 27, 1999. At that meeting, Capt. Harris was explaining the department's new standard operating procedure, which called for the use of one-and-one-half-inch lines to combat vehicle fires rather than one-inch lines. During this explanation, Mr. Smith exclaimed loudly that "[t]hat was the stupidest G** d***ed thing he had ever heard." Although Capt.

Harris informed Mr. Smith that there would be no argument concerning the new procedure and attempted to resume training, Mr. Smith continued to argue with Capt. Harris. Both Capt. Harris and another witness, Leslie Stevenson, testified that Mr. Smith's comment was directed toward Capt. Harris and that Mr. Smith's outburst was disrespectful and degrading to Capt. Harris and to the department. Mr. Stevenson admitted that foul language was commonly used by members of the department, but he also stated that such language was never directed toward superior officers.

Later that same day, Captain Fred Trent was using the telephone at the fire station when Mr. Smith's verbal banter became so loud that Capt. Trent had to leave the room to complete his conversation. Mr. Smith became even louder, thereby forcing Capt. Trent to return to the room on two separate occasions to ask Mr. Smith to be quiet. Battalion Chief Gary Huffman, who witnessed the incident, testified that Mr. Smith was using obscene language, "razzing" Capt. Trent about his telephone usage, and being generally disrespectful to his superior officer.

Finally, that same day, Chief Dennis Gilstrap of the Van Buren Fire Department undertook to speak with Mr. Smith about these instances of insubordination. While he was attempting to do so, Mr. Smith continually interrupted him with questions such as "[w]hat in the h*** did I do?" and "[w]ell, what in the f*** did I do?" Chief Gilstrap felt that Mr. Smith was deliberately attempting to make him angry and twice instructed Mr. Smith to "shut up." Mr. Smith continued his antagonism until Chief Gilstrap finally ordered him to go home. Chief Gilstrap suspended Mr. Smith without pay until further notice and recommended to the Mayor of Van Buren that Mr. Smith's employment be terminated. Mayor John Riggs accepted the chief's recommendation and terminated Mr. Smith's employment for violations of the Van Buren Fire Department Rules and Regulations, Sections 15 and 44.

The specific sections that Mr. Smith was accused of violating provide as follows:

> SECTION 15: Officers and members are cautioned that the use of obscene, immoral, profane or disrespectful language, agitating and acts tending to create dissension in the department, or attempt to cast unfavorable reflections upon any members of the department will not be tolerated.

SECTION 44: The following acts, infractions or violations of the rules and regulations shall be deemed, upon conviction, as sufficient cause for separation from the service.

1. Willful disobedience to orders.

3. Disrespect or insolence toward a superior officer.

* * *

7. Conduct unbecoming an officer or member of the department.

* * *

9. Agitating or creating dissension in any manner whatsoever to create dissatisfaction with any member or members, or ill feeling of any kind.

The Van Buren Civil Service Commission unanimously upheld the mayor's decision. Mr. Smith then appealed the commission's determination to the Circuit Court of Crawford County. The circuit court allowed Mr. Smith to present additional evidence pertaining to an incident at Lake Lou Emma on October 23, 1998, wherein Mr. Smith attempted to save the life of a drowning woman. Mr. Smith became disgruntled when he arrived at Lake Lou Emma in response to an emergency call and observed two police officers and the fire marshall standing nearby watching a woman floating in the lake. Mr. Smith asserted that these officials had been on the scene for at least fifteen minutes without attempting to help her and that, when he entered the water in an attempt to save her from drowning, they offered him no assistance. Mr. Smith was able to successfully remove the woman from the water, but she subsequently died.

Unhappy with the behavior of the officers on the scene, Mr. Smith wrote a letter to Van Buren's mayor, fire chief, police chief, and city council members, charging that the officers "committed a severe dereliction of duty bordering on the criminal and should be subjected to disciplinary measures fitting for such gross incompetence." Robert "Bob" Gilstrap, who was Chief of the Van Buren Fire Department at the time of the Lake Lou Emma incident, testified that he "felt like [Mr. Smith] had probably stepped over a line, and he had himself in a position that could cause some

problems" as a result of his letter to the various city officials. Bob Gilstrap was the fire chief for about seven years, beginning in 1992. He testified that even before he became chief, there had been talk about discharging Mr. Smith because of conflicts between Mr. Smith and the previous fire chief. He further testified that he would have had grounds during his own term as fire chief to terminate Mr. Smith's employment based upon violations of department rules, but that he considered Mr. Smith to be a good emergency-service worker. According to Bob Gilstrap, "one of [Mr. Smith's] shortcomings was that he was strong-willed and opinionated. . . . He had an opinion on just about everything, and he usually stated it. That would put him in conflict with his superiors and the former Chief had problems with him."

On January 1, 1999, Dennis Gilstrap succeeded his brother, Bob Gilstrap, as Chief of the Van Buren Fire Department. Within one month of assuming his duties as fire chief, Dennis Gilstrap recommended that Mayor Riggs discharge Mr. Smith. According to one witness, Bob Gilstrap disclosed that Dennis Gilstrap had made a statement, shortly after the drowning incident in October 1998, that Mr. Smith's "days were numbered" at the fire department because of his letter complaining about the police officers' actions at Lake Lou Emma. Chief Dennis Gilstrap denied making any such statement. He testified that he had very limited knowledge of the events surrounding the Lake Lou Emma incident and that it was not a motivating factor in his decision to recommend to the mayor that Mr. Smith be terminated.

In an order entered on October 11, 2000, the Crawford County Circuit Court ruled that Mr. Smith had been wrongfully terminated. The circuit court found that the correspondence sent by Mr. Smith to city officials as a result of the drowning incident at Lake Lou Emma "had a direct bearing [on], if not the total reason, for [Mr. Smith's] termination." The court further noted that "[t]here is no doubt that Fireman Smith is opinionated, and often speaks when it would be better to simply listen. However, the City of Van Buren tolerated this behavior for fifteen years, and to now use this as a reason for termination points more, in the Court's opinion, to the incident at Lake Lou Emma." Thus, the circuit court made the determination that Mr. Smith's termination was *not* predicated upon the three incidents that occurred at the fire station on January 27, 1999, but that his termination resulted from Mr. Smith's criticism of the Van Buren Police Department. According to the circuit court's order, this determination was based on (1) testimony by the former fire chief, Bob Gilstrap, that he believed

Mr. Smith had gone too far by writing the letter; (2) the testimony of several firemen, including former Chief Bob Gilstrap, who indicated Mr. Smith was a good fireman, particularly out on the job, but that problems arose from his being opinionated; and (3) the fact that Chief Dennis Gilstrap had "philosophical differences" with Mr. Smith and had not always gotten along with him. Although the circuit court recognized that Mr. Smith's cursing would ordinarily be sufficient grounds for termination of employment, the evidence demonstrated that such cursing was common around the fire station. Under these circumstances, the court found that Mr. Smith's inappropriate behavior on January 27, 1999, was not a sufficient basis for termination in the case at bar.

The circuit court reversed the commission's decision upholding Mr. Smith's discharge and held instead that Mr. Smith should have been suspended without pay for thirty days.[1] The court order also reinstated Mr. Smith as a fireman for the City of Van Buren.[2] Such a modification is within the authority of the circuit court. *City of Little Rock v. Hall, supra.* Based upon the evidence before the commission, along with the additional evidence originally presented to the circuit court, we cannot say that the circuit court's findings, as set forth in its order and judgment, are clearly against the preponderance of the evidence.

III. Presentation of Additional Evidence

For its second point on appeal, the City of Van Buren contends that it was error for the circuit court to admit into evidence testimony concerning events that occurred prior to January 27, 1999. Specifically, Van Buren asserts that such evidence is irrelevant to the issue of whether Mr. Smith's employment was properly terminated because of his behavior on January 27, 1999. Van Buren further argues that Mr. Smith waived his right to present additional evidence and should have been estopped from doing so because, at the hearing before the commission, he argued that no evidence of events preceding January 27, 1999, should be introduced.

---

[1] The court ordered Mr. Smith to attend counseling with Dr. Philip Barling "in an effort to help his working relationship with city personnel, and to alleviate the conflict created by his opinionated views."

[2] On December 29, 2000, the circuit court entered judgment against the City of Van Buren for Mr. Smith's lost wages in the amount of $15,122.13, and further awarded costs in the amount of $1,100.00. These figures are not disputed by the City of Van Buren.

The circuit court "shall review the commission's decision on the record and may, in addition, hear testimony or allow the introduction of further evidence upon the request of either the city or the employee," provided the evidence is competent and otherwise admissible. Ark. Code Ann. § 14-51-308(e)(1)(C) (Repl. 1998). "The relevancy of evidence is within the trial court's discretion, subject to review if abused." *Dalton v. City of Russellville*, 290 Ark. 603, 607, 720 S.W.2d 918, 921 (1986).

Van Buren has offered no citation to authority to support its argument that the trial court erred in allowing additional evidence to be presented despite its statutory authority to do so. This court does not consider arguments that are unsupported by convincing argument or sufficient citation to legal authority. *Arkansas Pub. Defender Comm'n v. Greene County Cir. Ct.*, 343 Ark. 49, 32 S.W.3d 470 (2000); *Judicial Discipline & Disab. Comm'n v. Thompson*, 341 Ark. 253, 16 S.W.3d 212 (2000); *Rainey v. Hartness*, 339 Ark. 293, 5 S.W.3d 410 (1999). Moreover, we cannot say that the circuit court abused its discretion by admitting the additional evidence that was relevant to the issue of whether Mr. Smith's behavior on January 27, 1999, was the actual reason for Mr. Smith's termination or merely a pretext.

Affirmed.

Jerry BULLINGTON, *d/b/a*
Bullington Builders, Inc. *v.* Helen PALANGIO

00-878 45 S.W.3d 834

Supreme Court of Arkansas
Opinion delivered June 21, 2001

[redacted]

The Blagg Law Firm, by: *Ralph J. Blagg* and *Brad A. Cazort*, for appellant.

Morgan & Tester, P.A., by: *Kent Tester*, for appellee.

RAY THORNTON, Justice. Appellant, Jerry Bullington, doing business as Bullington Builders, Inc., appeals the January 27, 2000, judgment of the Van Buren County Circuit Court, finding him individually liable to appellee, Helen Palangio, and awarding damages to appellee in the amount of $19,000.00. Appellant raises two points for reversal: (1) the trial court erred in allowing the jury to impose personal liability upon appellant, and (2) the trial court erred in submitting the issue of waiver of implied warranties to the jury. We find no reversible error and affirm.

On July 9, 1994, the parties entered into a contract for the construction of appellee's new residence in Damascus. The contract was signed on July 11, 1994, and is entitled "Bullington Builders, Inc." at the top of the contract, but is entitled "Jerry Bullington" at the upper right-hand corner. The language of the contract provides that the contract is between "Jerry Bullington, d/b/a Bullington Builders, Inc." and "Helen Palangio." The contract was executed by Jerry Bullington, d/b/a Bullington Builders, Inc., and does not indicate any official capacity as a corporate officer.

Bullington Builders, Inc. ("Corporation"), was incorporated on December 29, 1993. The Corporation's only stockholders were appellant, who managed the business, and appellant's wife. The Corporation failed to pay its franchise taxes, and its charter was revoked approximately one and one-half months before the completion of construction on appellee's home. The Corporation's charter was not reinstated.

The contract provides for a one-year express warranty for workmanship and materials beyond normal wear and tear. The contract further states that the "[c]ontractor will expedite work in a timely manner without sacrificing quality. *Quality will not be sacrificed under any circumstances.*" The contract is silent with regard to implied warranties of habitability and proper construction.

Following completion of the residence, appellant sought to remedy appellee's complaints about the construction, but she was not satisfied. After more than one year had passed, appellee contracted with another builder to remedy the defects she alleged.

On October 15, 1997, following the completion of these repairs, appellee brought this action against Jerry Bullington, d/b/a Bullington Builders, Inc., alleging negligence, breach of implied warranty, and breach of contract. Specifically, appellee alleged various acts of negligent construction, including negligent construction of steps from the garage into the house, negligent construction of the concrete driveway, negligent construction of the attic, negligent construction of support piers, and various instances of negligence pertaining to cosmetic features of the house.

On December 10, 1998, the complaint was amended to include Bullington personally as a defendant, asserting that the corporate entity did not shield him from personal liability for negligence, breach of implied warranties, and breach of contract, and asking the court to hold him and the Corporation jointly and severally liable for appellee's damages. The complaint was further amended to allege that appellant failed to follow the plan provided by appellee as set out in the contract between the parties, amounting to breach of contract.

At the conclusion of the trial, the jury returned a general verdict, finding appellant individually liable to appellee and awarding damages of $19,000.00 to her. The jury found no liability with regard to the Corporation. The trial court entered judgment in accordance with the jury verdict, and appellant brings this appeal.

1. Personal Liability

We first consider whether it was error to hold appellant personally liable for performance of the residential construction contract. We note that this case presents three possible rationales for imposing personal liability upon appellant as an individual.

The first rationale is that even if the contract was originally executed as a binding agreement to be performed by the Corporation, appellant, as owner and manager of the Corporation, became personally liable as an individual who continued to fully perform the terms and conditions of the construction contract after the corporate charter was revoked.

The second rationale is that the construction contract was entered into by Jerry Bullington, d/b/a Bullington Builders, Inc., rather than by the Corporation, and that the construction contract was not executed in the corporate name by its president and attested by its secretary.

The third rationale for imposing personal liability is appellee's contention that the Corporation was so managed and controlled by appellant as to constitute a sole proprietorship; that the Corporation was merely an alter ego and a tool; and that the corporate veil should be pierced in order to impose personal liability upon appellant, who was acting for and on behalf of the Corporation.

■ We first address the issue raised by the first rationale: the effect of revocation of the corporate charter before the completion of construction. Several statutory provisions are applicable in analyzing this issue. Ark. Code Ann. § 26-54-104(a) (Repl. 1997) provides, in relevant part: "(a) Every corporation shall file an annual franchise tax report and pay an annual franchise tax, unless exempted under § 26-54-105...." *Id.* Additionally, Ark. Code Ann. § 26-54-111(a) (Repl. 1997) provides:

> (a) On or before January 1 of each year, the Secretary of State shall issue a proclamation proclaiming as forfeited the corporate charters or authorities, as the case may be, of all corporations, both domestic and foreign which, according to his records, are delinquent in the payment of the annual franchise tax for any prior year.

Id. Finally, Ark. Code Ann. § 4-27-1420 (Repl. 1996) provides:

> The Secretary of State may commence a proceeding under § 4-27-1421 to administratively dissolve a corporation if:
>
> 1. The corporation does not pay within sixty (60) days after they are due any franchise taxes or penalties imposed by this chapter or other law.

* * *

Id. Reading these statutory provisions together, it is clear that our statutory law imposes an affirmative duty on the corporation to file franchise tax forms and pay the corresponding fees in order to maintain its corporate status.

In addition to our statutory law, we have well-established case law regarding the issue of whether personal liability attaches for liabilities that arise if a corporate charter is not perfected or is revoked. For example, in *Gazette Publ'g Co. v. Brady*, 204 Ark. 396, 162 S.W.2d 494 (1942), we stated that in order to exempt any association of persons from personal liability for the debts of a proposed corporation, they must comply fully with the act under which the corporation is created and that partial compliance with the act is not sufficient. *Id.*

In *Schmidt v. McIlroy Bank & Trust*, 306 Ark. 28, 811 S.W.2d 281 (1991), we expanded on the proposition we set forth in *Gazette*, *supra*, and stated that the reasoning behind cases holding officers and stockholders individually liable for obligations that arise during the operation of a corporation when the corporate charter has been revoked for nonpayment of franchise taxes is that they ought not be allowed to avoid personal liability because of their nonfeasance. *Id.* (citing *Whitaker v. Mitchell Mfg. Co.*, 219 Ark. 779, 244 S.W.2d 965 (1952); *Gazette*, *supra*).

In addition, in *H.T. Larzelere v. Reed*, 35 Ark. App. 174, 816 S.W.2d 614 (1991), the Arkansas Court of Appeals held that "[o]fficers and directors of a corporation who actively participate in its operation during the time when the corporate charter is revoked for failure to pay corporate franchise taxes are individually liable for debts incurred during the period of revocation." *Id.* (citing *Mullenax v. Edward Sheet Metal Works, Inc.*, 279 Ark. 247, 650 S.W.2d 582 (1983); *Moore v. Rommel*, 233 Ark. 989, 350 S.W.2d 190 (1961)).

In the instant case, it is undisputed that the corporate charter of Bullington Builders, Inc., was revoked for failure to pay franchise taxes approximately one and one-half months prior to the completion of construction, and the charter was not reinstated. After the corporate charter was revoked, appellant individually assumed the performance of the contract. Based upon our case law, we hold that appellant was personally liable for any liabilities that resulted from faulty or incomplete performance of the contract, including those arising as breaches of express or implied warranties. Because the revocation of corporate status imposes personal liability

upon appellant in this case, we need not address the issues presented by the second and third rationales upon which personal liability might be established.

II. Implied Warranties

We next consider whether it was error for the trial court to submit the issue of waiver of implied warranties to the jury. Appellant contends that the trial court erred by not finding as a matter of law that the contract between the parties constituted a waiver of implied warranties by the appellee.

As authority for his argument, appellant relies on *Carter v. Quick*, 263 Ark. 202, 563 S.W.2d 461 (1978), where we held that where a contract contains an express warranty on the subject of an asserted implied warranty, the former is exclusive and there is no implied warranty on that subject. *Id.* However, the ruling in *Carter, supra*, was that an implied warranty for materials and workmanship was replaced by a specific contractual warranty as to materials and workmanship. The expressed contractual warranty in *Carter, supra*, was that the builder promised that "he would build the house with the same quality and be as good as his own," and stated, "If you want to look at my house look it over. I'll build you one just like it with the same material and workmanship as my house." *Id.* At trial, Carter moved for a directed verdict on the ground that Quick failed to show a breach of the contract because no evidence was presented as to the quality of workmanship of appellant's residence. *Id.* In determining the effect of an express warranty upon an implied warranty in building contracts, we concluded that implied warranties are not applicable when there is an express warranty. *Id.* We further concluded that where a contract contains an express warranty on the subject of an asserted implied warranty, the former is exclusive and there is no implied warranty on that subject. *Id.* (citing *Reed v. Rea-Patterson Milling Co.*, 186 Ark. 595, 54 S.W.2d 695 (1932); *Earle v. Boyer*, 172 Ark. 534, 289 S.W.490 (1927) ; *Elder Grocery Co. v. Applegate*, 151 Ark. 565, 237 S.W. 92 (1922); *C.B. Ensign & Co. v. Coffelt*, 119 Ark. 1, 177 S.W. 735 (1915)). Based upon these principles, we held that because Carter's testimony was the only evidence pertaining to the quality of the workmanship on his own house, the evidence was not sufficient to show a breach of warranty and that Carter's motion for a directed verdict should have been granted. *Id.*

Since *Carter, supra,* we have made it clear that implied warranties of habitability, sound workmanship, and proper construction are given by operation of law and are intended to hold a builder-vendor to a standard of fairness. We addressed this issue in *O'Mara v. Dykema,* 328 Ark. 310, 942 S.W.2d 854 (1997), where we stated:

> In *Wawak v. Stewart,* 247 Ark. 1093, 449 S.W.2d 922 (1970), we adopted the view that by operation of law, a builder-vendor gives implied warranties of habitability, sound workmanship, and proper construction. The implied warranty does not rest upon an agreement, but arises by operation of law and is intended to hold the builder-vendor to a standard of fairness. *Wingfield v. Page,* 278 Ark. 276, 644 S.W.2d 940 (1983). However, implied warranties may be excluded when the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is excluded. *See Carter v. Quick,* 263 Ark. 202, 563 S.W.2d 461 (1978); 77A CJS *Sales* § 266 (1994).

O'Mara, supra.

In the present case, there is an express warranty that covers workmanship and materials, but there is no express exclusion of implied warranties of habitability and proper construction to hold a builder to a standard of fairness. Under the principle set forth in *Carter, supra,* the fact that the contract contains an express warranty that deals specifically with workmanship supports a conclusion that the implied warranty of workmanship has been waived by the express contractual warranty of workmanship. However, our decision in *Carter, supra,* did not specifically address the effect of the waiver of the warranty of materials and workmanship upon the more fundamental implied warranties of habitability and proper construction, and we now hold that the principle set forth in *Carter, supra,* was limited to the effect of an express warranty upon an implied warranty on the same subject. With regard to implied warranties of habitability and proper construction, the contract in the present case does not disclaim such implied warranties and does not use any language to suggest that the construction is being accepted "as is" or "with faults" so as to waive such implied warranties. In addition, appellant testified that he did not explain to appellee that the language of the express warranty covering workmanship and materials for one year was intended to waive implied warranties for habitability and proper construction.

According to *O'Mara, supra,* implied warranties may be excluded when the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is excluded. *Id.* Under this standard, the implied warranties of habitability and proper construction were not waived because they were not included in the language of the express warranty on workmanship. There is no showing that the buyer's attention was called to any proposed exclusion of implied warranties of habitability and proper construction.

Moreover, the jury instruction concerning warranties essentially mirrored the language of our holding in *O'Mara, supra.* The jury instructions provided as follows:

> For you to determine that the Plaintiff waived the implied warranty, you must consider that a builder, by operation of law, gives implied warranties of habitability, sound workmanship, and proper construction, and are intended to hold the builder to the standard of fairness.
>
> These warranties may be excluded when circumstances surrounding transactions are themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that certain implied warranties are excluded. You must determine whether there existed sufficient circumstances surrounding the transaction to call the Plaintiff's, Helen Palangio's, attention to the fact that no implied warranties were made or that certain implied warranties were excluded.

This instruction was not erroneous, and we affirm the trial court's referral of this question of fact to the jury.

With respect to the verdict reached by the jury, we have consistently held that it is not the appellate court's province to try issues of fact; the appellate court simply reviews the record for substantial evidence to support the jury's verdict. *E.g., City of Caddo Valley v. George,* 340 Ark. 203, 9 S.W.3d 481 (2000); *Missouri Pac. Transp. Co. v. Jones,* 197 Ark. 79, 122 S.W.2d 613 (1939) (holding that on questions of fact, the finding of the jury is conclusive). Because we defer to the jury as to findings of fact, and because there was substantial evidence to support its findings, we affirm.

Stephen CLEMMONS *v.* OFFICE of
CHILD SUPPORT ENFORCEMENT

01-258 47 S.W.3d 227

Supreme Court of Arkansas
Opinion delivered June 21, 2001

Kenneth A. Hodges, for appellant.

Phillips & Douthit, by: *Michael Lamoureux,* for appellee.

JIM HANNAH, Justice. Appellant Stephen L. Clemmons petitions for review from a court of appeals decision affirming the chancery court's order awarding child support to Appellee Office of Child Support Enforcement (OCSE) in the amount of $20,775. Stephen argues on appeal that the chancery court erred in finding that his ex-wife, Sheila, maintained the right to collect child-support arrearages, which she assigned to OCSE, after the couple's son, Christopher, had reached majority. Stephen also argues that the chancery court applied the wrong statute of limitations to allow OCSE to collect the entire amount of child-support arrearages due from a 1978 support order. We affirm the chancery court and the court of appeals.

Facts

The chronology of this case has been stated previously in the two prior court of appeals decisions in this case. *See Office of Child Supp. Enforcem't v. Clemmons*, 65 Ark. App. 84, 984 S.W.2d 837 (1999); *Clemmons v. Child Support Enforcement*, 72 Ark. App. 443, 37 S.W.3d 687 (2001). These facts are restated here.

Sheila and Stephen Clemmons were married in the state of Missouri on March 4, 1971, and divorced there on October 16, 1974. One child, Christopher Stephen Clemmons, was born of that union on June 5, 1973. The couple divorced in Missouri on October 16, 1974, and Sheila was awarded custody of Christopher, with Stephen ordered to pay seventy-five dollars per month child support until Christopher entered the first grade, at which time support was to increase to one hundred dollars per month. The custody and support provisions of this decree were modified by the Missouri court on May 7, 1976, with Sheila having custody of the minor child for nine months during the regular school term and Stephen having custody for three months during the summer, with each party having reasonable visitation while the child was in the other's custody. Further, Stephen was ordered to pay seventy-five dollars per month child support, which abated during his three months of custody.

On September 7, 1976, the Washington County, Arkansas, juvenile court placed custody of Christopher with Sheila, apparently based on a dependency-neglect petition filed by Sheila. On September 9, 1976, the juvenile court quashed that order and placed physical custody with Stephen. However, Sheila failed to appear at that hearing with Christopher; Stephen would later learn that she had taken him to California. On November 17, 1976, Stephen also obtained an order from the Missouri court awarding him temporary custody of Christopher.

In February 1977, Stephen located Sheila and Christopher in California, but Sheila refused to allow him any contact or communication with Christopher. Law enforcement officials declined to assist Stephen in gaining physical custody of Christopher, even though he had the Arkansas and Missouri custody orders.

A hearing was held in California in December 1977 on the issues of custody, visitation, and support. Both parties were present

and represented by counsel. On March 27, 1978, an order was entered in the Superior Court of California in the County of Los Angeles acknowledging the Missouri decree as a valid foreign decree and giving it full faith and credit; finding a child-support arrearage of $525.00 from June 1977 through December 1977; placing custody of Christopher with Sheila, with reasonable visitation awarded to Stephen; and modifying Stephen's child-support obligation from seventy-five dollars per month to one hundred twenty-five dollars per month as of January 1, 1978. After the California order was entered, Sheila continued to move around California and continued to refuse any contact between Stephen and Christopher. Stephen did not appeal the California order granting custody to Sheila, nor did he ever pursue a contempt citation concerning her denial of his visitation with Christopher, which would have been the proper forum for these issues.

Christopher turned eighteen on June 5, 1991. In 1993, Sheila assigned her rights to the state of Missouri for assistance in collecting child-support arrearages. After locating Stephen in Arkansas, Missouri initiated an interstate action to enforce Stephen's child-support obligation under the 1978 California award. On February 6, 1995, the Arkansas OCSE filed a request in Pope County, Arkansas, Chancery Court for registration of the California order and a petition to reduce Stephen's unpaid child support to judgment. On November 14, 1995, the Pope County Chancery Court entered the California order as a foreign decree and ordered briefing of two issues: the mother's assignment of rights of her non-minor child, and the proper statute of limitations. On January 22, 1998, the chancellor entered an order estopping OCSE or Sheila from obtaining a judgment and/or attempting to collect any child-support arrearages based upon the fact that Sheila had willfully concealed Christopher from his father.

OCSE appealed this order, and the court of appeals reversed and remanded the case, holding that the chancellor directly contravened the purpose of the Uniform Interstate Family Support Act ("UIFSA") when he refused to allow the collection of past-due support based upon a failure to allow visitation, and ordering that the chancellor "determine the proper amount of child-support arrearage due pursuant to the March 27, 1978, California order, taking into consideration the applicable statute of limitations and the propriety of the mother's assignment."

Upon remand, without elaborating his reasons, the chancellor made the determination at a hearing on August 26, 1999, that, "taking into consideration the applicable statute of limitations and the propriety of the mother's assignment, it is hereby found that the Defendant's child support delinquency to be [sic] the sum of $20,775 as of July 28, 1999." Stephen appealed that ruling, arguing that the chancellor erred (1) in not considering the propriety of Sheila's assignment of child support to OCSE pursuant to the instructions of this court on remand, and (2) in calculating the child-support arrearage. Despite the court of appeals' determination that the chancellor's opinion was "conclusory" and failed to address the issues put before it on remand, and despite the court of appeals recognition that this was an issue of first impression, the court of appeals affirmed the chancellor's ruling, and Stephen petitioned for review to this court arguing the same points on appeal. This court accepted review.

Standard of Review

■ ■ Upon a petition for review, we consider the case as though it were originally filed in this court. *Davis v. Child Support Enforcement*, 341 Ark. 349, 20 S.W.3d 273 (2000); *Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999); *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999); *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998); *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998); *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998). We have held many times that although we review chancery cases de novo on the record, 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).

I. Propriety of Sheila's Assignment to Missouri

The first issue before this court is whether Sheila's assignment of her collection rights to Missouri, which then assigned or transferred those rights to Arkansas, was proper. Within this issue is also the question of whether a custodial parent can attempt to collect child-support arrearages for a child who has since reached the age of majority.

A. Validity of Shelia's Assignment to Missouri and Arkansas

As an initial issue, it should be noted that Sheila's assignment of her collection rights to Missouri was a valid assignment under Missouri law pursuant to Mo. Ann. Stat. §§ 454.010 *et seq.* In turn, Arkansas recognizes collection orders for other states pursuant to Arkansas's Uniform Interstate Family Support Act found at Ark. Code Ann. §§ 9-17-101-9-17-902 (Repl. 1998). As such, there is no issue regarding the legitimacy of Sheila's assignment to collect arrearages and the transfer of that collection right to OCSE pursuant to Missouri and Arkansas law.

B. Sheila's Ability to Assign Collection Rights to the State

While there is no issue as to the mechanics of Sheila's assignment of her purported rights, the real issue here is whether Sheila actually had rights to assign. Stephen argues that Sheila no longer had the right to pursue support arrearages from him after Christopher turned eighteen in 1991, prior to Sheila's filing for collection. OCSE argues that the right belongs to anyone listed in the applicable statute.

Stephen argues that Ark. Code Ann. § 9-14-105 (Repl. 1998) "Petition for Support" controls and dictates that only Christopher could initiate the action to collect child support from him. This statute states:

> (a) The chancery courts in the several counties in this state shall have exclusive jurisdiction in all civil cases and matters relating to the support of a minor child or support owed to a person eighteen (18) or older which accrued during that person's minority.
>
> (b) The following may file a petition to require the noncustodial parent or parents of a minor child to provide support for the minor child:
>
> (1) Any parent having physical custody of a minor child;

(2) Any other person or agency to whom physical custody of a minor child has been given or relinquished;

(3) A minor child by and through his guardian or next friend; or

(4) The Office of Child Support Enforcement when the parent or person to whom physical custody has been relinquished or awarded is receiving assistance in the form of Aid to Families with Dependent Children, Medicaid, Title IV-E of the Social Security Act — Foster Care, or has contracted with the department for the collection of support.

(c) Any person age eighteen (18) or above to whom support was owed during his minority may file a petition for a judgment against the nonsupporting parent or parents. Upon hearing, a judgment may be entered upon proof by a preponderance of the evidence for the amount of support owed and unpaid. (Emphasis added.)

This statute seems to indicate that the people named in section (b) may initiate an action to collect support for a minor child, while section (c) indicates that a child who has reached majority may initiate an action on his or her own behalf.

Stephen also argues that Ark. Code Ann. § 9-14-236 (Repl. 1998) "Arrearages — Child support limited — Limitations period" requires that a child who has reached majority, rather than the custodial parent or guardian, must pursue collection of arrearages. This statute states:

(a) As used in this section:

(1) "Action" means any complaint, petition, motion, or other pleading seeking recovery of accrued child support arrearages;

(2) "Moving party" means any of the following:

(A) The custodial parent;

(B) Any person or agency to whom custody of a minor child has been given or relinquished;

(C) The minor child through his guardian or next friend;

(D) A person for whose benefit the support was ordered, within five (5) years of obtaining his majority; or

(E) The Office of Child Support Enforcement when the custodial parent or person to whom custody has been relinquished or awarded is or has been receiving assistance in the form of Aid to Families with Dependent Children or has contracted with the Office of Child Support Enforcement for the collection of support;

(3) "Accrued child support arrearages" means a delinquency owed under a court order or an order of an administrative process established under state law for support of any child or children which is past due and unpaid; and

(4) "Initial support order" means the earliest order, judgment, or decree entered in the case by the court or by administrative process which contains a provision for the payment of money for the support and care of any child or children.

(b) In any action involving the support of any minor child or children, the moving party shall be entitled to recover the full amount of accrued child support arrearages from the date of the initial support order until the filing of the action.

(c) Any action filed pursuant to subsection (b) of this section may be brought at any time up to and including five (5) years beyond the date the child for whose benefit the initial support order was entered reaches the age of eighteen (18) years.

This statute is the applicable statute in this case because OCSE is pursuing collection of support arrearages for support ordered in a prior judgment. Had OCSE sought an initial petition for support against Stephen, Ark. Code Ann. § 9-14-105 would have applied. This statute, which specifically applies to the collection of child-support *arrearages*, indicates that the "moving party" can be the custodial parent, any person or agency to whom custody of a minor child has been given or relinquished, a minor child's guardian or next friend, OCSE when rights have been assigned, *or* the child himself or herself once he or she reaches the age of majority. However, this statute does not indicate whether anyone is the exclusive party to pursue an action.

While Stephen argues that both of these statutes specifically allow only the child, upon majority, to pursue the collection action, Stephen's proposition would require this court to interpret and add language to the statute that is not there. This court reviews issues of statutory construction de novo, as it is for this court to decide what a statute means. *Stephens v. Arkansas School for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000); *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (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.* The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999). In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* The statute must be construed so that no word is left void or superfluous and in such a way that meaning and effect is given to every word therein, if possible. *Id.* If the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation. *Id.* Where the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Id.* (citing *State v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994)). Statutes relating to the same subject are said to be in *pari materia* and should be read in a harmonious manner, if possible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

First and foremost, taking into consideration our rules for interpreting statutes, this statute does not place a limitation on who can pursue an action for collection of child-support arrearages from the list of possible parties. In Ark. Code Ann. § 9-14-236, the list of potential moving parties is set off by the word "or" to indicate who the alternative moving parties may be. Had the General Assembly meant to limit child-support arrearage actions brought after the child reaches majority to those brought by the child, we believe that it would have specifically made such a statement in the statute rather than including the child of majority in a list of alternative moving parties.

In addition, our case law supports such a conclusion. In most of our cases, the custodial parent of a minor child sought

child-support arrearages. *See, e.g., Sharum v. Dodson*, 264 Ark. 57, 568 S.W.2d 503 (1978); *Cunningham v. Cunningham*, 297 Ark. 377, 761 S.W.2d 941 (1988); *Johnson v. Lilly*, 308 Ark. 201, 823 S.W.2d 883 (1992); *State Office of Child Sup. Enforcem't v. Terry*, 336 Ark. 310, 985 S.W.2d 711 (1999); *Branch v. Carter*, 326 Ark. 748, 933 S.W.2d 806 (1996); *Durham v. Arkansas Dep't of Human Services*, 322 Ark. 789, 912 S.W.2d 412 (1995). In some cases, the adult child pursued the arrearages. *See, e.g., Fonken v. Fonken*, 334 Ark. 637, 976 S.W.2d 952 (1998); *Chunn v. D'Agostino*, 312 Ark. 141, 847 S.W.2d 699 (1993). In others, the parent has pursued the arrearages even after a child reaches majority. *See Sanderson v. Harris*, 330 Ark. 741, 957 S.W.2d 685 (1997); *Cole v. Harris*, 330 Ark. 420, 953 S.W.2d 586 (1997). In no case has this court held that only the adult child has the right to pursue the arrearage.

The strongest support for the proposition that the right to pursue child-support arrearages belongs either to a custodial parent or to the child, whether of majority or not, is *Darr v. Bankston*, 327 Ark. 723, 940 S.W.2d 481 (1997), in which this court allowed the deceased custodial parent's estate to pursue and recover past-due child support from her ex-husband who had custody of the children after the mother's death. The court recognized "the custodial parent's right to unpaid installments of child support," and the estate was entitled to take possession of all of the mother's personal property, which included back child support. *Darr*, 327 Ark. at 725-726. While *Darr* obviously dealt with the recovery of child-support arrearages where the children were still minors, the case indicates that the right to the payments equally belongs to the "custodial parent," the parent who had custody of the children when the support was ordered. Based on *Darr*, "custodial parent" as listed in the statute necessarily must be a designation of the parent who maintains the right to collect the ordered support rather than the parent in whose custody a minor child currently resides. For example, the term "custodial parent" is merely the alternate to "non-custodial parent" for purposes of party recognition in support and custody proceedings. In this case, the 1978 California Order required child support to be paid to Shelia just as in *Darr*. This court in *Sharum, supra,* stated, "[E]ntitlement to payment of child support installments vested in appellant as they accrued, and she was entitled to judgment as a matter of right...." This proposition is further supported in *Chunn*, in which the children upon majority pursued the support arrearages. This court stated, "As we read the

statute it contemplates one support obligation which may be pursued by different persons at different times." *Chunn*, 312 Ark. at 145. These cases indicate that once a child reaches majority, whoever files the collection action first is allowed the right and ability to collect. Finally, the differences between Ark. Code Ann. § 9-14-105 and § 9-14-236 provide further support for this determination. In Ark. Code Ann. § 9-14-105(b), the petitioning party may be "any parent having physical custody of a minor child," while in Ark. Code Ann. § 9-14-236(a), the "moving party" may be the "custodial parent." Again, had the General Assembly meant to confer the right to collect arrearages only upon the "parent having physical custody of a minor child" until the child reached majority, and then only upon the adult child, it clearly would have so stated rather than using the term "custodial parent." Therefore, we determine that Sheila retained the right to pursue child-support arrearages even after Christopher reached age eighteen.

II. Calculation of Child-support Arrearages

In the second issue on appeal, Stephen argues that the chancery court erred in awarding $20,775.00 in child-support arrearages from the California order establishing support. He argues that the $525.00 awarded in the California order cannot be collected because the ten-year statute of limitations has run since it was reduced to judgment and not collected, and the rest of the pending monthly support can only be collected to ten years prior to February 6, 1995, when OCSE filed the action in Arkansas for collection of past-due support. Actually, the Arkansas statute of limitation bars all claims for child-support arrearages that have accrued prior to March 29, 1986. *See Johnson v. Lilly*, 308 Ark. 201, 823 S.W.2d 883 (1992); *Branch v. Carter*, 236 Ark. 748, 933 S.W.2d 806 (1996). In this case, if the Arkansas statute of limitations governs, then OCSE is entitled to recover all arrearages that accrued between March 29, 1986, and June 5, 1991, Christopher's eighteenth birthday.

OCSE argues in response that California's statute of limitations, and not Arkansas's, applies in this UIFSA litigation because California's statute of limitations is longer and is, therefore, the applicable statute. OCSE argues that because California does not have a statute of limitations for the collection of support arrearages, the entire amount can be collected from the issuance of the original order in June 1977.

In UIFSA arrearage proceedings, the applicable statute of limitations is the longer of the statute of limitations under Arkansas law or the state issuing the support order. Ark. Code Ann. § 9-17-604(b) (Repl. 1998). Such a determination requires a two-step analysis. First, the court must consider whether there are differing limitations on the time that a custodial parent or child of majority may initiate a proceeding to collect support arrearages. Second, the court must look at the longer of the two statutes allowing how far back collection of support arrearages is allowed.

On the first issue, both Arkansas and California law allow a child of majority or custodial parent to bring an action for support arrearages at least up to five years after the child turns eighteen, or up through age twenty-three. *See* Ark. Code Ann. § 9-14-236(c); Cal. Fam. Code § 4383 (Repealed in 1993); Cal. Fam. Code § 4502 (1993). Under California law, prior to 1993, a judgment for child support could be enforced by writ of execution without prior court approval until five years after the child reached majority and thereafter only as to amounts that were not more than ten years overdue. Cal. Fam. Code § 4383; *In re Marriage of Garcia*, 79 Cal. Rptr. 2d 242 (Ct. App. 1998). Beyond these time frames, the court had discretion to determine whether to allow enforcement of the judgment and could take into account such considerations as laches or lack of diligence. *Id.* After 1993 in California, upon the repeal of § 4383 by the enactment of § 4502, support judgments did not have to be renewed, and they became "enforceable until paid in full." *Id.* Based on this, because Sheila filed the action here within five years of Christopher's eighteenth birthday, under either Arkansas or California law she timely filed her action to collect arrearages.

The analysis does not end there, however. Of more importance here is how far back the court can go in determining the amount of support due. California does not consider its pre-1993 or post-1993 statutes for enforcement of child-support orders as "statutes of limitation," but instead as statutes providing a procedure for enforcement. *Garcia*; *In re Marriage of Wight*, 264 Cal. Rptr. 508 (1989). Whether the pre- or post-1993 statutes should apply is the first consideration. Certainly, under the post-1993 statute, there is no question that Sheila can collect the entire amount of support because the statute allows collection of the entire amount until paid in full. Cal. Fam. Code § 4502. However, based on the reasoning in *Garcia* that applying a post-1993 statute to a pre-1993 judgment

would be impermissibly retroactive, we believe the pre-1993 statute applies.

As noted, § 4383, the pre-1993 statute, allows collection in the five years between majority and age twenty-three by way of a writ of execution without court approval. After age twenty-three, collection can only be had for the ten years prior. Here, obviously, the claim was made within the five years, but Sheila did not have a writ of execution. However, according to the reasoning in *Wight* and *Garcia*, the trial court still retained discretion to determine whether to allow enforcement of the judgment. As such, the chancellor's determination to allow collection of the entire support amount is lawful. Under California law, the entire amount of child support until Christopher's eighteenth birthday was due. Because California allows for collection of the entire child-support arrearage, the law of California is applicable in this UIFSA action. Therefore, we do not find that the chancellor was clearly erroneous in granting the entire amount of child-support arrearage of $20,775.

The concurring opinion argues that the trial court should be affirmed by applying the law-of-the-case doctrine because the trial court in its first order seemingly ruled on the issues of the assignment and statute of limitations. However, the doctrine cannot apply in this case. The law-of-the-case doctrine provides that on second appeal the decision of the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented.[1] *Slaton v. Slaton*, 336 Ark. 211, 983 S.W.2d 951 (1999); *Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995); *Vandiver v. Banks*, 331 Ark. 386, 962 S.W.2d 349 (1998); *see also, Alexander v. Chapman,* 299 Ark. 126, 771 S.W.2d 744 (1989). The doctrine of law of the case prevents an issue raised in a prior appeal from being raised in a subsequent appeal. *Vandiver, supra*. The doctrine provides that a decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review. *Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998). On the second appeal, the decision of the first

[1] It should be noted that while *Slaton* indicates that law of the case extends to issues that were or *could have been* decided in the first appeal, in criminal cases we have held that the issue actually must have been decided explicitly or implicitly before the doctrine can apply. *See, e.g., King v. State,* 338 Ark. 591, 999 S.W.2d 183 (1999), and *Camargo v. State,* 337 Ark. 105, 987S.W.2d 680 (1999).

appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented. *Griffin v. First Nat'l Bank*, 318 Ark. 848, 888 S.W.2d 306 (1994). The doctrine extends to issues of constitutional law. *Id.*

While the history of this case may seem to trigger this doctrine given the language in the chancery court's 1998 original order, there is a reason why the law-of-the-case doctrine cannot apply in this case. The statements in the chancery court's 1998 order regarding the assignment to OCSE and the statute of limitations are *obiter dictum* and cannot satisfy the requirements of law-of-the-case doctrine.

The chancellor's 1998 order only decided OCSE's inability to collect arrearages due to estoppel, and the statements in the order regarding the assignment and statute-of-limitations issues were *obiter dictum*. As such, those statements do not qualify for recognition under the law-of-the-case doctrine. In *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000), this court discussed the interplay between the law-of-the-case doctrine and *obiter dictum*. The court stated:

> The law-of-the-case doctrine does dictate that a decision made in a prior appeal may not be revisited in a subsequent appeal. *Mode v. State,* 234 Ark. 46, 350 S.W.2d 675 (1961). We have long held that a decision in a prior appeal becomes the law of the case. *Bowman v. State*, 93 Ark. 168, 129 S.W. 80 (1909). This is true even if the decision was wrongly decided. *Rankin v. Schofield*, 81 Ark. 440, 98 S.W. 674 (1905). The conclusion of the court in one opinion becomes the law of the case on subsequent proceedings on the same cause and the matter is res judicata. *Perry v. Little Rock & Fort Smith Railway Cp.*, 44 Ark. 383, 395 (1884). The doctrine requires that matters decided in the first appeal be considered concluded. The doctrine is not inflexible and does not absolutely preclude correction of error, but it prevents an issue already decided from being raised in a subsequent appeal unless the evidence materially varies between the two appeals. *Carmargo v. State*, 337 Ark. 105, 987 S.W.2d 680 (1999).
>
> Courts developed the doctrine to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. *Fairchild v. Norris*, 317 Ark.166, 876

> S.W.2d 588 (1994). The doctrine requires that matters decided in a prior appeal be considered concluded. *Camargo v. State*, 337 Ark. 105, 987 S.W.2d 680 (1999); *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996); *Mauppin v. State*, 314 Ark. 566, 865 S.W.2d 270 (1993). While a decision of the court will not be disturbed because it is law of the case under res judicata, the court is not bound by a conclusion stated as obiter dictum, even if couched in terms that infer the court reached a conclusion on a matter. This is so because obiter dictum is mere comment and not a decision of the court, and therefore not binding as the law of the case under res judicata. In an opinion, the court may sustain by comment an argument presented by obiter dictum. *Peeples v. State*, 305 Ark. 338, 808 S.W.2d 331 (1991). However, a comment on the evidence does not rise to a decision or holding by the court. *Smith v. City of Little Rock*, 279 Ark. 4, 648 S.W.2d 454 (1983).
>
> Where discussion or comment in an opinion is not necessary to the decision reached therein, the discussion or comment is an obiter dictum. *Nashville Livestock Common v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990). In *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981), the court noted that even though the opinion stated, as obiter dictum, that upon retrial an instruction on first-degree murder ought to be given, that was not a point in issue and thus not binding. Dicta consists of statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand; and they lack the force of an adjudication. *Garrett v. Andrews*, 294 Ark. 160, 741 S.W.2d 257 (1987). "We point this out so that the dicta in one decision will not be seized on as the ratio decidendi in the next decision. . . ." *McLeod, Comm. Of Revenues v. J. E. Dilworth Co.*, 205 Ark. 780, 171 S.W.2d 62 (1943).

Green, 343 Ark. at 250-251. Based on this directive, it is obvious that the findings by the chancery court in the 1998 order regarding the assignment and the statute-of-limitations issue were dicta because they had nothing to do with the court's actual order — that is, that OCSE was estopped from collecting the arrearages due to Sheila's bad acts of concealing Christopher from his father for so many years. In other words, whether the chancery court decided the assignment and statute-of-limitations issues had nothing to do with the court's actual order barring collection of the arrearages. As such, there is no initial order from which Stephen is barred from arguing the issues due to the law-of-the-case doctrine.

The concurring opinion argues that the trial court on remand refused to reopen the issue of assignment, one of the issues placed before it by the court of appeals, and because Stephen failed to cross-appeal initially, he should now be barred from raising the issues here. However, the flaw in this reasoning is highlighted by the fact that the law-of-the-case doctrine applies not to what the trial court decided in its 1998 order, but instead to the court of appeals's first decision.

The concurring opinion also argues that in the first appeal, the court of appeals issued a limited remand order instructing the trial court to award arrearages and did not reopen the issues of assignment and limitation in its remand order. The concurring opinion is mistaken. The court of appeals's first decision only included reversal on the estoppel issue with a specific directive to "determine the proper amount of child-support arrearage due pursuant to the March 27, 1978, California order, taking into consideration the applicable statute of limitations and the propriety of the mother's assignment." *Office of Child Supp. Enforcement v. Clemmons*, 65 Ark. App. 84, 984 S.W.2d 837 (1999). That is plain language. The court of appeals directed the trial court to determine the proper amount of child-support arrearage. Because estoppel is not applicable, the trial court had to decide the propriety of the assignment first, and then had to decide the applicable statute of limitations before it could determine the proper amount of child-support arrearages. Those two issues were to be decided by the trial court on remand. Clearly, this directive indicates that the court of appeals did not find that these two issues, which were not necessary to the trial court's finding on estoppel, had been conclusively decided by the trial court to trigger the law-of-the-case doctrine. Otherwise, the court of appeals would have merely directed the trial court on remand to enter the judgment for arrears.

The concurring opinion is also mistaken in arguing that the trial court on remand refused to reopen the issue of assignment. The court of appeals did not direct the trial court to take further evidence. The trial court on remand did exactly what the court of appeals instructed it to do. The trial court decided the propriety of the assignment, the applicable statute of limitations, and the amount of child-support arrearages. Those issues were before the trial court, and the trial court decided them. In its second decision from which this petition for review arises, the court of appeals, after setting out the remand directive from the first appeal, stated:

> Upon remand, without elaborating his reasons, the chancellor made the conclusory determination that "taking into consideration the applicable statute of limitations and the propriety of the mother's assignment, it is hereby found that the Defendant's child support delinquency to be the sum of $20,775 as of July 28, 1999."

This statement clearly indicates that the court of appeals recognized that it instructed the trial court to consider these issues anew, and then recognized that the trial court had done so. Because the law-of-the-case doctrine only applies to the court of appeals's first decision rather than the trial court's 1998 order, law of the case does not bar our consideration of these issues on the merits in this appeal.

We affirm the chancery court and the court of appeals.

BROWN and IMBER, JJ., concur.

ANNABELLE CLINTON IMBER, Justice, concurring. I agree with the result reached by the majority; however, I would affirm the trial court by applying the doctrine of the law of the case. That doctrine bars consideration in a second appeal of issues that were or should have been decided in the first appeal, where there has been a decision on the merits in the first appeal. *Vandiver v. Banks*, 331 Ark. 386, 962 S.W.2d 349 (1998).[1] According to Justice Holmes, the law of the case merely expresses the practice of courts generally to refuse to reopen what has been decided. *Messenger v. Anderson*, 225 U.S. 436 (1912). The application of the law-of-the-case doctrine is not limited to issues actually raised in prior appeals, because it was developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. *Miller County v. Opportunities, Inc.*, 334 Ark. 88, 971 S.W.2d 781 (1998). For that reason, even those issues that might have been but were not actually presented in the first appeal are barred from reconsideration in the second appeal. *Vandiver v. Banks*, 331 Ark. at 394.

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[1] One exception to the law-of-the-case doctrine arises where evidence is presented during the period between two appeals that materially varies from the evidence presented prior to the first appeal. In this situation, the law-of-the-case doctrine will not bar the second appeal, whereas otherwise the appellant would have been barred. *Fairchild v. Norris*, 317 Ark. 166, 876 S.W.2d 588 (1994). This exception does not apply to the case at bar because no new evidence has materialized that would substantially change the outcome of this case.

On January 22, 1998, the Pope County Chancery Court entered an Order finding that:

> 1. the assignment by Mrs. Shelia Clemmons to the Office of Child Support Enforcement was proper;
>
> 2. the statute of limitations is ten years unless the action was filed prior to the child becoming 24 years of age, then all arrearages would be collectible; and,
>
> 3. regardless of the preceding findings, both Mrs. Clemmons and OCSE were estopped from obtaining a judgment for arrearage in child support because of Mrs. Clemmons' concealment of the minor child from its biological father, Stephen Clemmons.

OCSE appealed the trial court's finding of estoppel. Mr. Stephens filed no cross-appeal from the trial court's findings of proper assignment and statute of limitations. The Court of Appeals determined that the trial court erred in refusing to enforce an order for child support and determine the amount owed in arrearage based upon a theory of estoppel. The appellate court reversed and remanded the case with instructions to the trial court "to determine the proper amount of child-support arrearage due pursuant to the March 27, 1978, California order, taking into consideration the applicable statute of limitations and the propriety of the mother's assignment." *Office of Child Support Enforcement v. Clemmons*, 65 Ark. App. 84, 88, 984 S.W.2d 837, 839 (1999).

Upon remand, the trial court determined that Mr. Stephens owed child support in the amount of $20,757.00 and refused to reopen the issue of assignment. Mr. Clemmons then filed the appeal that is before us today, arguing that the trial court erred in not considering the propriety of Mrs. Clemmons' assignment of child support to OCSE.

An argument that could have been raised in the first appeal and is not made until a subsequent appeal is barred by the law of the case. *Alexander v. Chapman*, 299 Ark. 126, 771 S.W.2d 744 (1989); *McDonald's Corp. v. Hawkins*, 319 Ark. 1, 888 S.W.2d. 649 (1994). When there is no cross-appeal, the order from which cross-appeal is not taken becomes the law of the case. *Van Houten v. Pritchard*, 315 Ark. 688, 870 S.W.2d 377 (1994); *Moore v. Robertson*, 244 Ark. 837, 427 S.W.2d 796 (1968). In *Moore v. Robertson*, *supra*, Robertson

alleged on cross-appeal that the decision of the trial court in favor of his co-defendants should have enured to his benefit despite his failure to file an answer in the case. The failure to answer ultimately resulted in a default judgment against him. We refused to address the issue because it should have been raised by cross-appeal in the first appeal of the case. In declining to address the merits of Robertson's argument, we stated:

> The case at bar confirms the wisdom of the [law-of-the-case] rule. If the appellee's contention has merit — a point which we do not decide — its assertion on the first appeal would have done away with the necessity for a second trial and a second appeal, with their attendant expenditure of time and money. Such waste can be effectively prevented only by a strict adherence to the principle that points not urged upon the first appeal are not available later on.

Moore v. Robertson, 244 Ark. at 839-40. As in *Robertson*, the case at bar demonstrates the wisdom of the law-of-the-case doctrine. Had Mr. Clemmons cross-appealed the trial court's adverse assignment and limitations rulings, those issues could have been addressed in the first appeal and, if successful, would have done away with the necessity for a remand and second appeal. Because Mr. Clemmons failed to cross-appeal the first time around, the trial court's findings with regard to the propriety of the assignment and applicable statute of limitations became the law of the case.

Upon remand, the trial court noted that it had already determined that Mrs. Clemmons' assignment to OCSE was proper and that the action was brought within the applicable statute of limitations. Despite these findings, the trial court denied relief in the first trial based upon the affirmative defense of estoppel. The majority concludes that the finding of estoppel rendered the first two findings unnecessary *dicta* not subject to the law-of-the-case doctrine. That conclusion ignores the defensive nature of an estoppel claim.

"Equitable estoppel is a judicial remedy by which a party may be precluded by its own act or omission from asserting a right to which it otherwise would have been entitled, or pleading or proving an otherwise important fact." 28 AM.JUR.2d *Estoppel and Waiver*, § 28 (2000). The trial court's findings effectively determined that OCSE had a claim that could properly be asserted. Thus, contrary to the majority's conclusion, the findings *did* have something to do with the trial court's order and were not merely *obiter dicta*. The

affirmative defense of estoppel would have been moot if OCSE had no right to be asserted. The trial court's findings as to assignment and limitations were, therefore, integral to its ultimate holding and not merely comments on the evidence.

Mr. Clemmons did not raise these issues in the first appeal, but sought to reopen the issues upon remand to the trial court based upon the court of appeals' instructions. The trial court refused to reopen the issues in the proceedings on remand, wherein the following exchange occurred:

> BY THE COURT: Okay. Well, Mr. Hodges basically wants to relitigate the findings that I made earlier, and says that the propriety of the assignment, or the assignment of the interest was improper, and that the statute of limitations has run because of the improper assignment. I think that's basically what we are getting to.
>
> MR. HODGES: Yes, sir. I was just following the decision of the Court of Appeals.
>
> BY THE COURT: Well, I don't agree with either one of you, and I don't want to cut off any argument that you might want to make, but let me tell you how I see this. In my decision — Letter decision to you I found that the statute of limitations was ten (10) years. Well, that would cause — it's in excess of the time that would cut off some of the support period. And based on that the arrearages, ten years of arrearages would be Fifteen Thousand dollars ($15,000.00). *I had already made my decision on the issues that you raised again, Mr. Hodges, in regard to the propriety of the assignment and the statue (sic) of limitations, and I'm not going to change my mind about that, nor do I want to hear anymore proof on that. I think that all was produced at the trial.*
>
> Now, is there anything else?
>
> MR. HELMS: Your Honor, I — the, uh — the letter ruling that you referred to—
>
> BY THE COURT: uh-huh.
>
> MR. HELMS: —I guess I'm reading that wrong. You said under the statute of limitations in this case is ten (10) years, unless the

> action was filed prior to the child becoming twenty-four (24) years of age—
>
> BY THE COURT: Yes.
>
> MR. HELMS: —and then all arrearage accrued would be collectible.
>
> * * *
>
> BY THE COURT: Unless I'm wrong about his age, I believe he was — he was born on June 5th of '73, and it was filed in '95. That's twenty-two (22). You may be right, Mr. Helms.
>
> MR. HELMS: I never claimed to be good at math, your Honor.
>
> BY THE COURT: Well, I was doing it on my — in my head, and I put it on the calculator. He would have been twenty-two (22). So in that case your figures as to the arrearages would be correct....

(Emphasis added.) Thus, the trial court recognized that the issues of assignment and limitations had been conclusively determined at the first trial and did not reopen those issues in its deliberations on remand. Taking into account the propriety of the assignment and the applicable statute of limitations as had previously been determined, the trial court awarded arrearages. By doing so, the trial court followed the directive of the appellate court, which, contrary to the majority's conclusion, did not reopen the issues of assignment and limitations in its remand order.

The court of appeals issued a limited remand order, instructing the trial court to determine "the proper amount of child-support arrearage...." In doing so, the appellate court did instruct the trial court to "*tak[e] into consideration* the propriety of the assignment and the proper statute of limitations." The appellate court did *not* instruct the trial court to *redetermine* the propriety of the assignment and the proper statute of limitations. Those issues had already been determined. The remand order issued by the court of appeals was no more than a directive to the trial court to apply the findings it had previously made in determining the proper amount of child support to award in arrearage. If Mr. Clemmons thought those

findings were made in error, he could have submitted the issues to the court of appeals for determination on cross-appeal and preserved those issues in case he lost on direct appeal. He failed to do so. Mr. Clemmons cannot now reopen findings that could have been addressed in the first appeal of this matter simply because he is dissatisfied with the manner in which those findings are now being applied.

Because I believe that the law-of-the-case doctrine bars the appellant from raising in this second appeal an issue that could have been raised in the first appeal, I concur with the majority in affirming the trial court.

BROWN, J., joins in this concurrence.

Jacinto HENDERSON *v.* STATE of Arkansas

CR 01-616 45 S.W.3d 846

Supreme Court of Arkansas
Opinion delivered June 21, 2001

Q. Byrum Hurst, Jr., for appellant.

No response.

PER CURIAM. Jacinto Henderson, by his attorney, Q. Byrum Hurst, Jr., has filed a motion for rule on the clerk. The motion admits that the record was not timely filed and that it was no fault of the appellant.

This court has held that we will grant a motion for rule on 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, but instead implies fault on the part of the court reporter and the clerk of the lower court. We have held that a statement that it was someone else's fault or no one's fault will not suffice. *Clark v. State*, 289 Ark. 382, 711 S.W.2d 162 (1986). Therefore, appellant's motion must be denied.

The appellant's attorney shall file within thirty days from the date of this per curiam a motion and affidavit in this case accepting full responsibility for not timely filing the transcript, and upon filing same, the motion 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.

Ivory JOHNSON *v.* STATE of Arkansas

CR 99-1160 45 S.W.3d 844

Supreme Court of Arkansas
Opinion delivered June 21, 2001

[redacted]

William A. McLean, for appellant.

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

PER CURIAM. Appellant, Ivory Johnson, pled guilty to nine counts of aggravated robbery and nine counts of theft of property. He was sentenced to a total of forty years in the Arkansas Department of Correction. Appellant subsequently filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37 alleging ineffective assistance of counsel. After a hearing, the trial court entered its order denying appellant's petition. This appeal followed.

Appellant's counsel has submitted a brief on appellant's behalf that incorrectly states that jurisdiction of this appeal lies in the court of appeals. Not only has counsel failed to correctly set forth the jurisdiction of this appeal, counsel has also misled this court with the structure of his brief that this appeal challenges the trial court's decision. Under the "Point on Appeal" heading, counsel argues that the trial court erred in ruling that appellant did not receive effective assistance of counsel and under the "Conclusion" section of his argument, counsel argues that the circuit court should be reversed and the case remanded for a new trial. However, within the actual argument presented to this court, counsel concedes that this appeal is without merit. We find counsel's argument confusing and because of the structure of his argument there has resulted an unnecessary delay in the disposition of this appeal.

Rule 16 of the Rules of Appellate Procedure—Criminal provides in pertinent part that trial counsel, whether retained or court-appointed, shall continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. Counsel filed a notice of appeal from the denial of appellant's petition and was thus obligated to represent appellant until such time as he was permitted by the appellate court to withdraw pursuant to Ark. Sup. Ct. R. 4-3(j)(1). Under Rule 4-3(j)(1), a court-appointed attorney who wishes to withdraw from an appeal must abstract and brief all of the rulings that were adverse to his client. Although such a "no-merit" brief is typically filed in a direct appeal from a judgment, we have also allowed the filing of

no-merit briefs in postconviction appeals. *See Riley v. State*, 298 Ark. 292, 766 S.W.2d 921 (1989).

If it was counsel's intention to withdraw, he should have filed a brief and a motion to be relieved as counsel pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967) and our Rule 4-3(j)(1), stating there is no merit to the appeal. In turn, we would have informed appellant in accordance with Rule 4-3(j) that he was entitled to file within thirty days a *pro se* brief advancing any points for reversal he desired to raise on appeal.

Because counsel has failed to follow the above rules, the disposition of appellant's appeal has been unduly delayed. We direct counsel to either file a motion to withdraw with an accompanying brief pursuant to Rule 4-3(j)(1) or rebrief the issues in this appeal and argue the merits. Counsel has thirty days from this decision to file the appropriate documents.

Rebriefing ordered.

Raymond MITCHELL *v.* STATE of Arkansas

CR 01-600 45 S.W.3d 846

Supreme Court of Arkansas
Opinion delivered June 21, 2001

John H. Bradley, for appellant.

No response.

PER CURIAM. On September 6, 1997, a hearing was held before the Arkansas Board of Certified Court Reporter Examiners concerning a complaint filed by then-practicing attorney Wayne A. Gruber against Nila J. Keels, CCR #456. As a result of that hearing, Keels's license was revoked. That revocation still stands. The Board's actions are filed with the Supreme Court Clerk's file, of which this court takes judicial notice.[1] *See Shoemate v. State*, 339 Ark. 403, 5 S.W.3d 446 (1999); *State v. Knight*, 259 Ark. 107, 533 S.W.2d 488 (1976).

The issue now before this court involving Ms. Keels arises in Raymond Mitchell's attempt to perfect his appeal from a hearing held on February 28, 2001, where the circuit court revoked Mitchell's earlier suspended imposition of sentence in CR-96-258 in the Chickasawba District of Mississippi County Circuit Court. Ms. Keels was the court reporter, and Mitchell timely filed his notice of appeal and requested a copy of the transcript. On May 9, 2001, Mitchell's original record was mailed to the Supreme Court Clerk to lodge the appeal, but the clerk notified Mitchell's counsel that

[1] There are other complaints and actions that have been taken against Ms. Keels that are reflected in the Supreme Court Clerk's file, but we need not dwell on them for present purposes.

the record could not be lodged because Ms. Keels was not a certified court reporter. On May 24, 2001, Mitchell requested a motion for rule on the clerk to file the record regardless of Ms. Keels's failure of certification, but we denied that request.

On May 29, 2001, Mitchell renewed his request for motion for rule on the clerk, attaching the lower court's emergency order which reflected that court's attempt to grant Ms. Keels a 120-day period from January 2, 2001 to May 1, 2001, to continue the court's business as provided under Section 13 of the regulations of the Board of Certified Court Reporter Examiners. Even assuming the circuit court's emergency order was valid,[2] that order has expired on its face, and Ms. Keels is not shown as certified or licensed to complete the court's business so as to permit the lodging of Mitchell's appeal.

The court clerk's officer clearly was correct in rejecting a transcript from a court reporter who is not certified, and therefore we deny Mitchell's motion. The court has clearly held that its intention is to *strictly adhere to Section 9* of the Rules Providing for Certification of Court Reporters, which provides all transcripts taken in court proceedings will be accepted only if they are certified by a court reporter who holds a valid certificate. *See Pullam v. Fulbright*, 285 Ark. 152, 685 S.W.2d 151 (1985). However, because this is a criminal case, we will direct the Supreme Court Clerk to accept the transcript in this case, provided the attorneys of record will certify to the Clerk, by affidavit, statements that the transcripts are true, accurate, and complete. Moreover, the trial court shall certify within thirty days of this per curiam that this reporter is not now employed as a court reporter without proper certification by the Board of Certified Court Reporter Examiners. *Id.*

[2] This court need not reach at this time other pending questions surrounding the emergency order's validity. For example, a serious issue is raised as to whether such emergency orders are intended to extend a court reporter's license if grounds have been shown to warrant revocation under Section 19 of the Board's regulations.

Oscar STILLEY *v.* Margaret JAMES, Rick Grinnan, Linda Varnado, and Alban Varnado *v.* John Speed

00-1463 48 S.W.3d 521

Supreme Court of Arkansas
Opinion delivered June 28, 2001

Appellant, pro se.

Cross, Gunter, Witherspoon & Galchus, P.C., by: *Abraham W. Bogoslavsky*, for appellees Margaret James, Rick Grinnan, Linda Varnado, and Alban Varnado.

Mike Spades, Jr., for appellee John Speed.

W.H."DUB" ARNOLD, Chief Justice. Appellant Oscar Stilley appeals the Sebastian County Circuit Court's order granting appellees Margaret James, Rick Grinnan, Linda Varnado, and Alban Varnado's motion for summary judgment. For reversal, appellant argues that it was error for the trial court to grant appellees' motion for summary judgment. As this matter involves an issue involving an attorney in the practice of law, this Court's jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(5). We affirm the trial court.

Appellees filed the present action under the Arkansas Declaratory Judgment Act, codified at Ark. Code Ann. § 16-111-101 (Repl. 1987), in an effort to collect a $200,000 judgment from appellant. Appellees asked the trial court to determine the rights and responsibilities of various parties under an indemnification agreement executed between appellant Oscar Stilley and cross-

appellee John Speed. The trial court granted the appellees' motion for summary judgment and ruled that the appellees were entitled to judgment against Mr. Stilley in the amount of $200,000, which was the amount of their original judgment against Mr. Speed.

This was the third of three related cases. In the first case, Mr. Speed had retained Mr. Stilley as counsel to prosecute claims for nonpayment of vacation pay and other compensatory time after he was fired from the employment of the Western Arkansas Chapter of the American Red Cross in 1996. He also made a claim for defamation against the Red Cross and others. The suit was dismissed without prejudice as to certain individual plaintiffs. The remaining claims went to trial.

The Red Cross counterclaimed, alleging that certain items were purchased for John Speed personally on Red Cross credit cards. Mr. Stilley, asserting that the counterclaim was meritless, orally promised to pay any judgment taken against Mr. Speed. Mr. Speed lost his direct claims and lost on the counterclaim, as well. The jury awarded the Red Cross almost $4,000, which was paid by Mr. Stilley.

On July 21, 1997, the appellees filed a lawsuit alleging a claim of malicious prosecution against both Mr. Speed and Mr. Stilley. Although Mr. Stilley was a co-defendant in this matter, he represented himself, as well as Mr. Speed. The malicious prosecution claim was scheduled for trial on February 14, 2000.

Sometime in January of 2000, Mr. Speed apparently began to be concerned about the representation being provided to him by Mr. Stilley. Mr. Speed spoke with Mike Spades, Jr., an attorney friend. Mr. Spades informed Mr. Speed that he felt there was a conflict of interest with Mr. Stilley representing him in the malicious prosecution case in which they were co-defendants and that Mr. Speed should hire his own, separate lawyer. This possibility was obviously communicated to Mr. Stilley, along with the fact that a continuance would be necessary. As Mr. Stilley did not want either of those two things to happen, he agreed to sign an indemnity agreement if he could continue representing Mr. Speed. As a result, an indemnity agreement was forwarded to Mr. Stilley.

In the cover letter to that indemnity agreement, Mr. Spades stated that Mr. Speed was willing to continue with Mr. Stilley as his attorney, as long as the indemnification agreement was signed. Mr. Spades went on to specifically state that if the indemnity agreement

was *not* returned immediately, he and Mr. Speed would have to revisit the issue of whether Mr. Speed should retain Mr. Spades as counsel.

On February 7, 2000, one week before trial, Mr. Stilley executed the indemnity agreement. Because he signed the indemnity agreement, Mr. Speed allowed Mr. Stilley to continue to represent both of them at trial. The indemnity agreement specifically referenced the malicious prosecution lawsuit and stated that Mr. Stilley received ten dollars, as well as "other good and valuable consideration." Mr. Stilley went on to say that he agreed to "indemnify and hold harmless the defendant, John Speed, for any damages assessed, apportioned, or otherwise charged to the co-defendant, John Speed, whether such damages are assessed, apportioned, or charged individually, or jointly and severally against John Speed and the co-defendant Oscar Stilley." The agreement even recognized the fact that such judgment should be paid in a speedy manner, as Mr. Stilley specifically stated that he would pay any such damages "in a timely manner within a reasonable period of time, to avoid collection action against John Speed so as to protect his credit rating and dignity."

In the trial of this case, Mr. Stilley, over appellees' objection, was allowed to take the witness stand and testify. At the end of the trial, the jury returned a verdict in favor of the appellees, and against Mr. Speed in the amount of $200,000. A directed-verdict was granted in Mr. Stilley's favor. Mr. Speed made demand upon Mr. Stilley to honor the indemnity agreement and pay the judgment to appellees, but Mr. Stilley refused. During postjudgment discovery, the appellees learned of the existence of the indemnity agreement and also made demand upon Mr. Stilley for payment of the judgment. Once again, Mr. Stilley refused to honor the indemnity agreement. No surety bond was ever posted in this matter. Mr. Stilley continued to refuse to honor the agreement.

On May 9, 2000, appellees filed a declaratory judgment action, seeking to have the court determine that Mr. Stilley was indebted to them for payment of the judgment which they had obtained against Mr. Speed. In light of the language of the written contract, and the undisputed facts of a judgment, with no surety bond having been posted, appellees moved for summary judgment on their claim. Mr. Stilley filed his own motion for summary judgment, stating that there was no consideration given for the indemnity agreement.

The trial court held a hearing on these motions. At the end of the hearing, the court determined that Mr. Speed's decision to allow Mr. Stilley to represent both co-defendants, and thereby control the litigation stage of the lawsuit, constituted consideration. The court also was aware of no legal requirement that Mr. Speed had to personally pursue an appeal in order for Mr. Stilley to have to pay the judgment, especially since no such requirement was contained in the indemnity agreement. Finally, the court found that appellees were clearly third-party beneficiaries of this indemnity agreement, since they were the individuals to whom Mr. Stilley had promised to pay the judgment. Consequently, the court granted appellees' motion for summary judgment and entered judgment in favor of the appellees and against Mr. Stilley for the amount of the judgment which the appellees had obtained against Mr. Speed in the malicious prosecution trial. It is from these rulings that Mr. Stilley now appeals.

On appeal, appellant asserts the following:

1) The trial court erred in ruling that the failure to fire appellant as counsel constituted consideration for a contract with appellant, where there was no promise not to fire counsel, and where counsel was in fact fired shortly after the trial, without legal repercussions;

2) The trial court erred in ruling that one who claims indemnification is not obligated to cooperate with an appeal as a condition of the right to claim for indemnification;

3) The trial court erred in ruling that one who is found by a jury to have committed an intentional tort is entitled to indemnification despite the fact that he was found to have lied to the purported indemnitor, and tacitly concedes that he did in fact lie to the purported indemnitor to obtain the purported indemnity contract;

4) The trial court erred in ruling that a third party is entitled to a direct action against a claimed indemnitor, where neither the claimed indemnitee nor the claimed indemnitor intended by their conduct to confer any benefit on the third party.

We affirm.

I. Standard of Review

This court recently summarized the appropriate standard or review to be employed when determining whether a trial court erred in granting a motion for summary judgment in *Worth v. City of Rogers*, 341 Ark. 12, 14 S.W.3d 471 (2000):

> We have repeatedly held 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. *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999); *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Once a 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, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its 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. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998); *Pugh*, 327 Ark. 577, 940 S.W.2d 445. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. *Wallace v. Boyles*, 331 Ark. 58, 961 S.W.2d 712 (1998); *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997). After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts. *George*, 337 Ark. 206, 987 S.W.2d 710.

Id. at 20, 14 S.W.3d at 475.

II. Consideration

The argument raised below by Mr. Stilley, in an effort to avoid liability under the indemnity agreement with Mr. Speed, his client, was that there was *no* consideration given for this agreement. He contends, therefore, that the trial court erred in ruling that Mr. Speed's decision not to fire him as counsel constituted consideration for a contract with Mr. Stilley. Mr. Stilley asserts this claim despite the fact that he executed a written document with his client which plainly stated that he received "other good and valuable

consideration." For Mr. Stilley's present contention that no consideration was given to be accurate, he would have to admit that that statement in the indemnity agreement, which he averred by signing, was false. In this case, Mr. Stilley is attempting to introduce parol evidence to demonstrate a complete lack of consideration. Arkansas case law is clear that parol evidence may *not* be introduced to demonstrate a complete lack of consideration. *See Martin v. Rochelle*, 249 Ark. 509, 460 S.W.2d 70 (1970); *United Loan & Investment Co. v. Nunez*, 225 Ark. 362, 282 S.W.2d 595 (1955); *Toney v. Raines*, 224 Ark. 692, 275 S.W.2d 771 (1955). This, in fact, is the exact fact situation under which the parol-evidence rule was formulated, which was the basis for the trial court's decision.

The parol-evidence rule prohibits the introduction of extrinsic evidence, parol or otherwise, which is offered to vary the terms of a written agreement; it is a substantive rule of the law, rather than a rule of evidence, and its premise is that the written agreement itself is the best evidence of the intention of the parties. *First Nat'l Bank of Crossett v. Griffin*, 310 Ark. 164, 168, 832 S.W.2d 816, 819 (1992), *cert. denied*, 507 U.S. 919, 113 S.Ct. 1280 (1993).

In support of his argument that parol evidence is appropriate in this case, Mr. Stilley cites a single case, *Hamburg Bank v. Jones*, 202 Ark. 622, 161 S.W.2d 990 (1941). However, that case is clearly distinguishable to the current lawsuit because that case involved allegations of misrepresentation and fraud in the procurement of the contract. There are no such fraudulent allegations here; to the contrary, this is simply the classic case of an individual who signed an agreement acknowledging that he had received consideration, and is now trying to avoid his obligations under the contract. In fact, although no fraudulent allegations were asserted, if any fraud existed in the procurement of the agreement, it could be argued that it was on Mr. Stilley's part, as it appears that he executed the indemnity agreement so that he could continue to control the litigation of the suit, knowing that if a judgment was entered against Mr. Speed, he would then raise the issue of "no consideration" in an attempt to avoid payment.

In short, because parol evidence is inadmissible and because consideration did in fact exist, the appellees were clearly entitled to payment under the indemnity agreement, and the trial court's decision was correct.

III. Cooperation with Appeal

Appellant asserts that Mr. Speed's cooperation with an appeal was required as a condition for indemnification and that the trial court erred in finding no such requirement. The simple answer to this question is "no." This argument raised by Mr. Stilley has, in fact, no support in law as applied to the facts of this case. The indemnity agreement between the parties made no reference to an appeal, or any indication or statement about cooperation, as most liability insurance contracts do. In fact, the indemnification agreement indicates that a judgment would be paid, or a bond posted, by Mr. Stilley *before* an appeal would begin, as it specifically states that any judgment against Mr. Speed would be paid by Mr. Stilley "before a collection proceeding commenced." Under Arkansas law, collection proceedings may begin within ten days after a final order is entered. Therefore, the plain language of this agreement clearly contemplates that Mr. Stilley would pay any such judgment, or post a bond, prior to an appeal and cannot be read to indicate that this step by Mr. Speed was necessary.

Not only do the undisputed facts of the case fail to support Mr. Stilley's argument on this point, he cites no case law in support of it. The only law he cites involves cooperation in settlement negotiations, which is not applicable to this case, since Mr. Stilley was defending Mr. Speed in this lawsuit and the indemnification agreement was executed approximately one week before trial of this matter. Mr. Stilley was, therefore, aware of the exact nature of the lawsuit, as well as the settlement discussions.[1]

Even more disturbing than the lack of factual or legal support for this argument is the fact that Mr. Stilley ignores the fact that he could have filed his own appeal. As an indemnitor, and the individual who would be liable for paying the judgment in this matter, Mr. Stilley had a pecuniary interest in this case and could have filed his own appeal. *See In re $3,166,199.00*, 337 Ark. 74, 987 S.W.2d 633 (1999); *In the Matter of Allen*, 304 Ark. 222, 800 S.W.2d 715 (1999). The fact of the matter is that Mr. Stilley could have pursued an appeal on his own behalf, but he would have had to actually honor his agreement and admit that he was responsible

[1] The record indicates that the appellees offered to settle the case against Mr. Speed for $3,000.00 and that Mr. Stilley did not convey the offer to his client; however, this is a disputed fact and is not a part of our consideration in deciding this case.

under the indemnity agreement with his client; however, Mr. Stilley admitted on the record that he intentionally did not appeal so that he could make the above "no-consideration" argument in order to avoid paying pursuant to the indemnity agreement.

IV. Intentional Tort and Indemnification

Mr. Stilley next argues that the trial court erred in ruling that he had to indemnify Mr. Speed even though the judgment was for the intentional tort of malicious prosecution. Once again, Mr. Stilley can cite no law in support of this argument which is relevant to the facts of this particular case — where a lawyer agrees to indemnify a client one week before a trial is to begin. In addition, Mr. Stilley failed to make this argument below, and is therefore procedurally barred from raising it for the first time on appeal.

Mr. Stilley appears to be confusing what type of judgment that he indemnified Speed against (the tort of malicious prosecution) for what he alleged Mr. Speed did to him (come into his office, "mislead" him and tell a "bunch of lies"). In other words, Mr. Stilley entered into the indemnity agreement *knowing* exactly what type of judgment he was indemnifying Mr. Speed against, *even if* Mr. Speed lied to him. For these reasons, we find no merit in appellant's argument.

In support of his argument on this point, Mr. Stilley relies on cases involving insurance contracts, or other contracts of indemnity, which were executed *prior to* the act which is the subject of indemnification taking place. This case involves a situation where an indemnification agreement was entered into *after* the alleged improper conduct had occurred; and, since the only claim against Mr. Speed was for malicious prosecution, Mr. Stilley knew that the act he was indemnifying against was an intentional tort involving malice.

Indemnification agreements are contracts. As such, the clear meaning of the contract must be enforced. In looking at the contract in this case, it is clear that the trial court's decision was correct. Mr. Stilley executed a contract whereby he agreed to be responsible for *any* judgment which might be rendered against John Speed on a claim of malicious prosecution. The indemnity agreement begins by citing the fact that Mr. Speed and Mr. Stilley are the

"defendants in a lawsuit in Sebastian County, Arkansas, Case Number CV-97-538-II." Mr. Stilley was the attorney, and a co-defendant; he was, obviously, quite aware that the only outstanding claim against Mr. Speed on February 7, 2000, the date the agreement was executed, was a claim for malicious prosecution. After referencing the lawsuit, the agreement then states in clear and unequivocal terms that Mr. Stilley would "indemnify and hold harmless the defendant, John Speed, for any damages assessed, apportioned, or otherwise charged to the co-defendant, John Speed, whether such damages are assessed, apportioned, or charged individually, or jointly and severally against John Speed and the co-defendant Oscar Stilley." Since the jury did return a verdict against Mr. Speed on the claim of malicious prosecution, this is exactly the type of damages that the indemnity agreement provided for, and for which Mr. Stilley promised to indemnify Mr. Speed.

Based on the undisputed facts of this case, it is clear that the trial court correctly interpreted the express and unequivocal terms of the indemnity agreement and properly held Mr. Stilley responsible for the damages assessed against Mr. Speed, even though those damages were for an intentional tort, since they were the exact damages set forth in the agreement.

V. Standing

Appellant contends that appellees lacked standing to pursue a declaratory judgment action in this case. In addition to being a meritless argument, Mr. Stilley's argument on this point is contrary to Arkansas case law. First, this is an action brought under the Declaratory Judgment Act. Declaratory judgments are used to determine the rights and liabilities of respective parties. The purpose of a declaratory judgment is to prevent "uncertainty and insecurity with respect to rights, status, and other legal relations." Ark. Code Ann. § 16-111-102 (Repl. 1987). Under this Act, "[a]ny person interested under a . . . written contract . . . or his rights, status, or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." Ark. Code Ann. § 16-111-104 (Repl. 1987). The indemnity agreement in this case was established with the sole purpose of Mr. Stilley being liable for a judgment to the appellees if Mr. Speed had a judgment entered against him. Since such a judgment was entered against Mr.

Speed, it is *clear* that the appellees are "interested parties" whose "rights, status, and other legal relations are affected by a contract."

Moreover, this promise by Mr. Stilley to pay Mr. Speed's "debts" (judgment) to appellees is a classic third-party-beneficiary scenario. As such, Arkansas law is clear that "a contract made for the benefit of a third party is actionable by such third party." *See Edgin v. Entergy Operations, Inc.*, 331 Ark. 162, 961 S.W.2d 724 (1998); *Howell v. Worth James Constr. Co.*, 259 Ark. 627, 535 S.W.2d 826 (1976). The trial court looked at the indemnity agreement, which stated that Mr. Stilley would pay money to the appellees if they obtained a judgment against Mr. Speed, and reached the conclusion that there was a direct benefit conferred upon the appellees. Therefore, the trial court clearly did not err in finding that appellees had standing to bring this lawsuit.

For the reasons stated above, we affirm the trial court's decision to grant appellees' motion for summary judgment. Further, we refer this matter to the Professional Conduct Committee for whatever action it determines is appropriate. See Model Rules of Professional Conduct Preamble, Rule 3.5(c); *Ortho-Neuro Med. Assoc. v. Jeffrey*, 344 Ark. 72, 37 S.W.3d 577 (2001); *Skokos v. Gray*, 318 Ark. 571, 886 S.W.2d 618 (1994).

ARKANSAS STATE PLANT BOARD *v.* Billy Paul BULLOCK, *d/b/a* Bullock Flying Service

01-216 48 S.W.3d 516

Supreme Court of Arkansas
Opinion delivered June 28, 2001

Mark Pryor, Att'y Gen., by: *Arnold M. Jochums*, Ass't Att'y Gen., for appellant.

Russell D. Berry, for appellee.

TOM GLAZE, Justice. The Arkansas State Plant Board brings this appeal from the Arkansas County Circuit Court's decision reversing the Board's determination that Billy Paul Bullock, d/b/a Bullock Flying Service (BFS), a crop-dusting service, unlawfully used a pesticide in violation of Ark. Code Ann. § 20-20-214(a)(2) (Repl. 2000). We take jurisdiction of the appeal under Ark. Sup. Ct. R. 1-2(b)(6) because it involves a substantial question of law concerning the interpretation of a statute, Ark. Code. Ann. § 2-16-203(b) (Supp. 1999), and the Board's penalty matrix regulation authorized under that statute.

Steve and Rhonda Harris initiated this action by filing a complaint against BFS with the Plant Board, alleging that on May 4, 1996, BFS allowed an aerially-applied chemical, Stam 4E, to drift onto their garden, causing damage to many of their plants. After the Plant Board investigated the Harrises' complaint and held a hearing on the matter, the Board's Pesticide Committee, and later the

Board itself, concluded BFS had violated Ark. Code Ann. § 20-20-214(a)(2)[1] by using a pesticide in a manner inconsistent with the labeling registered with the United States Environmental Protection Agency (EPA) or the Plant Board or in violation of EPA or Plant Board restrictions on the use of that pesticide. The Board imposed a $400.00 fine against BFS for the violation, and BFS appealed that decision to the Arkansas County Circuit Court as authorized under the Administrative Procedures Act, Ark. Code Ann. §§ 25-15-201 *et seq.* (Repl. 1996 and Supp. 1999). The circuit court reversed the Board's decision, finding the evidence was insufficient to support the Board's ruling and fine.

We first must consider § 20-20-214(a)(2) and the registered label that BFS is alleged to have violated or misused. As previously mentioned, § 20-20-214(a)(2) prohibits a licensed applicator of pesticides from using a pesticide in a manner inconsistent with the registered label or other Board restrictions. The chemical involved here is propanil, or Stam 4E, which is a selective postemergence herbicide for use only in the control of certain weeds that grow in rice crops. The warning label's "use restrictions" for Stam 4E read as follows:

> Do not apply to any crop other than rice. STAM 4E herbicide injures most crops except cereal grains and perennial grasses. *Avoid drift or accidental application* from turning aircraft on cotton, soybeans, corn, safflower, seedling legumes, vegetables, orchards, vineyards, gardens, shrubs, and ornamentals. Once applied, it does not release fumes hazardous to nearby crops. (Emphasis added.)

The label also provides that applicators are to "[a]void applications when the wind speed exceeds 10 mph because of drift hazard to sensitive crops and the possibility of uneven (streaked) application."

The Plant Board found that BFS's application of Stam 4E to Benny Thigpen's rice crop resulted in an off-target drift onto nearby property occupied by the Harrises, and such application constituted using the product in a manner inconsistent with the

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[1] (a) The State Plant Board may . . . after opportunity for a hearing . . . deny, suspend, revoke, or modify any license or permit, or any provision thereof, issued under this subchapter if it finds that the applicant or the holder of a license or permit has committed any of the following acts, each of which is declared to be a violation of this subchapter . . . :

(2) . . . used a pesticide in a manner inconsistent with the labeling registered with EPA or the Plant Board for that pesticide, or in violation of EPA or State Plant Board restrictions on the use of that pesticide[.]

above label use restrictions. In this appeal, we directly review the Board's decision, not the circuit court's, and in doing so, we must decide whether the Board's decision is supported by substantial evidence, given its strongest probative force in favor of the agency's ruling. *Culpepper v. Board of Chiropractic Examiners*, 343 Ark. 467, 36 S.W.3d 335 (2001). The question is not whether the testimony or evidence would have supported a contrary finding, but instead whether it supports the finding made. *Arkansas Bd. of Examiners v. Carlson*, 334 Ark. 614, 976 S.W.2d 934 (1998).

Other standards that this court follows when reviewing administrative decisions direct us to review the entire record to determine whether there is any substantial evidence to support the administrative agency's decision, whether there is arbitrary and capricious action, or whether the action is characterized by abuse of discretion. *Wright v. Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992). The stated correlative rule is that, to establish an absence of substantial evidence, the party appealing the board's or agency's decision must demonstrate that the proof before the administrative board was so nearly undisputed that fair-minded persons could not reach its conclusions. *Id.* at 130. We also follow the settled rule that administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies, and this recognition accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency. *Id.* As such, the administrative agency or board is afforded great deference. *Culpepper*, 343 Ark. at 472.

In reviewing the record and giving deference to the Board's ruling, as we must, we easily conclude that there is substantial evidence that supports the decision that BFS failed to comply with Stam 4E's use restrictions on May 4, 1996, causing damage to the Harrises' garden and trees. At the Board's hearing, Rhonda Harris testified that she was awakened that morning by the sound of an airplane. She got up and looked out of her window, and noticed that her horse was running. When she stepped outside to try to calm the horse, she noticed a mist that burned her eyes. She recognized the smell in the air as that of Stam, so she immediately got a water hose and started spraying down her garden. She remained in the garden for approximately forty-five minutes, but when she became concerned about having the spray on her, she went inside to wash herself.

At some point after May 4, trees and plants in the Harrises' garden began to show signs of burning. Plant Board Investigator Kevin Cauley went to the Harrises' property on June 4, 1996, to look at their garden; he noted that the garden and trees had propanil burn that appeared to be about four weeks old. At the hearing before the Plant Board, Cauley appeared as the Board's expert witness and introduced photographs he had taken of the burned plants. Cauley's narrative report of the incident reflected that Steve Harris claimed the reason he waited in filing the request for an investigation was because Harris had talked to Thigpen after the application, and Thigpen said that he would pay Harris for his losses; however, after that, Harris did not hear from Thigpen for several weeks. Thigpen's statement to the Plant Board was that Thigpen told Harris he would pay him for the damage to the Harrises' garden as soon as Thigpen got his wheat cut and his soybeans planted. Thigpen also made a statement, contained in Cauley's report, that he instructed BFS to put the spray on his fields on the morning in question regardless of the weather.

The Plant Board's further investigation revealed that the records of DeWitt Fertilizer Company showed that Thigpen Grain & Cattle purchased a quantity of Stam on May 2, 1996, and the records of BFS showed that BFS had applied Stam on May 4, 1996, to Thigpen's field. BFS's records also showed that the wind speed on the morning of May 4, 1996, was three miles per hour and within label restrictions. However, based on his experience as a Plant Board investigator, Cauley concluded that BFS's application of Stam to Thigpen's field resulted in drift onto the Harrises' property.

The Board also heard testimony from Patty Moore, whose house was located between Thigpen's field and the Harrises' property. Moore stated that the day before this incident, Thigpen had gone to visit her, and he informed her that if the wind was not blowing the following morning, he was going to spray his field. Thigpen offered to water Moore's garden down if she did not want to get up that early. On the morning of May 4, around 6:30, Moore went outside after she heard the crop-duster and began to water down her garden; however, she did not feel any mist, and did not recall the wind blowing particularly hard.

The Board obviously believed Rhonda Harris's testimony that she observed a crop-duster spraying Stam 4E on the morning of May 4, 1996, and that the chemical being sprayed had drifted onto her property and her face and skin. BFS's assertion that it sprayed

the chemical when the wind speed was less than ten miles per hour is not dispositive of whether its application was consistent with the label, since Rhonda Harris gave direct testimony that she saw and felt the drift of Stam 4E on the day BFS sprayed it on Thigpen's property. Furthermore, as already mentioned, the Board's expert, Mr.Cauley, confirmed that BFS sprayed Stam 4E on Thigpen's nearby property on the day in question, that the Harrises sustained plant and tree damage from Stam, and that his opinion was that BFS's application of Stam to the Thigpen field had drifted onto the Harris property. Cauley's report further reflected that Thigpen had "instructed BFS to put the spray on Thigpen's rice field on the morning of May 4, 1996, regardless of the weather."

We are mindful of the rule that expert testimony qualifies as substantial evidence unless it is shown that the opinion is without a reasonable basis. *See Ozark Gas Pipeline Corp. v. Arkansas Publ. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000). We also are guided by the rule that gives the Plant Board the prerogative to believe or disbelieve any witness and to decide what weight to accord the evidence. *Carlson*, 334 Ark. at 618. While our review of the record reflects evidence that could have supported a finding that BFS complied with the Stam 4E warning label in issue, there, too, is compelling evidence to support the decision that the Board made. Accordingly, we affirm the Board's decision.

The Board next contends that the $400.00 fine it imposed against BFS was not in error. Under Ark. Code Ann. § 2-16-203(b), the Plant Board may, in a lawful proceeding respecting licensing as defined in the Administrative Procedure Act, §§ 25-15-201 *et seq.*, in addition to or in lieu of any other lawful disciplinary action, assess a civil penalty of not more than one thousand dollars ($1,000) for each violation of any statute, rule, or order enforceable by the State Plant Board. That statute also directs the Board to establish a schedule designating the minimum and maximum civil penalties to be assessed for violations of statutes, rules, or orders over which the Board has regulatory control. Ark. Code Ann. § 2-16-203(b)(2). Accordingly, the Board adopted its own set of Pesticide Enforcement Response Regulations, which include a "penalty matrix," a graph by which the Board determines the nature of a violation and assesses its severity and the appropriate sanction. For example, the violation at issue here is using a pesticide in a manner inconsistent with the registered label. The penalty matrix indicates

that for such a violation, at the first level of enforcement, a warning letter is a proper penalty, if the violation is a minor one.[2] If the violation is major, the Board may impose a fine of between $200 and $600 at this level. At the second level of enforcement, however, the Board may impose a fine in an amount between $400 and $800.

BFS urges that the May 4 incident should not be subject to the second level of enforcement, because it occurred prior to the May 17, 1996, violation for which BFS received a warning letter. Because the May 4 event was a "prior" violation, and not a "subsequent" one, BFS argues, the May 17 violation should not have been taken into consideration when the Board assessed the second-level civil penalty against him.

In response, the Board directs us to *Walker v. State*, 314 Ark. 628, 864 S.W.2d 230 (1993), where this court held that it was appropriate to sentence the defendant as a habitual offender, even though his "prior" felony convictions arose in part from a crime that occurred *after* the one for which he was found to be a habitual criminal. The court wrote that there was "no question that had the prosecutor filed two informations, which was clearly within his authority, the first conviction would have been admissible for enhancement purposes irrespective of the fact that the conduct at issue in the first trial occurred after the conduct at issue in the case at bar." *Walker*, 314 Ark. at 631.

We agree that the reasoning of *Walker* should control here. Thus, even though the conduct at issue in the first disciplinary proceeding (the May 17 incident) occurred after the conduct at issue in the case at bar (the May 4 incident), that earlier sanction was "admissible for enhancement purposes," even though it was for an action that occurred later in time. For the reasons set out above, we affirm the rulings of the Plant Board.

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[2] A "minor" violation is defined as one that "does not involve human health, safety, or endanger the environment. A "major" violation is one that "affects human health, safety, or the environment."

BPS, INC., and Micro Flo Company,
Appellants/Petitioners v. Jason PARKER,
Appellee/Respondent; Allen Bartlo,
BPS, Inc., and Micro Flo Company,
Appellants/Petitioners v. Linda Winston,
et al., *Appellees/Respondents*

01-204 47 S.W.3d 858

Supreme Court of Arkansas
Opinion delivered June 28, 2001

Wright, Lindsey & Jennings, LLP, by: *Gordon S. Rather, Jr.*, *Michael D. Barnes*, and *Jane Weisenfels Duke*; and *Friday, Eldredge & Clark*, by: *Kevin Crass*, for appellants/petitioners.

Wilson & Valley, by: *E. Dion Wilson*, for appellees/respondents.

ROBERT L. BROWN, Justice. This is an appeal from an order of the circuit court entitled "Joint Findings of Fact and Conclusions of Law" in which the court denied summary judgment to appellants, BPS, Inc. and Micro Flo Company. The court of appeals granted a motion filed by appellees Jason Parker and Linda Winston to dismiss the appeal, and this court granted review of that dismissal. We deny the motion to dismiss this appeal and vacate the court of appeals' order granting that motion. Furthermore, we reverse that part of the circuit court's order which makes findings of fact and conclusions of law on the issue of the Fireman's Rule and remand this matter to the circuit court with instructions to limit its order to the issue of whether summary judgment is appropriate.

The facts are that on May 8, 1997, the West Helena Fire Department responded to an emergency call at the BPS facility, which packages agricultural chemicals. The Fire Department received a report that the chemical, Azinphos Methyl (AZM), was

smoldering in BPS's Unit 2. As firefighters responded to the emergency at Unit 2, the building exploded, killing three firefighters, including Reginald Robinson, Sr., a volunteer firefighter. A fourth firefighter, Jason Parker, was injured in the explosion.

On August 8, 1997, Jason Parker filed a personal injury lawsuit against BPS and asserted that BPS representatives had misrepresented to the firefighters that there was no chance of explosive harm. He sued for negligence; willful, wanton, and reckless misconduct; strict liability due to the mishandling of ultra-hazardous chemicals; and the presence of hidden dangers on BPS's premises. On October 31, 1997, Linda Winston, as administratrix of Reginald Robinson, Sr.'s estate, filed a wrongful death action against BPS and its president, Allen Bartlo. She sued for negligence; willful, wanton, and reckless misconduct; misrepresentation; hidden danger; and strict liability due to ultra-hazardous materials. Both complaints sought compensatory and punitive damages. Later, both Parker and Winston amended their separate complaints to include Micro Flo Company, which was BPS's supplier of AZM, as a party defendant. In their respective answers to the amended complaints, BPS, Bartlo, and Micro Flo stated that the claims of Parker and Winston were barred under the doctrine of the Fireman's Rule. BPS also filed a third-party complaint against Micro Flo for contribution and indemnity, and Micro Flo cross-claimed against BPS.

On December 18, 1998, BPS filed a motion for summary judgment in the Parker case based upon the Fireman's Rule. Allen Bartlo and BPS filed a similar motion in the Winston case. Micro Flo did the same in both cases. Parker and Winston both responded that factual issues existed, that exceptions to the Fireman's Rule prevented summary judgment from being entered, and that the motions for summary judgment should be denied. Neither Parker nor Winston filed summary judgment motions on their own behalf. On May 22, 2000, the circuit court entered its order entitled "Joint Findings of Fact and Conclusions of Law." In that order, the court recited the facts involved in the case, the issues involved in the case, and the applicable law. The circuit court made numerous findings of fact and conclusions of law in its order. It then concluded that summary judgment should be denied.

On June 15, 2000, BPS, Bartlo, and Micro Flo (hereinafter referred to jointly as BPS) appealed "from the order containing joint findings of fact and conclusions of law of the Circuit Court[.]" On October 11, 2000, the two appeals were consolidated by order of the court of appeals. On January 15, 2001, Parker and Winston

moved to dismiss the appeal as an invalid appeal from a denial of a motion for summary judgment. On February 7, 2001, the court of appeals granted that motion to dismiss. BPS petitioned this court for review of the dismissal of the appeal, and we granted review and set an expedited briefing schedule.

BPS raises two issues in its brief on appeal: (1) that the circuit court's order is an appealable order, and (2) that the circuit court acted outside of the bounds of Ark. R. Civ. P. 56 when it made findings of fact and conclusions of law that granted affirmative relief to Parker and Winston. This had the effect, according to BPS, of striking part of its answer pertaining to its defenses. Thus, BPS contends that an appeal is appropriate under Ark. R. App. P.—Civ. 2(a)(4). With regard to requested relief, BPS asks that the dismissal of its appeal be vacated and that its appeal be reinstated. It further requests that the improper findings of fact and conclusions of law be set aside and that the circuit court be instructed to enter an order that merely denies the various motions for summary judgment.

Parker and Winston dispute the assertion that the circuit court made improper findings of fact and conclusions of law and rest their argument on the fact that this court has steadfastly refused to entertain appeals from denials of summary judgment. The appellees emphasize that the circuit court entered no directed verdicts on the liability issues. They further point out that this case has now been set for trial, and that BPS will have ample opportunity to present additional proof and argue its defenses respecting the Fireman's Rule at that time.

It appears clear to this court that the issues before us involve not only the appealability of the circuit court's order, but also consideration of a remedy to limit the scope of that order should we determine that it was improperly entered. When this court grants a petition for review, we consider the matter as if the appeal had been originally filed in this court. *See Crockett v. Essex*, 341 Ark. 558, 19 S.W.3d 585 (2000). Hence, we consider the appeal by BPS and the motion to dismiss by Parker and Winston, which was granted by the court of appeals.

We begin by examining the circuit court's order. It is eighteen pages in length and, as already stated, entitled "Joint Findings of Fact and Conclusions of Law." The order begins by stating that it is prompted by the identical motions for summary judgment filed by the appellants. A five-page recitation of the facts follows. That, in turn, is followed by a discussion of the law of summary judgment

and the Fireman's Rule, as adopted by this court in *Waggoner v. Troutman Oil Co.*, 320 Ark. 56, 894 S.W.2d 913 (1995).[1]

The circuit court then made certain findings of fact and conclusions of law. We quote directly from the circuit court's order:

> Plaintiffs have established the facts and circumstances in the instant cause allowing for the instigation of the various defenses asserted and have overwhelmingly proven through the testimony of the defendants' witnesses themselves: (a) the presences [*sic*] of misrepresentation on the part of Micro Flo Company and BPS; (b) the presence of continuous affirmative acts of negligence afer [*sic*] the initial negligence which caused the accident; (c) the presence of hidden peril and dangers which were known to both Micro Flo Company and BPS relative to reactivity and flammability; (d) the presence of hidden peril caused by a previous dousing of chemicals through the sprinkler system of BPS either early the [*sic*] morning of the date of this incident or the day before; (e) the presence of a forklift with a propane tank in vicinity [*sic*], i.e. heat or fire; (f) the presence of Maneb in the area of the AZM which had a known reactivity propensity after being exposed to water; (g) the presence of AZM in an area adjacent to a heated pipe.[2]
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> . . . .
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> In conclusion, the Court incorporates its findings of facts and conclusions of law and more specifically finds that the defendants' reliance on *Waggoner* is misplaced. . . . Specifically, the rule of law that a firefighter cannot recover for injuries or death that results from ordinary or open and obvious dangers which are associated with his/her employment. However, the mere fact that a person is a firefighter injured or killed in the line of duty is not enough to be an absolute bar to recovery. . . . It is undisputed in this case that on May 8, 1997, BPS reported to the City of West Helena Fire Department that they had a smoldering supersack of AZM and requested that firefighters remove the material from Warehouse No. 2, where the material was located, this [*sic*] factual issue is sufficient to deny summary judgment. . . .

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[1] Briefly stated, the Fireman's Rule provides that a professional firefighter may not recover from a private party for injuries arising out of the scope of his duties even though the private party may have been negligent in causing the fire and those injuries.

[2] Maneb is another agricultural chemical.

The Court, specifically, finds that the incorrect MSDS sheet constituted a hidden danger, and such defect is attributable to BPS and Micro Flo Company;[3] that the failure to correctly test and rate such a volatile and dangerous chemicals [*sic*] is tantamount to willful and wanton conduct; and supplying the firefighters with this limited amount of incorrect information was an independent act of negligence and arguably reckless indifference to the value of human life, on the part of both defendants BPS and Micro Flo Company.

This Court has no hesitancy in determining that the Motion for Summary Judgment in and of itself does not comport with the requirement of proof for proof, and it is deficient in the elements plead on the specific subject matter of summary judgment per the Firemen's Rule as required by *Lipson v. The Superior Court of Orange County; John Berger, Real Party in Interest*, cited as 31 Cal. 3d [362,] 644 P.2d [8]22; 1982 Cal. Lewis 178; 182 Cal Rptr. 62 (1982). The Court finds that there are exceptions to the Firemen's Rule, and the Court finds that the exceptions apply to the facts of this case. The Court further finds that BPS acted with willful and wanton misconduct in concealing a hidden danger. That the testimony shows that the President of BPS, Allen Bartlo, had knowledge that the chemical properties of AZM were volatile and, in fact, wrote letters and requested further information and testing from Micro Flo Company on this chemical, but this information was not supplied to the City of West Helena Fire Department nor the West Helena firefighters at any time prior to the explosion. BPS received information that the City of West Helena Fire Department received information from the chemical engineer for BPS in New Jersey in which he telephoned the City of West Helena Fire Department after the explosion occurred and stated that if AZM was in the building and there was a water sprinkler system, that the chemical would explode. Thus, BPS had prior knowledge that the chemical compound, AZM, had the potential to explode and concealed this knowledge from the City of West Helena Fire Department which is the essence of a hidden danger.

The Court further finds from the plaintiffs' exhibits and deposition that BPS had knowledge prior to the explosion that Micro Flo Company's MSDS for AZM was incorrect. Correspondence and memos from BPS to Micro Flo Company which have been introduced show that BPS had in the past worked with another

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[3] An MSDS sheet is a Material Safety Data Sheet that accompanies products and tells the properties and characteristics of the products.

brand of AZM (Guthion) which is rated as a "2" for both flammability and reactivity. The inquiry was further supplemented by samples of AZM being furnished to BPS for testing and an explanation that the product would smolder and smoke at approximately 170 degrees Fahrenheit. BPS further corresponded with Micro Flo Company indicating that the AZM was up and running, and that they had not experienced any problems with the dust they had expected. None of this information or other information for which BPS had knowledge with regard to potential problems with AZM being flammable, explosive, or otherwise, reactive was shared with the firefighters. The Court also finds that the evidence shows in this case that the chemist for BPS's New Jersey office telephoned the City of West Helena Fire Department and asked if the sprinklers were activated. Upon questioning about what would happen if the sprinklers went off, the chemist stated that there would be an explosion.

The Court further finds that the City of West Helena firefighters were not told about a propane forklift that was left by a BPS employee in close proximity to the smoldering sack of AZM. Obviously, propane is highly explosive, and the firefighters should have been warned.

The Court further finds evidence that BPS had advanced knowledge of a potential problems [*sic*] with Micro Flo Company's AZM product. A truck driver who delivered the product and BPS employees reported an unusually strong and sickening odor from one of the two truckloads of AZM delivered prior to the explosion, and that there was a torn supersack of AZM.

The Court specifically finds that the joint investigation report by the EPA and OSHA, which sets forth findings, was taken into consideration by the Court and, therefore, for the purpose of the Court ruling on the motion, the Court adopts said report as well as all of plaintiffs' other exhibits including the deposition of BPS President, Allen Bartlo, and other [*sic*] in the record herein.

The Court finds that the pleadings revealed that BPS accuses Micro Flo Company of misconduct and misrepresentation, mainly with regard to the faulty MSDS sheet, and Micro Flo Company accuses BPS of misconduct and other fault, which allegations in and of themselves give rise to a factual controversy such that the bare application of the Firemen's Rule to the facts of this case is wholly inappropriate, and such that summary judgment cannot be granted to either defendant.

> The pleadings and other evidence just do not lend themselves to the conclusion that this drastic remedy of the Firemen's Rule should be invoked by this Court. Factual controversies regarding valid exceptions to the Firemen's Rule are very real or have been plead [*sic*], and there is [*sic*] sufficient factual allegations to prove exceptions to the Firemen's Rule, and summary judgment should be denied. The Court finds that the dangers which the firefighters faced on May 8, 1997, were not apparent nor were they obvious to even the trained eye, and the defendants had the opportunity to supply the firefighters with correct/appropriate information and warnings but did not. Defendants' Motion for Summary Judgment does not address the issues of strict liability or *res ipsa loquitur* or [*sic*] plead by plaintiffs. The Court having found that issues of fact prevent the granting of summary judgment reserves ruling on these issues. Plaintiffs raise the unconstitutionality of the Firemen's Rule, and the Court reserves its ruling for the same reason but note [*sic*] that the ruling of *Ouachita Wilderness Institute v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (Ark. 1997) which was decided after *Waggoner* creates a question of the viability of *Waggoner*.

It is patently clear to this court that the circuit court, while finding that factual issues pertained which militated in favor of denying summary judgment, also made specific findings of fact and conclusions of law relative to the ultimate defense asserted by BPS, which is the Fireman's Rule. Specifically, the court concluded that exceptions to the Fireman's Rule did exist and found that BPS's actions constituted willful and wanton misconduct, which involved hiding a danger from the firefighters. These findings were made even though the only issue before the court was whether genuine issues of material fact existed so as to foreclose summary judgment in favor of BPS. *See* Ark. R. Civ. P. 56(c). This court has often stated that the purpose of summary judgment is not to try the issues but to determine whether there are any issues to be tried. *See, e.g., Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000); *Culpepper v. Smith*, 302 Ark. 558, 792 S.W.2d 293 (1990). This basic maxim of summary-judgment law was violated extensively in this case.

Parker and Winston, however, raise another maxim of summary-judgment law and that is that this court does not take appeals from denials of summary judgment. The appellees are correct that this is a well-settled principle in this court's jurisprudence. *See Gibson Appliance Co. v. Nationwide Ins.* Co., 341 Ark. 536, 20 S.W.3d 285 (2000); *Dobie v. Rogers*, 339 Ark. 242, 5 S.W.3d 30 (1999); *Hartford Ins. Co. v. Mullinax*, 336 Ark. 335, 984 S.W.2d 812

(1999); *Liberty Mut. Ins. Co. v. Thomas*, 333 Ark. 655, 971 S.W.2d 244 (1998). Such review is not even available after a trial on the merits. *See Ball v. Foehner*, 326 Ark. 409, 931 S.W.2d 142 (1996). The rationale for this rule is that "a final judgment should be tested upon the record as it exists at the time it is rendered, rather than at the time the motion for summary judgment is denied, since further evidence may be supplied at trial." *Ball, supra* (quoting *Rick's Pro Dive 'N Ski Shop*, 304 Ark. 671, 673, 803 S.W.2d 934, 935 (1991)).

BPS, however, maintains that it is not appealing from a denial of summary judgment but from that part of the circuit court's order where improper findings of fact and conclusions of law were made. In making this argument, BPS leans heavily on the court of appeals' decision in *Danco Constr. Co. v. City of Ft. Smith*, 268 Ark. 1053, 598 S.W.2d 437 (Ark. App. 1980). In *Danco Constr.*, the City had sued the construction company for damages arising out of negligence in the construction of a sewer line. Danco answered and affirmatively pled the statute of limitations as a defense. Danco then moved for summary judgment raising the same limitations defense. The circuit court found that there was a genuine issue of material fact and overruled the motion. But the court then went forward and concluded that the City's claim was not barred by the statute of limitations. Danco appealed. The court of appeals first noted that a denial of summary judgment is not a final order from which an appeal may be taken. The court did not disagree with this principle of appellate law, but it then considered Danco's twin arguments — that the circuit court's ruling had the effect of granting summary judgment for the City and the ruling would also operate to bar Danco from offering evidence at trial on the limitations defense.

The court of appeals held as follows:

> We reverse the portion of the order of the trial court finding or holding the City of Fort Smith is not barred by the statute of limitations. In doing so we make it clear we are not holding the City is not barred. In view of the determination by the court that there is a genuine issue of material fact, the motion for summary judgment should have been simply denied. The parties shall be permitted to introduce any further evidence they wish touching on the issue of the statute of limitations and on the date the statute began to run.
>
> We do not review the court's denial of the motion for summary judgment since the order is interlocutory and not appealable. However, the part of the order ruling the City is not barred by the

> statute of limitations would operate to foreclose appellant from further asserting that defense and offering evidence at trial on that issue. That portion of the order is therefore a final disposition of that issue, and is therefore appealable.

Danco Constr., 268 Ark. at 1056, 598 S.W.2d at 439.

This court has followed the reasoning of the court of appeals in the *Danco Constr.* case on at least one occasion. *See Young v. Staude*, 280 Ark. 298, 657 S.W.2d 542 (1983) (trial court cannot deny summary judgment and refuse to find a promissory note usurious but then grant relief not requested by reforming the note to make it non-usurious). We take this occasion to do so again. We formally adopt the reasoning of the court of appeals in *Danco Constr.* and apply it to the facts of this case. In the instant case, as in *Danco Constr.*, the circuit court went far beyond merely denying summary judgment to BPS, but it effectively granted relief to Parker and Winston and foreclosed BPS from further asserting a defense under the Fireman's Rule and from offering evidence at trial on that issue. This was clear error. As in *Danco Constr.*, we consider that portion of the circuit court's order where findings of fact and conclusions of law were made which effectively decided the Fireman's Rule issue to be a final disposition and appealable. We reverse that portion of the circuit court's order where such findings and conclusions were made and hold that the order denying summary judgment must be limited to the single issue of whether genuine issues of material fact exist.

We stress that in deciding as we do today, we are not determining whether the Fireman's Rule applies in this case or does not apply. That is an issue to be further developed in the circuit court. Moreover, we underscore the uniqueness of this case, where the circuit court has drifted into deciding the merits of a matter which was not yet ripe for decision.

For the foregoing reasons, the motion of Parker and Winston to dismiss the appeal is denied and the order of the court of appeals granting that motion is vacated. We also reverse that portion of the circuit court's order which makes findings of facts and conclusions of law on the Fireman's Rule defense and remand the case with directions that an order be entered consistent with this opinion.

Richard COX *v.* STATE of Arkansas

CR 00-345 47 S.W.3d 244

Supreme Court of Arkansas
Opinion delivered June 28, 2001

Etoch Law Firm, by: *Louis A. Etoch*, for appellant.

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

ROBERT L. BROWN, Justice. The appellant, Richard Cox, was tried and convicted of capital murder resulting from the death of Holly Strickland. He was sentenced to life in prison without the possibility of parole. He appeals and raises five points: (1) the trial court erred in not granting his motion for directed verdict at trial; (2) the trial court erred in not suppressing his custodial statement; (3) the trial court erred in excluding from evidence statements by Kingrale Collins that Collins had committed the murder; (4) the trial court erred in not declaring a mistrial after allegedly improper comments and argument by the prosecuting attorney; and (5) the trial court erred in not requiring a racially neutral reason from the prosecuting attorney when the prosecutor struck a potential African-American juror. We hold that none of the points has merit, and we affirm.

The facts of this case are taken from the statement given by Cox to Wynne police officers and from various witnesses at his trial. In the early morning hours of May 18, 1996, Kingrale Collins, who was in his twenties, and Cox, who was age sixteen at the time, went to Collins's house in Wynne and got Collins's 12 gauge pump shotgun and shotgun shells. The handle of the shotgun was taped with gray tape. Cox carried the shotgun until the two young men crossed the railroad tracks when he handed it to Collins. Cox said that Collins told him he was "going to get some money" that was owed him.

Cox and Collins first stopped at a house trailer and knocked on the door. No one answered, and they left. According to Cox, Collins then stopped at two more residences by himself, a white house and an apartment complex, and knocked on the doors, while Cox watched from a distance. Two witnesses for the State, Charlotte Archer and Greg Wilson, confirmed that they had heard knocks on their doors during this time period. Ms. Archer testified that she looked through a window and saw two young black males standing at her door. She did not answer the door. Greg Wilson testified that at about 2:00 or 3:00 a.m. he heard someone beating on his door. He went to the door, and no one was there. Later, he heard shots and went out to his porch where he saw "two guys" running down the street with a shotgun.

According to Johnny Strickland, the husband of the murder victim, he was in the bathroom having just arrived at a friend's house with his wife at around 2:30 a.m. He heard shots, ran out to the living room, and found his wife on the floor in a pool of blood in front of the door. She showed no signs of life. Dr. Stephen

Erickson, a forensic pathologist with the State Crime Lab, testified that she died from a single shotgun wound to the right arm, and right chest.

In Cox's statement to Wynne police officers, he denied going to the front door where Holly Strickland was killed but stated that he heard three shots and heard the victim scream. He admitted that his finger prints were on two of the loaded shells in the shotgun and on the trigger as well. He denied killing Holly Strickland, however, and was adamant that Collins had done it. He did admit to carrying and hiding the shotgun as he ran away from the crime scene with Collins. When asked what would have happened if the man in the trailer had opened his door, Cox answered: "I guess he would have shot him."[1] He told interrogating police officers that Collins asked him to imitate the victim's scream, and when Cox did, Collins laughed.

At about 3:00 that same morning, Antonio Milam reported information about Collins's connection to the murder to the Wynne Police Department. A search warrant was issued for Collins's house where a shotgun and shells were found. The shotgun proved to be the murder weapon used in the Strickland slaying. On May 22, 1996, Cox was arrested and interrogated by Wynne police officers. First, he answered questions implicating himself in the crime. He then signed a written statement that summarized his activity on the night of the crime. Later, he moved to suppress those statements on the basis that they were not voluntarily given and his *Miranda* rights were not knowingly and intelligently waived. The circuit court denied that motion. He was subsequently charged with capital murder, and the death penalty was requested. He was convicted of capital murder, as already indicated, and sentenced to life in prison without parole after the State waived the death penalty. Collins, in a separate trial, was convicted of capital murder and sentenced to death. We affirmed Collins's conviction and death sentence. *See Collins v. State*, 338 Ark. 1, 991 S.W.2d 541 (1999).

[1] Cox's abstract of the record in his brief contains the statement: "I guess *we* would have shot him." We are governed by the record which has the personal pronoun "he."

I. Sufficiency of the Evidence

For his first point of appeal, Cox contends that the trial court erred in failing to grant his motion for directed verdict. He maintains that there was no evidence presented that he fired the fatal shots. Indeed, he points to the fact that in his statement, which the prosecutor introduced as part of the State's case-in-chief, Cox said that Collins was the murderer. In addition, he urges that there was no proof that he acted with deliberation and premeditation. On the contrary, he claims that he was merely present at the crime scene without any indication that Collins would do what he did.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000); *Terrell v. State*, 342 Ark. 208, 27 S.W.3d 423 (2000). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Ferguson v. State, supra*; *Terrell v. State, supra*. Substantial evidence is evidence that is of sufficient certainty and precision that it compels a conclusion one way or another. *Ferguson v. State, supra*; *see also Booker v. State*, 335 Ark. 316, 984 S.W.2d 16 (1999). On appeal, this court views the evidence in the light most favorable to the State and sustains a judgment of conviction if there is substantial evidence to support it. *Ferguson v. State, supra; Terrell v. State, supra*. Double jeopardy considerations require this court to consider a challenge to the sufficiency of the evidence prior to other assignments of circuit court error. *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997); *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996).

The prosecution's theory of the case at Cox's trial was that he was an accomplice in the Strickland murder with Collins. Our Criminal Code defines an accomplice as follows:

> (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:
>
> (1) Solicits, advises, encourages, or coerces the other person to commit it; or
>
> (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing it; or

> (3) Having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

Ark. Code Ann. § 5-2-403(a) (Repl. 1997); *see also* AMCI 2d 401. Mere presence when the crime is being committed and when one does not have a legal duty to act does not make one an accomplice. *See Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997); *Pilcher v. State*, 303 Ark. 335, 796 S.W.2d 845 (1990); *see also* AMCI 2d 404.

We first note that the jury was instructed on the law of accomplice liability, which included an instruction on mere presence. The jury obviously concluded that Cox was an accomplice with Collins in perpetrating the crime. We believe that the jury's verdict is supported by substantial evidence. Cox's fingerprints were on two of the shells loaded into the shotgun, and his fingerprint was on the trigger. By his own admission, he accompanied Collins to the murder scene and carried the shotgun part of the way on that journey. After the murder, he fled with Collins. He carried the shotgun while fleeing and tried to hide it on his person. He also accompanied Collins to the first residence, which was a trailer. Moreover, the jury could have inferred from these facts that Cox did more in perpetrating the murder than simply assisting Collins. *See, e.g., Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997). We affirm the circuit court on this point.

II. Suppression of Statement

For his next point, Cox maintains that his statement to police officers should have been suppressed because it was not voluntarily given and because he did not knowingly and intelligently waive his *Miranda* rights.[2] We affirm the circuit court.

a. Voluntariness

First, with regard to whether Cox voluntarily admitted his participation in the crime, he underscores that he was only age sixteen at the time of the police interrogation and a ninth grade student with an I.Q. of 92. He says that he was arrested and handcuffed at about 10:00 p.m. on May 22, 1996, and that his

[2] In his motion to suppress before the circuit court, Cox appeared to contest the written statement prepared by Wynne police officers and signed by him as well. In his argument on appeal, the written summary is not specifically mentioned.

mother was never notified before the police interrogation. In addition, he claims that he was the victim of false promises of leniency by the interrogating police officers. As an initial matter, he claims that Officer Roger Speer of the Wynne Police Department told him that he could help himself by telling the truth and that the prosecuting attorney would want to know whether he cooperated. It was after this exchange, according to Cox, that he told his story. Furthermore, towards the end of the interrogation, Chief Lynn Rogers said to Cox that he would probably be out on bond the next day.[3] He claims that that was a false promise, and, as a result, his statement to the police officers was not only the result of coercion and intimidation but also due to deception.

Our court has set out the standards for reviewing the voluntariness of statements resulting from police interrogation:

> We have said that statements made while in police custody are presumed to be involuntary and the burden rests on the State to prove their voluntariness and a waiver of *Miranda* rights by a preponderance of the evidence. *See Rychtarik v. State*, 334 Ark. 492, 976 S.W.2d 374 (1998); *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427 (1998). In determining voluntariness, this court looks to whether the statement and waiver were the result of free and deliberate choice rather than coercion, intimidation, and deception. *Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999); *Smith v. State, supra*, citing *Colorado v. Spring*, 479 U.S. 564 (1987) and *Moran v. Burbine*, 475 U.S. 412 (1986). On appeal, this court makes an independent determination of the voluntariness of a confession, but in doing so, we review the totality of the circumstances and will reverse only when the trial court's finding of voluntariness is clearly against the preponderance of the evidence. *See Jones v. State*, 323 Ark. 655, 916 S.W.2d 736 (1996); *Trull v. State*, 322 Ark. 157, 908 S.W.2d 83 (1995). We recognize in our determination of whether a trial court's finding is clearly erroneous that conflicts in testimony are for the trial court to resolve. See *Jones v. State, supra*. Where it is apparent from the record that a statement is not the product of an accused's free and rational choice and where the undisputed evidence makes clear that the accused did not want to talk to police detectives, the Supreme Court has held that due process of law requires that the resulting statement not be used against the accused. *Mincey v. Arizona*, 437 U.S. 385 (1978). Other

[3] At various times in the record Officer Speer is referred to as Officer Spear and Chief Rogers as Chief Rodgers.

> factors mentioned in *Mincey*, in addition to the fact that the accused made repeated requests that the interrogation stop so he could retain a lawyer, were that he was weakened by pain and shock, isolated from family, friends, and legal counsel, and was barely conscious. Under these circumstances the Court held that Mincey's will was overborne and the statement could not be used against him.

Riggs v. State, 339 Ark. 111, 119, 3 S.W.3d 305, 309-310 (1999).

This court has also consistently held that relevant factors in determining whether a confession was involuntary are age, education, and the intelligence of the accused as well as the lack of advice as to his constitutional rights, the length of detention, the repeated and prolonged nature of questioning, and the use of mental or physical punishment. *See, e.g., Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998); *Davis v. State*, 330 Ark. 76, 953 S.W.2d 559 (1997).

In the instant case, it is true that Cox was sixteen and had an average I.Q. He was also arrested and interrogated without notice to his mother. He, of course, was subsequently charged as an adult with capital murder pursuant to Ark. Code Ann. § 9-27-318 (Repl. 1998). Accordingly, notifying his parent was not required. *See Ray v. State*, 344 Ark. 136, 40 S.W.3d 243 (2001); *Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998). Moreover, Cox's age of sixteen is not of such significance, standing alone, to invalidate the statement. *See, e.g., Miller v. State,* 338 Ark. 445, 994 S.W.2d 476 (1999); *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997). These circumstances enumerated by Cox do not render his statement inadmissible, and the circuit court did not clearly err in ruling as it did.

Cox, however, goes further and specifically contends that Wynne police officers made false promises of leniency. He is correct that our blackletter law states that false promises of leniency will invalidate a confession. *See, e.g., Bisbee v. State* 341 Ark. 508, 17 S.W.3d 477 (2000); *Sanford v. State, supra*; *Humphrey v. State, supra*; *Key v. State*, 325 Ark. 73, 923 S.W.2d 865 (1996). The relevant colloquy at issue between Officer Speer and Cox follows:

> SPEER: Here's what's going to happen. Now, one of the ways, you know, you can help yourself is to tell the truth. Now, this is benefitting you by telling the truth.

COX: Okay.

SPEER: Because what I'm going to do,. whenever I get to the prosecutor, he's going to say, "Well, did either one of them cooperate with you? Did either one of them want to tell you the truth about what happened?" As of right now, I've got one person that I can say, "Yes, he cooperated with me."

COX: Okay, okay, I'll tell the truth.

[redacted] Our reading of Officer Speer's comments is that he was advising Cox to tell the truth and that he would tell the prosecutor if Cox cooperated. At no point did he state that leniency would flow from Cox's telling the truth. At no point did he state that he or anyone else other than the prosecutor could mete out leniency. We conclude that Cox's proof falls short of a false promise of leniency when no promise was made by Officer Speer, and Officer Speer had no authority to make such a promise.

[redacted] Moreover, we conclude that Chief Rogers's indication that bail would be set for Cox the following day had no impact on whether Cox voluntarily made his statement. The discussion between Cox and Chief Rogers regarding bail follows:

COX: Will I be able to leave tomorrow? Or will I have to stay here until court, cause I don's want to do that?

ROGERS: Uh, we'll make arrangements for a bond to be posted for you.

COX: A bond, how much?

ROGERS: Well, that'll be up to the judge.

COX: So, like, my brother is in the army right now and he gets some money out of the bank and pays my bond, I can go home?

ROGERS: Yea, well, like I said the judge will be the one that post bond.

COX: So the bond (inaudible).

ROGERS: I don't set bond.

> COX: I get the bond tomorrow. Probably?
>
> ROGERS: Probably, ok.
>
> COX: So can I call my brother, right now, and tell him?
>
> ROGERS: We'll let you make a phone call as soon as you get over to the jail.

Again, Cox argues that this amounted to a false promise by Chief Rogers that he would be bonded out of jail the following day. The chief of police, however, was clear that he did not set the bonds and that the judge did. The chief does appear to agree with Cox that he would "probably" have bond set the next day. We disagree, however, that this was a promise that misled Cox or in any way induced him to continue making a statement. There is also the fact that Cox had already given his statement to Officer Speer and reiterated part of it to Chief Rogers before this colloquy regarding the bond took place. The one new fact that did develop after the bond colloquy was Cox's admission that his fingerprint was probably also on the shotgun's trigger because he put the safety on and pulled the trigger to make certain that the safety had been activated.

In short, we conclude that no false promise of leniency was made by Officer Speer or Chief Rogers. Thus, the circuit court did not clearly err in finding that Cox's statement was voluntary.

b. Knowing and Intelligent Waiver

Cox further claims that his waiver of his *Miranda* rights was not knowingly and intelligently made. We need not address this point. Following the suppression hearing, the circuit court made the following ruling:

> The Court is of the opinion that the State has met its burden of proof and has satisfied the Court the statement was freely and voluntarily given. I don't find that there are any such promises that would require the denial of the use of the statement by the State. The promises by the officers were complied with. Some things may have to come out of the videotape or the statement. We will deal with that later.

At no point does the circuit court address the waiver issue, and Cox did not urge that it do so. We have held that the question of voluntariness and the question of a knowing and intelligent waiver

are separate inquiries. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). Cox, of course, was given his *Miranda* warnings both at the time of his arrest and when the interrogation began. In any case, the failure of Cox to obtain a ruling on waiver precludes our consideration of this issue. *Id.*

III. Exclusion of Collins's Statements

Cox next claims that it was error for the circuit court to exclude incriminating statements made by Kingrale Collins to two separate people.[4]

The first statement that Cox desired to introduce was Collins's statement to Antonio Milam after the Strickland murder: "I shot the bitch." According to Cox, at the time Collins made that statement, he had the shotgun and shotgun shells in his hand. The second statement that Cox intended to introduce involved this colloquy between Collins and Keith "Rusty" Ward, the Cross County Jailer:

> COLLINS: Rusty, do you know what I'm charged with?
>
> WARD: No.
>
> COLLINS: It's a capital murder.
>
> WARD: Man, that's a heavy charge.
>
> COLLINS: Yeah, and I did it too.

The prosecutor stipulated that Collins was unavailable to testify but moved *in limine* that the statements be excluded as hearsay and because Cox and Collins were accomplices. The circuit court granted the motion and admonished Cox throughout the trial not to allude to these statements. Cox contends that this was error.

Specifically, Cox maintains that Collins's admissions constituted an exception to the hearsay rule under Ark. R. Evid. 804(b)(3), which reads:

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[4] In his argument before the circuit court, Cox also wanted to introduce the fact of Collins's conviction. He does not pursue this in his appeal.

> (b) *Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ....
>
> (3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. *A statement tending to expose the declarant to criminal liability and offering to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.* A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception. (Emphasis added.)

Reading this rule, we first note that Collins was clearly unavailable. Going forward, the rule reads that a statement which exposes the declarant, in this case Collins, to criminal liability, and also exculpates the accused (Cox) is not admissible unless it is proven trustworthy by corroboration. Cox, in his arguments, focuses on the fact that the statements were against Collins's penal interests and were trustworthy, as shown by Collins's ultimate conviction. Nevertheless, we question the application of this rule when accomplices are involved. The prosecutor's theory of the case was that the two young men were accomplices, an issue that we have already discussed. The fact that Collins says he committed the murder does not exclude the fact that Cox was an accomplice and assisted in its perpetration. The jury found that Cox was culpable, after being instructed on the law of accomplice liability. Accordingly, we hold that the circumstances of these statements do not fall within the ambit of the hearsay exception set forth in Ark. R. Evid. 804(b)(3).

Furthermore, we do not believe that our case of *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993), mandates a different conclusion, as Cox would have it. That case concerned the issue of third-party culpability and what is required, but it did not involve Rule 804(b)(3) or the issue of accomplice liability. Those matters govern our decision in the instant case. The circuit court did not abuse its discretion in denying the admission of these statements into evidence.

IV. Mistrial Motion

Cox claims that the circuit court erred in not declaring a mistrial when the prosecutor made derogatory comments directed towards him in closing arguments. The prosecutor's comments, defense counsel's objection, and the circuit court's ruling follow:

> PROSECUTOR: It's ludicrous for Mr. Etoch to stand up here and try to tell you that Cox didn't know these things. Mr. Long told you in voir dire, sometimes people try to get you to believe some ridiculous things in here and they will. I made a list of some of the doozies I've heard so far. Labeled, "the crazy things you should not believe" if the defendant is polite during the interrogation, you can't convict him. It doesn't matter what comes out of his mouth. If he's polite, you can't convict him.
>
> DEFENSE COUNSEL: Your Honor, I object to that characterization that maybe I said something like that.
>
> COURT: I don't know that he said that, he asked some questions. I guess you can argue what you think he was getting at and going to.
>
> PROSECUTOR: Mr. Etoch is about to get up here and he's going to try to sell you a load of crap.
>
> DEFENSE: Your Honor, I object. I've been attacked, attacked, and attacked. Mr. Ladd does not have a clue as to what I'm going to say. He has no idea.
>
> COURT: Use a different phrase. The objection is sustained.
>
> PROSECUTOR: Mr. Etoch is about to get up here and tell you why his client is not guilty of killing Holly Holmes Strickland. I think all of the things he is about to tell you fall under number four in my list of "crazy things you should not believe."
>
> DEFENSE: Your Honor, may we approach?

Defense counsel then asked for a limiting instruction, and the circuit court refused.

We have consistently held that the declaration of a mistrial is an extreme remedy, which should only be granted when

justice cannot be served by continuing the trial. *See, e.g., Williams v. State*, 343 Ark. 591, 36 S.W.3d 324 (2001); *Woods v. State*, 342 Ark. 89, 27 S.W.3d 367 (2000). Remarks that require reversal are rare and require an appeal to the jurors' passions. *Williams v. State, supra; Calloway v. State*, 330 Ark. 143, 953 S.W.2d 571 (1997); *Lee v. State*, 326 Ark. 529, 932 S.W.2d 756 (1996). The circuit court is given broad discretion to control counsel in closing arguments, and we only interfere with such discretion when there has been a manifest abuse of discretion. *Calloway v. State, supra; Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994).

The prosecutor's comment that defense counsel was about to sell the jury a "load of crap" was certainly crude and inappropriate. However, we conclude the circuit court correctly sustained defense counsel's objection and declined to declare a mistrial.

Cox further takes issue with the prosecutor's closing argument where this colloquy took place:

> PROSECUTOR: Think about what your experiences in life have taught you. If two people are involved in something like this together and you separate them and interview them, you ask them both, "did you pull the trigger?"
>
> DEFENSE: Your Honor I object. May I approach? (Then bench conference.) Your Honor, all these jurors know some facts about this case. Mr. Long has been going at it, on and on about he get (sic) in Kingrale Collins' statement and now he's saying that if two people are separated, each person says the other one did it. He's jut trying to get in Kingrale Collins' statement. I object and I move for a mistrial.
>
> PROSECUTOR: It's nothing but common sense, common argument.
>
> DEFENSE: He's arguing what the co-defendant said, not what Richard Cox said.
>
> COURT: Motion is denied.
>
> PROSECUTOR: You take these two people who you are trying to make criminally responsible for their activities and you separate them, you ask them both, did you pull the trigger? I leave it for you to determine if each of them was asked that question what it would be.

DEFENSE: I object.

COURT: Objections overruled.

PROSECUTOR: I leave it for you to deduce what each of the responses to that question would be, simply because they would both be trying to avoid as much responsibility as they could. "Oh, I carried, but I didn't pull the trigger. I loaded it, but I didn't pull the trigger."

DEFENSE: I guess this is a continuing objection, your Honor.

Cox argues that the prosecutor's argument amounted to the prosecutor's saying that Collins pointed the finger at Cox as the perpetrator of the murder just as Cox had said Collins committed it. We do not see it that way. Rather, it appears to us that the prosecutor broached a hypothetical situation and that his allusion, if any, was to Cox's statement where he admitted to only carrying the shotgun but not to pulling the trigger. In our judgment, there had to have been a more specific reference to Collins's statement, where he incriminated Cox and said he was the shooter, for error to have occurred. That did not transpire.

We discern no abuse of discretion when the circuit court overruled Cox's objection.

V. Batson *Motion*

For his final point, Cox asserts that the circuit court erred in rejecting his *Batson* challenge. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Specifically, he urges that error was committed by not requiring the prosecutor to give a racially neutral reason for striking an African-American juror.

The facts surrounding his argument, according to Cox, are that fifty-four members of the *venire* were questioned as potential jurors in this case. Nine of those persons were African-Americans. Of those nine persons, seven were excused for cause by the circuit court, one was excused by agreement of the parties, and the one potential juror at issue, Dorothy Caddell, was excused by the prosecutors by peremptory challenge. The result was that Cox was tried by an all-white jury. Counsel for Cox underscores the significance of this because Cox is black and the victim, Holly Strickland, was white.

When Ms. Caddell was being questioned by the circuit court as part of *voir dire*, she admitted to having been the victim of a crime. In answer to the prosecutor's questions, she initially said that she could impose either the death sentence or life without parole on Cox and that she could also follow an instruction on accomplice liability. However, she later stated in response to the prosecutor's questions that she could not sentence a sixteen-year-old to death. She also advised defense counsel that she had previously served on a jury where the defendant was found not guilty. She further stated that her son-in-law was a policeman in Forrest City.

At the time that Dorothy Caddell was questioned as part of *voir dire* and then struck by the prosecutor, only seven jurors had been seated. Four African-Americans had been excluded by the circuit court or by agreement of the parties. Four additional African-Americans remained to be questioned. Defense counsel made his *Batson* motion and argued that a *prima facie* case had been made because there were no African-Americans on the jury and no racially neutral reason had been given to exclude Ms. Caddell. The circuit court responded that it found that a *prima facie* case showing a *Batson* violation had not been made. The prosecutor added that there had been no pattern of discrimination, which *Batson* requires for a violation. Defense counsel's retort was that the only black juror the prosecutor had a chance to strike, he struck. The circuit court then ruled:

> Well, in the event Mr. Long [prosecutor] explained it based on the answers to the questions, the Court would not find that she was subject to cause but there's ample reason to exercise peremptory based on the responses to the questions she was asked and whether he chooses to explain that or not, the Court would have to find that to be the case, and in any event it wouldn't matter.

The essence of Cox's argument appears to be that a *prima facie* case was made under *Batson* when the prosecutor struck Ms. Caddell. Under the facts of this case, we disagree. This court has defined what must occur in order for a *prima facie* case to be made:

> The strike's opponent must present facts, at this initial step, to raise an inference of purposeful discrimination. According to the *Batson* decision, that is done by showing (1) that the strike's opponent is a member of an identifiable racial group, (2) that the strike is part of a jury-selection process or pattern designed to discriminate, and (3) that the strike was used to exclude jurors because of their race. In deciding whether a *prima facie* case has been made, the

> trial court should consider all relevant circumstances. Should the trial court determine that a *prima facie* case has been made, the inquiry proceeds to Step Two. However, if the determination by the trial court is to the contrary, that ends the inquiry.

MacKintrush v. State, 334 Ark. 390, 398, 978 S.W.2d 293, 296 (1998).

Certainly, Ms. Caddell, as an African-American, was part of a racially identifiable group. However, the circumstances at this stage of the *voir dire* do not support a finding that the strike was part of a process or pattern designed to discriminate or that the strike was used to exclude jurors because of their race. The prosecutor had made no other strikes of African-Americans at this stage, and there were four more African-Americans left on the *venire*. The mere striking of one African-American *venire* person does not automatically equate to a *prima facie* case for a *Batson* violation. *Cf. Wooten v. State*, 325 Ark. 510, 931 S.W.2d 408 (1996) (striking sole black person on *venire may* establish *prima facie* case; case did not say a *prima facie* case automatically was made).

We will reverse a circuit court's *Batson* findings only when they are clearly against the preponderance of the evidence. *Sanford v. State, supra*; *Green v. State*, 330 Ark. 458, 956 S.W.2d 849 (1997). The circumstances of this case do not show that the circuit court clearly erred.

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

Affirmed.

THORNTON, J., dissents.

RAY THORNTON, Justice, dissenting. Although I agree with the majority opinion's disposition of issues one through four, I cannot agree with the conclusions reached by the majority in appellant's final point on appeal. Specifically, I cannot join the majority opinion in holding that the trial court did not err in finding that a *prima facie* case was not made, and consequently, that no race-neutral response was required before the court rejected appellant's *Batson* challenge. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

In *Batson*, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits a prosecutor from using peremptory challenges to exclude African-American *venire* persons from service on a jury because of their race. *Id.* To test whether a peremptory strike should be disallowed, a three-step process was articulated in *Purkett v. Elem*, 514 U.S. 765 (1995):

> Once the opponent of a peremptory challenge has made out a *prima facie* case of discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Id.

In *Williams v. Groose*, 77 F.3d 259 (8th Cir. 1996), the Eighth Circuit was even more succinct:

> After a defendant makes a *prima facie* showing of racial discrimination in the Government's use of a peremptory challenge, the Government *must offer a race-neutral reason for the challenge.*

Id. (citing *Purkett, supra*) (emphasis added).

We have adopted this principle in Arkansas, requiring that when a *prima facie* showing of discrimination has been made, the party seeking to use a peremptory challenge is required to state a race-neutral reason for the challenge. *See MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). In *MacKintrush*, we established a procedure for following the *Purkett* modification to *Batson*. We held that after a *prima facie* case was presented, it was necessary to proceed to step two, where the maker of the peremptory motion was required to state a race-neutral reason for the strike, after which the trial judge proceeds to step three. *MacKintrush, supra.*

The issue in the present case is whether the peremptory challenge was wrongfully used to strike the only African-American venire person who would otherwise have been seated on the jury panel, resulting in a trial by an all-white jury of an African-American defendant charged with the murder of a white woman. The trial court ruled that a *prima facie* case of discrimination had not been presented, and the trial court found that a race-neutral explanation was not required. The prosecution did not offer such an

explanation. In my opinion, this was clearly a reversible error by the trial court.

We turn to our case law to determine what is required to make a *prima facie* showing of discrimination in the context of a *Batson* challenge. Among the cases defining what is required to make a *prima facie* showing of discrimination are:

> 1. *Mitchell v. State*, 295 Ark. 341, 750 S.W.2d 936 (1988), where we stated:
>
> Where the use of a peremptory challenge excludes from the jury *all members of the defendant's minority race*, it is not necessary to show exclusion of more than one minority juror of the same race as the defendant to make a prima facie case of discriminatory use of a peremptory challenge.

Id. (Emphasis added.)

> 2. *Hollamon v. State*, 312 Ark. 48, 846 S.W.2d 663 (1993) provides:
>
> Accordingly the defendant must first establish a prima facie case of purposeful discrimination *which the appellant clearly did in this case when he pointed to a peremptory strike by the State dismissing the sole black person on the jury*.

Id. (Emphasis added.)

> 3. *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996), where we stated:
>
> This court has stated that a prima facie case may be established by: (1) showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose, (2) demonstrating total or serious disproportionate exclusion of blacks from the jury, *or* (3) showing a pattern of strikes, questions, or statements by a prosecuting attorney during voir dire.

Id. (emphasis added). The word *or* indicates that one of these factors must be present to establish a *prima facie* case.

This court suggested in *MacKintrush, supra*, that a *prima facie* case could be made by showing:

> (1) that the strike's opponent is a member of an identifiable racial group, (2) that the strike is part of a jury-selection process or pattern designed to discriminate, and (3) that the strike was used to exclude jurors because of their race.

MacKintrush, supra. This definition on which the majority relies does not incorporate the factors enunciated in *Prowell, supra.*

Although our research indicates that *Mitchell, supra* and *Hollamon, supra* have been limited by *MacKintrush*, I submit that *Mitchell, Hollamon*, and *Prowell, supra* are not overturned on this point by *MacKintrush, supra.* If *MacKintrush* is given the meaning that a *prima facie* case cannot be made unless a pattern is established, such an interpretation of our *MacKintrush* decision would fly in the face of the Supreme Court, which stated in *Batson*:

> [A] defendant may make a *prima facie* showing of purposeful racial discrimination in selection of the *venire* by relying solely on the facts concerning its selection *in his case.*

Id. (Emphasis supplied.)

The Supreme Court further states that " 'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause.' " *Id.* (citing *Arlington Heights v. Metropolitan Housing Dep't Corp.*, 429 U.S. 252 (1977)). The Supreme Court then concludes that " '[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " *Id.* (citing *Arlington Heights, supra*).

The Supreme Court then continued:

> These principles support our conclusion that a defendant may establish a *prima facie* case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.

Batson, supra.

> Further, the Supreme Court gave the requirements for establishing a *prima facie* case:
>
> To establish such a case, the defendant must first show that he is a member of a cognizable racial group . . . and that the prosecutor

> has exercised peremptory challenges to remove from the venire members of the defendant's race.

Id. (citation omitted). This requirement is met in the case before us, as appellant is an African-American.

Next, the *Batson* Court states:

> Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."

Id. (citing *Avery v. Georgia*, 345 U.S. 559 (1953)). Here, there is no doubt that by use of a peremptory challenge, the prosecutor had the opportunity to engage in invidious discrimination.

Finally, the Supreme Court states:

> [T]he defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id.

With regard to this third factor, the fact that the only African-American venire person who was not excluded for other reasons from jury duty was stricken from the panel by the prosecutor's peremptory challenge is sufficient to show that a *prima facie* case was made, and it follows that the prosecutor should have been required to state a race-neutral reason for the strike. Under the Supreme Court's analysis in *Batson, supra*, as refined in *Purkett, supra*, a *prima facie* case can be established when only one juror is peremptorily struck because of race. Our state judiciary does not have authority to override the principles established by the Supreme Court, and consequently, our decisions in *Mitchell, supra*, *Hollamon, supra*, and *Prowell, supra* remain good law on the definition of a *prima facie* case.

The majority would now depart from this well-established standard for showing a *prima facie* case, and agree with the trial court's ruling that no race-neutral explanation is required. Perhaps that is because the majority of this court is able to discern from the record that a race-neutral explanation might have been offered if the trial court had required it. How do we know that? Is it not

equally possible that a prosecutor might explain that he thought he had a better chance of gaining a death sentence if all African-American venire persons were excluded from the jury? We will never know what explanation the prosecutor might have given, because he was not required to state his reasons for the strike. Surely, we are not charged with developing on appeal a race-neutral reason, and concluding that, because such a defensible reason might have been offered, there was no need to require the prosecutor to state a race-neutral explanation.

Because I cannot agree with that conclusion, I respectfully dissent.

Orlando Ray ELLIS *v.* STATE of Arkansas

CR 01-1068 47 S.W.3d 259

Supreme Court of Arkansas
Opinion delivered June 28, 2001

William R. Simpson, Jr., Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

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

ANNABELLE CLINTON IMBER, Justice. Orlando Ray Ellis, Appellant, was convicted of first-degree murder in the shooting death of Quincent James. A jury sentenced Mr. Ellis to life imprisonment without parole in the Arkansas Department of Correction. On appeal, Mr. Ellis argues that the trial court's failure to instruct the jury on reckless manslaughter was reversible error. We disagree and affirm.

The facts are undisputed. August 27, 1999, was Mr. James's thirtieth birthday. On that day, he went over to his sister's house in Southwest Little Rock to visit with her children. At some point during that visit, Mr. James noticed Mr. Ellis wrestling with ten-year-old Patrick Patton, Mr. James's nephew. He asked Mr. Ellis to let go of the boy. When Mr. Ellis refused, Mr. James began staring at him. Both men exchanged words, with Mr. Ellis repeatedly demanding that Mr. James stop "mugging" him. Mr. James, however, continued to stare at him. Eventually, Mr. Ellis pulled a gun and shot Mr. James in the abdomen from a distance of three to five feet. After the shooting, Mr. Ellis waived his gun around and told everyone present not to call 911. Ultimately, Mr. James's sister was able to call for help, and Mr. James was taken to a hospital where he died eight hours later.

At the end of the guilt phase of the trial, Mr. Ellis proffered a jury instruction on reckless manslaughter as a lesser-included offense of first and second-degree murder. The trial court instructed the jury on purposeful first-degree murder and knowing second-degree murder but denied Mr. Ellis's proffered instruction on reckless manslaughter. The jury found Mr. Ellis guilty of first-degree murder. From the trial court's denial of his proffered reckless manslaughter instruction, Mr. Ellis now appeals.

We have often stated that refusal to give an instruction on a lesser-included offense is reversible error if the instruction is supported by even the slightest evidence. *Harshaw v. State*, 344 Ark. 129, 132, 39 S.W.3d 753, 755 (2001). However, we will affirm a trial court's decision to exclude an instruction on a lesser-included offense if there is no rational basis for giving the instruction. *Id. See also* Ark. Code Ann. § 5-10-110(c) (Supl. 1999).

Manslaughter is committed by one who recklessly causes the death of another person. Ark. Code Ann. § 5-10-104(a)(3) (Repl. 1997). "Recklessly" is defined as follows:

> "Recklessly." A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation[.]

Ark. Code Ann. § 5-2-202(3) (1997).

In urging this court to find a rational basis in the evidence for a reckless manslaughter instruction, Mr. Ellis first points to the circumstances surrounding his argument with the victim. Specifically, he emphasizes the fact that the victim refused to stop staring at him, whereupon Mr. Ellis pulled a gun and fired a shot. The record does not reflect that Mr. Ellis requested a manslaughter instruction based upon extreme emotional disturbance. Even if he had made such a request, merely being stared at cannot be distinguished from being teased, which we have held "is not a reasonable excuse for a state of emotional disturbance so great as to excuse killing." *Frazier v. State*, 309 Ark. 228, 230, 828 S.W.2d 838, 839 (1992). Mr. Ellis also did not assert the defense of justification, or self defense; thus, this court's decision in *Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001), which involved an imperfect justification-type reckless manslaughter, is inapposite.

For his next argument, Mr. Ellis claims that pulling a gun and shooting the victim once in the stomach from a range of three to five feet could be construed as reckless conduct. Furthermore, he suggests that his failure to shoot the victim a second time is evidence of reckless conduct and not purposeful conduct. These arguments are wholly without merit. To find a rational basis for a reckless manslaughter instruction on this record would run contrary

to our prior case law. *See, e.g., Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000) (shooting blindly into a house and killing ex-father-in-law did not form a rational basis for a manslaughter instruction); *Allen v. State*, 310 Ark. 384, 838 S.W.2d 346 (1992) (shooting into a vehicle intending to scare, but killing, the driver did not constitute a rational basis for a manslaughter instruction): and *Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000) (no rational basis for manslaughter instruction where the defendant shot his victim twice, even though the victim was unarmed and posed no threat).

Finally, Mr. Ellis's reliance on *Worring v. State*, 6 Ark. App. 64, 638 S.W.2d 678 (1982), and *Williams v. State*, 17 Ark. App. 53, 702 S.W.2d 825 (1986), is misplaced. In *Worring*, a woman shot her husband after finding him in an automobile with another woman. *Id.*, 6 Ark. App. at 72, 638 S.W.2d at 682. In holding that there was ample evidence from which the jury could find the defendant either recklessly caused her husband's death, or that she caused his death under extreme emotional disturbance, the Arkansas Court of Appeals noted that the medical examiner's testimony "might have supported a finding by the jury that the gun discharged because the deceased grabbed it." *Id.* In contrast, there is no testimony in this case that the deceased did anything other than stare at Mr. Ellis.

As for *Williams*, the evidence there supported a reckless-manslaughter instruction because the defendant claimed that the victim struck him first with a chair in a fight over a card game before the defendant used a knife to defend himself. *Id.*, 17 Ark. App. at 54-55, 702 S.W.2d at 826. Here, there was no physical altercation, and Mr. Ellis does not claim that his victim was armed or posed any threat. As previously noted, he made no claim of self-defense.

The evidence adduced at trial is clear. Mr. James stared at Mr. Ellis during the confrontation, and Mr. Ellis then drew a gun and shot Mr. James at close range. After the shooting, Mr. Ellis told the witnesses not to call for help. No claims of extreme emotional disturbance or self-defense were asserted by Mr. Ellis. We cannot say that the trial court erred in finding no rational basis for giving the instruction on reckless manslaughter.

The transcript of the record in this case has been reviewed in accordance with Ark. Sup. Ct. R. 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 has been found.

Affirmed.

Opal WRIGHT *v.* CITY of MONTICELLO,
Curt Thomas, Lee Ann Thomas,
and Jeff Reinhart

01-105 47 S.W.3d 851

Supreme Court of Arkansas
Opinion delivered June 28, 2001

Gibson Law Office, by: *Charles S. Gibson*, for appellant.

David Hoffman, City Attorney, for appellee City of Monticello.

The Harper Law Office, P.L.L.C., by: *Kenneth A. Harper* and *Greg Fallon*, for separate appellees Curt Thomas, Lee Ann Thomas, and Jeff Reinhart.

RAY THORNTON, Justice. The issue presented in this case is whether the City of Monticello can extinguish a private

right-of-way providing Opal Wright a means of ingress and egress to her property by use of a dedicated city street by abandonment or vacation of the street and conveyance of the property to the landowners flanking the street. The chancellor (1) recognized Ms. Wright's property interest in her right-of-way through the street, but concluded that the property rights were subordinate to the City of Monticello's right to control and regulate the use of public streets; (2) dissolved an injunction prohibiting interference with Ms. Wright's property right of ingress and egress; and (3) conveyed the property contained within the boundaries of the public street to the adjoining landowners. We conclude that the trial court erred in extinguishing Ms. Wright's property interest without compensation, and we reverse and remand.

The history of this case began on May 14, 1999, when appellees, Jeff Reinhart, Curt Thomas and Lee Ann Thomas, filed a petition with appellee the City of Monticello [the City] requesting that the city vacate and abandon a portion of Browning Drive. Specifically, appellees sought to have the portion of Browning Drive described as:

> all that unpaved portion of Browning Drive lying north of the paved northerly edge of said Browning Drive and extending to the north boundary line of the said Westwood Estates Subdivision and bounded on the eastern and western boundaries by the eastern and western rights-of-way of said Browning Drive

vacated and abandoned by the City.

The property that appellees sought to have vacated and abandoned runs between property owned by Reinhart and the Thomases, and it also adjoins property owned by appellant, Opal Wright, who was using the dedicated, but unimproved street as a means of access to her property.

On June 24, 1999, the City adopted ordinance number 698, granting appellees's petition, and vacated and abandoned the City's ownership of the land. Ordinance number 698 also vested ownership in the abandoned property in appellees Reinhart and the Thomases.

On July 23, 1999, appellant filed a complaint in the Chancery Court of Drew County seeking to set aside ordinance number 698 because it was not enacted pursuant to Ark. Code Ann. § 14-301-303 (1987). Specifically, appellant argued that because she had not

consented to abandonment and vacation of the property, which abuts her property, the ordinance was invalid. On September 17, 1999, the chancery court entered an injunction prohibiting appellees from interfering with appellant's use of Browning Drive.

On October 28, 1999, the City enacted ordinance number 700 pursuant to Ark. Code Ann. § 14-54-104(2) (Repl. 1998). This statute allows a city to vacate portions of streets which may not be required for corporate purposes. Ordinance number 700, like ordinance number 698, abandoned and vacated the unpaved segment of Browning Drive. The ordinance described the same segment of Browning Drive as was vacated by ordinance number 698. The ordinance stated that the City "finds that such portion of Browning Drive above-described is not used or useful nor required for corporate purposes and the public welfare will not be adversely affected by the abandonment of said portion of Browning Drive." The ordinance also stated in pertinent part "the absolute ownership of said portion of Browning Drive shall vest in Jeff Reinhart, Curt Thomas and Lee Ann Thomas, who are the owners of the property abutting thereon...[.]" The ordinance ignored the earlier injunction entered by the chancellor, which was still in effect on the date ordinance number 700 was adopted, prohibiting interference with appellant's use of Browning Drive.

On December 14, 1999, appellant filed a supplemental complaint in the Drew County Chancery Court. Appellant argued that ordinance number 700 was an unconstitutional taking. Specifically, she argued that the ordinance deprived her of her right of access to her property without compensation. She further argued that the ordinance was oppressive, arbitrary, and capricious. Additionally, she argued that the ordinance was unlawful because it took public property for a private use. Appellant petitioned that ordinance number 700 be invalidated and that a permanent injunction be issued enjoining appellees from denying appellant access to her property.

On January 25, 2000, the chancery court entered an order finding ordinance number 698 not in compliance with Ark. Code Ann. § 14-301-303. The court, upon making this finding, vacated ordinance number 698.

On June 22, 2000, the chancellor dissolved its previous injunction against interference with appellant's use of Browning Drive as a means of ingress and egress. Appellant and appellees filed motions seeking summary judgment. On October 23, 2000, the chancery

court granted appellees's motion for summary judgment. The chancellor found that there were no material issues of fact in dispute and determined that ordinance number 700 was not unreasonable, oppressive, or discriminatory. The chancellor also found that although appellant as an abutting landowner has an established property interest in the property that the City was abandoning, appellant was not entitled to compensation as a result of the ordinance.

In appellant's sole point on appeal, she argues that ordinance number 700 is unconstitutional and therefore, the chancellor erred in granting appellees's request for summary judgment. Specifically, she contends that the ordinance was unconstitutional because her property right of ingress and egress were taken by the City and given to private individuals. She further argues that the actions taken by the City were unconstitutional because she did not receive just compensation. Appellees respond to appellant's contentions by arguing that: (1) appellant lacks standing to challenge the ordinance; (2) the ordinance is valid; and (3) appellant through her pleadings has waived any claim to compensation.

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. *Meadors v. Still*, 344 Ark. 307, 40 S.W.3d 294 (2001). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.*

Before we can address the other issues raised in this case, we must first determine whether appellant has standing to challenge the ordinance. We have held that, as a general principle, before a landowner can recover for damage to his property where there has been no actual taking, he must suffer direct and substantial damage peculiar to himself, and not suffered by other members of the public, and this is true, even though he may be actually more inconvenienced than the public in general. *Arkansas State Hwy. Comm'n v. McNeill*, 238 Ark. 244, 381 S.W.2d 425 (1964). We have noted that it is not enough that a landowner show that his damage is different from that suffered by the general public. *Arkansas State Hwy. Comm'n. v. Kesner*, 239 Ark. 270, 388 S.W.2d 905, 388 S.W.2d 905 (1965). He must show that a property right has been invaded, and the fact that the value of his lot has diminished is not, within

itself, sufficient to establish special compensatory damages. *Id.* We have also explained that:

> [U]nder our decisions, the owner of property abutting upon a street or highway has an easement in such street or highway for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself; and any subsequent act by which that easement is substantially impaired for the benefit of the public is a damage to the lot itself within the meaning of the constitutional provision for which the owner is entitled to compensation. The reason is that its easement in the street or highway is incident to the lot itself, and any damage, whether by destruction or impairment, is a damage to the property owner and independent of any damage sustained by the public generally.

Id. Pursuant to our case law, for a property owner to challenge a governmental action that is not an actual taking of his property, he must suffer damages that are distinct from those suffered by the general public. A property owner whose land abuts the land being taken by the government and who has a property right of egress and ingress through such land suffers a distinct injury not suffered by the general public.

Applying these principles to the case now on review, it is clear that appellant has standing to challenge the ordinance. Specifically, appellant owns the property that abuts the portion of Browning Drive that the City has abandoned, vacated, and given to appellees. Appellant used this portion of her property as a means of egress and ingress. Ordinance number 700, as interpreted by the chancellor, denies appellant the use of her easement. Accordingly, because appellant suffered an injury that is distinct from that suffered by the general public, she has standing to challenge the constitutionality of ordinance number 700.

Having determined that appellant has standing to challenge ordinance number 700, we must next determine whether ordinance number 700 was unconstitutional as interpreted by the chancellor. Ordinance number 700 provided in part:

> The City of Monticello hereby releases, vacates and abandons all its rights, together with the rights of the public generally, in and to the above-described portion of said Browning Drive. The absolute ownership of said abandoned portion of said Browning Drive shall vest in Jeff Reinhart, Curt Thomas, and Leeann Thomas, who are

> the owners of the property abutting thereon; and such ownership shall be free from the easement of the City for public use as a street.

We have held that every reasonable presumption must be indulged that any ordinance adopted by a city within the scope of its power is valid and not unreasonable or arbitrary, and may be overcome only by clear and satisfactory evidence. *City of Little Rock v. T.H. Linn*, 245 Ark. 260, 432 S.W.2d 455 (1968). However, the interpretation given to ordinance number 700 by the chancellor caused appellant's property right of ingress and egress to be extinguished. The chancellor found:

> Ordinance no. 700 by which the northern end of Browning Drive was again vacated and abandoned was properly enacted pursuant to Ark. Code Ann. § 14-54-104(2), in that the vacated segment of the street was not required for corporate purposes, as found and determined by the Monticello City Council in its discretion;
>
> The enactment of ordinance no. 700 was not unreasonable, arbitrary, oppressive, or discriminatory, and the control and regulation of traffic upon a public street constitutes a rational basis supporting ordinance no. 700;
>
> There is in this case no impediment under the property rights and takings provision of the Arkansas Constitution (Art. 2 § 22) *to closure of the segment of Browning Drive providing an access route to plaintiff's abutting land without compensation to her, and in vesting title in the vacated portion of the street in private parties;*
>
> In the absence of unreasonable, arbitrary, oppressive or discriminatory action, there is no requirement under the constitutional provision cited above that the abandonment of the segment of Browning Drive abutting and providing one means of access to plaintiff's land be employed for public use, nor is there such a requirement that the abandonment and vacation of the street be accomplished with compensation to plaintiff as an abutting landowner, and plaintiff's argument to the contrary is not accepted by the court;
>
> Although as an abutting landowner *plaintiff has an established property interest in the means of access formerly provided her land by Browning Drive, the same is subordinate to the City of Monticello's right to control and regulate the use of public streets* under the circumstances present in which abandonment of Browning Drive was rationally based, and was neither unreasonable, arbitrary, oppressive nor discriminatory.

(Emphasis added.)

The ordinance was enacted pursuant to Ark. Code Ann. § 14-54-104(2). That statute in relevant part states:

> In order to better provide for the public welfare, safety, comfort, and convenience of inhabitants of cities of the first class, the following enlarged and additional powers are conferred upon these cities:
>
> * * *
>
> To alter or change the width or extent of streets, sidewalks, alleys, avenues, parks, wharves, and other public grounds, and to vacate or lease out such portions thereof as may not for the time being be required for corporate purposes, and where lands have been acquired or donated to the city for any object or purpose which has become impossible or impracticable to achieve, the lands may be used or devoted for other proper public or corporate purposes or sold by order of the city council and the proceeds applied for public or corporate purposes.

Id. We note that nothing in this statute provides that a right of ingress or egress across the property being vacated can be extinguished or taken without compensation[1].

In the present case, the City made a finding that portions of Browning Drive were not used or useful nor were they required for corporate purposes and that public welfare would not be adversely affected by the abandonment of the property. The legislature granted the City the authority to abandon or vacate roads or streets. However, the City exceeded that authority when it enacted ordinance number 700 for the purpose of extinguishing appellant's right of ingress and egress through the vacated street.

The chancellor erred in approving ordinance number 700 and in dissolving the injunction prohibiting interference with appellant's use of Browning Drive as a means of ingress and egress to her property. In interpreting ordinance 700, the chancellor found that such an extinguishment of appellant's rights was not an "impediment under the property rights and takings provision of the

[1] We note that other means are available for use in condemning and taking private property. However, these means have not been employed in this case and because these means have not been pursued, we do not reach the argument of whether appellant waived her right to compensation.

Arkansas Constitution" and that the established property rights belonging to appellant were "subordinate to the City of Monticello's right to control and regulate the use of public streets." These findings were erroneous. Specifically, appellant, as an abutting landowner with a property right of ingress and egress, has an independent right to use Browning Road as a means of accessing her property. We have held that the owner of property abutting upon a street has an easement in such street for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself. *Flake v. Thompson, Inc.*, 249 Ark. 713, 460 S.W.2d 789 (1970). We have also noted that this property right is not diminished merely because the property owner has alternative means of ingress and egress. *Id.* Finally, we have held that when a public road is abandoned, it does not affect the private right of the occupants to the use of the abandoned road for purposes of ingress and egress. *Sevener v. Falukner*, 253 Ark. 649, 488 S.W.2d 316 (1973).

This issue was recently discussed by our court of appeals. In *Tweedy v. Counts*, 73 Ark. App. 163, 40 S.W.3d 328 (2001), the court of appeals was asked to determine whether a property owner's right to access his property was terminated when a road was closed by Randolph County. The property owners argued that as abutting landowners, they had an independent right, separate from the public's right, to use the road, which was not affected by the vacation or abandonment of the road by the county. *Id.* The court of appeals noted that as a general rule an abutting landowner has two distinct kinds of rights in a road: a public right that he enjoys in common with all other citizens and certain private rights that arise from his ownership of property contiguous to the highway and that are not common to the public generally, and this is regardless of whether the fee of the road is in him or not. *Id.* (*citing Paschall v. Valentine*, 45 Tenn. App. 131, 321 S.W.2d 568 (1958)). Relying on this principle and our holdings in *Sevener, supra*, and *Flake, supra*, the court of appeals held:

> even though there was a valid road closing and Randolph County no longer has any responsibility for maintenance, appellants, as abutting property owners, still have a right to use the old road for ingress and egress to their property.

Tweedy, supra.

Applying the principles set out in *Sevener, supra*, and *Tweedy, supra*, we hold that the chancellor erred when he interpreted and approved ordinance number 700 as extinguishing appellant's right of ingress and egress to her property by way of Browning Drive. Specifically, because appellant is an abutting landowner who has established a right-of-way to use Browning Drive as a means of ingress and egress, her right to continue to use that right-of-way could not be legally extinguished by the City's adoption of ordinance number 700. As interpreted by the chancellor, the ordinance exceeded the scope of Ark. Code Ann. § 14-54-104(2). The City may abandon or vacate the public use of a street, but it may not extinguish without compensation appellant's property right of ingress and egress. Accordingly, we reverse the chancellor and remand this matter for further proceedings consistent with this opinion.

Reversed and remanded.

Jon H. DODSON, M.D. *v.*
ALLSTATE INSURANCE COMPANY

00-456 47 S.W.3d 866

Supreme Court of Arkansas
Opinion delivered June 28, 2001

David M. Hargis, for appellant.

Watts & Donovan, P.A., by: *Richard N. Watts*; and *Laser Law Firm*, by: *Brian A. Brown*, for appellee.

JIM HANNAH, Justice. Appellant Jon Dodson, M.D., appeals a Pulaski County jury's verdict finding in favor of Appellee Allstate Insurance Company on claims of defamation and tortious interference with a contract. This court accepted this case on March 9, 2001, pursuant to Ark. Sup. Ct. R. 1-2(g). Dodson raises ten points on appeal. We hold that the trial judge erred in ruling that Allstate's withdrawn counterclaim could not be used at trial as evidence that Allstate defamed or interfered with Dodson's contractual relationships with his patients. We reverse and remand.

Facts

On September 3, 1997, Dodson filed a complaint against Allstate and two of its agents in Arkansas, Bobbie Waddell and John Runkle, alleging that these employees, at Allstate's direction, defamed Dodson by representing to insureds and claimants that Dodson provided unqualified physical-therapy treatment at his

office and that this amounted to fraud. Dodson also complained that Allstate represented that he overcharged for treatment, and that his medical practice was illegal.[1] Dodson further alleged that these defamatory statements were made with an intent to damage his professional reputation. Allstate, Waddell, and Runkle answered on September 5, 1997, and they then filed a counterclaim on November 7, 1997. In the counterclaim, Allstate, Waddell, and Runkle alleged that Dodson did not employ state-licensed physical therapists at his clinic, that Dodson intended to deceive and defraud, that these acts violate the Arkansas Physical Therapy Act, that Dodson knowingly collected money for unlawful and unnecessary treatment, and that Dodson misrepresented to Allstate the treatment he provided to patients. Allstate further requested an accounting for the previous five years and sought punitive damages. Dodson moved to dismiss the counterclaim and filed his answer to the counterclaim on November 26, 1997.

On December 17, 1997, Dodson filed his first amended complaint in which he alleged a claim for civil conspiracy among the defendants wherein they targeted Dodson and others to put them out of business in order to increase their profits. Dodson alleged that these practices by the defendants were performed as unfair methods of competition, that Allstate attempted to induce claimants to forego their rights to due process to seek medical attention, and that Allstate set out on a course to destroy Dodson's reputation and business. Dodson further alleged specific acts performed by Waddell and Runkle in furtherance of these claims.

Over the course of the case, the parties filed various requests for discovery, admissions, and production of documents. The parties exchanged motions to compel, motions to deem admissions admitted, and motions to strike discovery answers. Due to the constant bickering among the parties, the trial court entered an order on December 14, 1998, noting that the parties agreed at a hearing to resolve discovery disputes among themselves without court intervention. However, because the parties could not resolve

[1] Dodson filed two previous complaints before filing the complaint that is the subject of this appeal. He first filed a complaint on August 3, 1994, seeking a declaratory judgment in Pulaski County Circuit Court that his employment of physical therapists that were not state licensed, but supervised by Dodson under his medical license was proper. On May 17, 1995, that case was dismissed by the court because a justiciable issue had not been raised. On July 14, 1995, a complaint for defamation and tortious interference with a contract was filed in Pulaski County Circuit Court. This action was dismissed by Dodson on August 1, 1996. This current action was then filed in 1997.

the issues themselves, the court ordered that certain of Dodson's answers to the defendants' requests for admissions be stricken with additional time to respond to six particular requests. The court ordered that the remainder of the defendants' requests to strike be denied. On Dodson's motion to compel, the trial court found that certain answers by the defendants were adequate, certain requests by Dodson were overly broad, and the court ordered that Allstate respond to certain requests on a limited basis, providing Arkansas materials only.

On December 30, 1998, Dodson filed a motion to reduce time for discovery responses, a motion for reconsideration of the trial court's rulings in its December 14, 1998, order on the motions to compel discovery, and a motion for order setting times and dates for depositions and procedures for authentication of evidence. The defendants responded on January 20, 1999. The defendants also filed a motion for a protective order or, in the alternative, a motion to quash Dodson's second set of interrogatories and requests for production arguing that they had nothing to do with the lawsuit and were merely asked as a "fishing expedition." Dodson responded on February 1, 1999, arguing that the defense had "stonewalled" discovery and had failed to produce any of the ordered discovery. Dodson further argued that the requested discovery was sought to highlight Allstate's continued practice of denying soft-tissue injury claims. In addition to these motions, both parties filed additional motions regarding discovery or lack thereof.

On April 5, 1999, Allstate, Waddell, and Runkle moved to dismiss their counterclaim, and the court granted this motion that same day. A week later, the parties agreed to a joint stipulation that documents contained in thirteen volumes of Allstate company manuals were authentic and comply with the rules for the admissibility of business records in Arkansas. However, the stipulation specifically noted that it remained an issue for the jury as to whether these records were used in the training of local employees.

The defendants filed a motion for summary judgment on April 16, 1999, arguing that Arkansas no longer recognized the tort of defamation per se, and Dodson must show actual damages, which he could not do. Furthermore, the defendants argued that any statements made by Waddell and Runkle that may have been defamatory were privileged, and that they took no improper action to interfere with Dodson's contractual relations. Dodson replied to the motion for summary judgment on April 22, 1999, and included responses, as well, to various other defense motions including a

motion *in limine* and motions to exclude certain witnesses. The trial court denied the defendants' motion for summary judgment on May 7, 1999, reset the trial for September 8, 1999, and ordered that no further pleadings, motions, or amendments would be permitted without leave of court and no additional discovery would be allowed. The court also "froze" the witness lists. On August 12, 1999, however, Dodson filed a second amended complaint restating his claims in the first amended complaint and increasing his claim for damages.

Trial began in this case on September 8, 1999, with jury *voir dire*. Over the course of the trial, each party presented numerous witnesses who testified regarding alleged representations made by Allstate and its agents, as well as the claims practices of Allstate. The defendants also presented evidence of the alleged lack of proper treatment and care by Dodson and his physical-therapy aides in support of the defense's theory that claims were properly denied because of inadequate treatment by Dodson. At the close of trial, prior to instructing the jury, Dodson dismissed his claims against Runkle and Waddell and proceeded only against Allstate. The trial court submitted the claims of defamation and tortious interference with a contractual relationship to the jury, and the jury found for Allstate. On September 24, 1999, the trial court entered its judgment reflecting the jury's decision. Dodson raises ten points on appeal.

I. Judicial and Juror Misconduct

Dodson first argues on appeal that the trial court erred in denying his motion for new trial because there was judicial and juror misconduct that damaged his ability to present a fair case to the jury. This court has said that a decision on whether to grant or deny a motion for new trial lies within the sound discretion of the trial court. *State v. Cherry*, 341 Ark. 924, 20 S.W.3d 354 (2000); *Miller v. State*, 328 Ark. 121, 942 S.W.2d 825 (1997). This court will reverse a trial court's order granting a motion for a new trial only if there is a manifest abuse of discretion. *Id.* A trial court's factual determination on a motion for a new trial will not be reversed unless clearly erroneous. *Clayton v. State*, 321 Ark. 602, 906 S.W.2d 290 (1995).

A. Judicial Misconduct

Dodson argues that the trial judge was biased and hostile to his claims and that this "ultimately...determined the outcome of this litigation." Dodson argues that the trial judge's rulings on various discovery motions, his statements made during hearings and at trial, the court's denial of jury instructions proffered by Dodson, and the judge's alleged communications with a juror all served to prejudice Dodson.

This argument is not preserved for review, as appellant did not object to any statements by the trial judge, nor did he move for the judge's recusal. *See Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998). While Dodson cites examples of what he believes are biased or harsh remarks on the part of the trial judge, the abstract is devoid of any objection or motion to recuse. As such, even though this matter was argued in the motion for new trial, it has been abandoned on appeal for failure to preserve the issue in a timely and proper manner.

B. Juror Misconduct

Dodson also alleges in his motion for new trial and on appeal that one of the jurors who became the jury foreman engaged in improper *ex parte* communications with the judge, lied during *voir dire* about her profession and insurance experience, and demonstrated outward acts of disdain during Dodson's closing arguments.

Jury misconduct is a basis for granting a new trial under Rule 59 (a)(2). *See Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994); *Hacker v. Hall*, 296 Ark. 571, 759 S.W.2d 32 (1988). The decision whether to grant a new trial under Ark. R. Civ. P. 59 (a)(2) is discretionary with the trial judge who will not be reversed absent an abuse of that discretion. *Borden v. St. Louis Southwestern Ry. Co.*, 287 Ark. 316, 698 S.W.2d 795 (1985). The burden of proof in establishing jury misconduct is on the moving party. *Id.* The moving party must show that the alleged misconduct prejudiced his chances for a fair trial and that he was unaware of this bias until after trial. *Owens v. State*, 300 Ark. 73, 777 S.W.2d 205 (1989); *Hendrix v. State*, 298 Ark. 568, 768 S.W.2d 546 (1989). We have held that the appellant bears the burden of demonstrating that a reasonable possibility of prejudice resulted from the alleged improper contact or

conduct. *See Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000); *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995).

Again, Dodson fails to show that the trial judge abused his discretion in denying the motion for new trial where Dodson's motion for new trial and supporting affidavits failed to indicate how Dodson was prejudiced by the juror's conduct. Certainly, Dodson offered affidavits from himself, his wife, and his daughter, along with an affidavit from his attorney, David Hargis, alleging that the juror generally acted with disdain during Hargis's closing argument. However, no evidence was submitted to indicate that these alleged antics had any influence over other jurors or the court. Furthermore, while Dodson alleges that this juror engaged in *ex parte* communications with the trial judge, again there is no evidence besides the affidavits that these contacts occurred or that they had any bearing on the other jurors's perceptions or decisions in this case. Apparently the juror in question in answering the juror's information sheet listed her occupation as a housewife. Dodson states they learned after the trial that the juror's family owned a business and that the juror was responsible for the family business's Arkansas Worker's Compensation self-insurance plan. However, during *voir dire*, in response to Dodson's question, the juror stated that she was married to a lawyer, she was a chair-person for a state chamber-of-commerce-related committee concerning workers' compensation, and that at a state legislature committee meeting a plaintiff's lawyer called her a "Nazi." Dodson did not question the juror any further, he did not challenge her for cause, and he did not strike her from the jury. The juror's response during *voir dire* was sufficient to cause Dodson to inquire further or at least to strike her from the jury. Dodson cannot maintain after the trial that he was prejudiced by this juror when he had sufficient information during voir dire to strike her from the jury. Basically, Dodson failed to supply any proof of prejudice from the alleged misconduct by the juror.

II. Discovery

In his second point on appeal, Dodson argues that discovery abuses occurred when Allstate "stonewalled" the production of documents, sometimes failing to produce requested discovery at all, and the trial court did not compel Allstate to produce all of the requested documents but instead limited discovery to "Arkansas" materials. Allstate argues that the trial court did not abuse its discretion in refusing to require Allstate to produce certain documents

and that Dodson cannot show prejudice in not receiving this information.

Arkansas Rule of Civil Procedure 26 "General provisions governing discovery" states in pertinent part:

> (b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identity and location of any books, documents, or other tangible things and the identity and location of persons who have knowledge of any discoverable matter or who will or may be called as a witness at the trial of any cause. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

This court has long held that the trial court has wide discretion in matters pertaining to discovery and that a trial court's decision will not be reversed absent an abuse of discretion. *Parker v. Southern Farm Bureau Ins. Co.,* 326 Ark. 1073, 935 S.W.2d 556 (1996); *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992) (citing *Marrow v. State Farm Ins. Co.,* 264 Ark. 227, 570 S.W.2d 607 (1978)). Although this court recognizes the magnitude of the trial court's discretion in discovery matters, it has found an abuse of discretion where there has been an undue limitation of substantial rights of the appellant under the prevailing circumstances. *Rickett v. Hayes*, 251 Ark. 395, 473 S.W.2d 446 (1971). A motion for production of documents must be considered in the light of the particular circumstances which give rise to it, and the need of the movant for the information requested. *Marrow, supra.* In cases where the appellant is relegated to having to prove his claim by documents, papers, and letters kept by the appellee, the scope of discovery should be broader. *Id.* We consider this factor in deciding whether there has been an abuse of discretion in denying a discovery request. *Id.* The goal of discovery is to permit a litigant to obtain whatever information he may need to prepare adequately for issues that may develop without imposing an onerous burden on his adversary. *Id.*

Permissible discovery necessarily revolves around the causes of actions alleged by the plaintiff, and from these causes of action the trial court must fashion its rulings on discovery. *See* Ark. R. Evid. 26. In this case, Dodson alleged three causes of action: libel, tortious interference with a contractual relationship, and civil conspiracy. Rule 26 notes that discovery that is relevant to these claims must be produced.

To understand the relevancy of requested discovery, one must understand the elements and nature of the causes of action alleged. First, the following elements must be proven to support a claim of defamation, whether it be by the spoken word (slander) or the written word (libel): (1) the defamatory nature of the statement of fact; (2) that statement's identification of or reference to the plaintiff; (3) publication of the statement by the defendant; (4) the defendant's fault in the publication; (5) the statement's falsity; and (6) damages. *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997); *Mitchell v. Globe Int'l Pub., Inc.*, 773 F. Supp. 1235 (W.D. Ark. 1991). We held in the case of *United Ins. Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998), that a plaintiff in a defamation case must prove reputational injury in order to recover damages. In *United Ins.*, the doctrine of presumed damages in a defamation per se case was abolished, and all prior inconsistent decisions were overruled. *See also, Ellis v. Price*, 337 Ark. 542, 990 S.W.2d 543 (1999). An action for defamation turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation. *Southall v. Little Rock Newspapers, Inc.*, 332 Ark. 123, 964 S.W.2d 187 (1998); *Little Rock Newspapers, Inc. v. Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914 (1997); *Thomson Newspaper Publishing, Inc. v. Coody*, 320 Ark. 455, 896 S.W.2d 897, cert. denied, 116 S. Ct. 563 (1995).

Next, the elements of tortious interference that must be proved are: (1) the existence of a valid contractual relationship or a business expectancy; (2) knowledge of the relationship or expectancy on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997); *Cross v. Arkansas Livestock & Poultry Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997); *United Bilt Homes, Inc. v. Sampson*, 310 Ark. 47, 832 S.W.2d 502 (1992). Our law requires that the conduct of the defendants be at least "improper," and we look to factors in § 767 of the RESTATEMENT

(SECOND) OF TORTS for guidance about what is improper. *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 969 S.W.2d 160 (1998).[2]

Finally, in order to prove a civil conspiracy, Dodson must show a combination of two or more persons to accomplish a purpose that is unlawful or oppressive or to accomplish some purpose, not in itself unlawful, oppressive or immoral, by unlawful, oppressive or immoral means, to the injury of another. *Mason v. Funderburk*, 247 Ark. 521, 446 S.W.2d 543 (1969). Such a conspiracy is not actionable in and of itself, but recovery may be had for damages caused by acts committed pursuant to the conspiracy. *Id.* Civil conspiracy is an intentional tort requiring a specific intent to accomplish the contemplated wrong. 16 AM. JUR. 2d *Conspiracy* § 51 (1998). Since a corporate entity cannot conspire with itself, a civil conspiracy is not legally possible where a corporation and its alleged coconspirators are not separate entities, but, rather, stand in either a principal-agent or employer-employee relationship with the corporation. *Id.* at § 56. Corporate agents may not be held liable for civil conspiracy in the absence of evidence showing that they were acting for their own personal benefit rather than for the benefit of the corporation. *Id.* at § 68.The only proper party plaintiff in a civil conspiracy action is the person who has suffered damage. *Id.* at § 66.

Based on these foregoing elements to Dodson's causes of action, it is clear that because Waddell and Runkle were employees of Allstate presumably carrying out all directives by Allstate in the course of their employment, the civil conspiracy claim could not have survived even if Dodson had not voluntarily dismissed Waddell and Runkle from the case prior to its submission to the jury. And,

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[2] To obtain a better understanding of the term "improperly," the court referred to the RESTATEMENT (SECOND) OF TORTS § 767 (1979), which states:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> the nature of the actor's conduct,
>
> the actor's motive,
>
> the interests of the other with which the actor's conduct interferes,
>
> the interests sought to be advanced by the actor,
>
> the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> the proximity or remoteness of the actor's conduct to the interference and
>
> the relations between the parties.

See Mason, 333 Ark. at 14.

certainly, once these individuals were dismissed, the civil conspiracy claim necessarily had to fail because Allstate, as a corporation, could not conspire with itself. Therefore, this court must necessarily consider the trial court's decisions based on an abuse of discretion review under the two viable theories in the case: defamation and tortious interference with a contractual relationship.

Pursuant to these causes of action, we cannot say that the trial court abused its discretion in limiting discovery to Arkansas materials or failing to compel Allstate to produce nationwide documents because these two causes of action necessarily require a direct act against Dodson. Defamation, for example, requires that the defendants make specific slanderous or libelous publication directly against Dodson in order for those statements to be actionable. Tortious interference with a contractual relationship, as well, requires that the defendants know of the existence of a valid contractual relationship or a business expectancy and intentional interference inducing or causing a breach or termination of the relationship or expectancy. The requests for documents about which Dodson appears to complain do not, however, appear to provide information "which is relevant to the issues in the pending actions" or is "reasonably calculated to lead to the discovery of admissible evidence." For example, Dodson complains that he did not receive the "Do You Need a Lawyer" letter through discovery; however, he fails to show how this letter defamed him or interfered with his contractual relationships with his clients. In addition, Dodson argues that Allstate failed to produce the "scratch pads" used by Runkle and his office in claims in which Dodson was a treating physician. The abstract, however, contains evidence of these "scratch pads" used by Allstate in its evaluation of these claims. Dodson complains that the trial judge limited discovery to "Arkansas" materials; however, he fails to show how materials and matters employed by Allstate outside of Arkansas defamed him or interfered with his contractual relationship with his clients. This would be proper discovery if this were a class action, but it is not a class action. Instead, at the time of the trial court's rulings on discovery, it was a suit by Dodson against Allstate and two of its agents for defamation, tortious interference with his contractual relationship with his clients, and civil conspiracy. Overall, based on the viable claims presented by Dodson at trial, the rulings limiting discovery for the causes of action in this case did not amount to an abuse of discretion.

III. The Counterclaim

In his third point on appeal, Dodson argues that the trial court erred in ruling that Allstate's withdrawn counterclaim could not be used at trial as evidence that Allstate defamed or interfered with Dodson's contractual relationships with his patients. Allstate responds that the trial court did not abuse its discretion in denying the use of this evidence because the counterclaim contained legal assertions and issues for the jury and did not comprise evidence of Allstate's position of the claims in the case. On appeal, we will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion. *O'Fallon v. O'Fallon*, 341 Ark. 138, 14 S.W.3d 506 (2000); *In re Estate of O'Donnell*, 304 Ark. 460, 803 S.W.2d 530 (1991). Nor will we reverse a trial court's ruling on evidentiary matters absent a showing of prejudice. *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30 (1999); *Grummer v. Cummings*, 336 Ark. 447, 986 S.W.2d 91 (1999); *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998).

The case law on this issue has diverged over the years into two schools of thought. Some Arkansas cases hold that the admission of pleadings as evidence generally is not allowed as a party admission in a case. *See Sutter v. Payne*, 337 Ark. 330, 989 S.W.2d 887 (1999); *Tri-State Transit Co., Inc. v. Miller*, 188 Ark. 149, 65 S.W.2d 9 (1933); *Little Rock & Ft. Smith Ry. Co. v. Clark*, 58 Ark. 490, 25 S.W. 504 (1894). In these cases, this court noted that a withdrawn answer could not be introduced at trial as a party admission. In 1933, the *Miller* court provided a thorough discussion of the use of a party's pleadings as evidence in a case, stating:

> The only assignment of error which we deem to be well taken is the introduction in evidence, over appellant's objections, of its substituted answer hereinabove set out and which was withdrawn and replaced by the "second substituted answer," on which the case went to trial. Said answer was filed for a particular purpose, was in the nature of a demurrer and an offer of compromise. It admitted the allegations of the complaint for the purpose of contending that appellee was an employee and was subject to the Louisiana Workmen's Compensation Act. It offered to confess judgment for the maximum amount allowed under said act if he were an employee. Its introduction in evidence was manifestly prejudicial, if erroneously done, for the reason that it admitted to be true, "for the purpose of this answer," all the allegations of the complaint as to how the injury occurred. Said answer was not verified, but was

signed only by appellant's attorney. In the "second substituted answer," the previous answer was specifically withdrawn. Under such circumstances it was erroneous and prejudicial to admit in evidence the withdrawn answer. In *Railway Co. v. Clark*, 58 Ark. 490, 25 S.W. 504, this court held that it was error to permit the appellee to read the original answer of appellant as an admission after same had been withdrawn, and *Holland v. Rogers*, 33 Ark. 251, and other authorities were cited in support of the holding. This case was cited with approval in *Murphy v. St. L., I. M. & S. R. Co.*, 92 Ark. 159, 122 S.W. 636, where it was held, to quote a headnote, that: "Interrogatories prepared by plaintiff's counsel and submitted to defendant's counsel, but subsequently abandoned by plaintiff without being propounded to the intended witness, are not admissible, either as testimony or as admissions of plaintiff's counsel." The rule announced in *Railway Co. v. Clark* appears to be against the great weight of authority, for in 14 A.L.R. 65 it is stated: "With but few exceptions pleadings are admitted, other conditions being proper, against the pleader in the proceeding in which filed, * * * as evidence of admissions against interest therein contained." The exceptions there noted are California, Arkansas, Mississippi, Missouri, Washington and Nebraska. Our own case of *Holland v. Rogers* and *Railway Co. v. Clark, supra*, are cited in support of the minority rule. In *Valley Planting Co. v. Wise*, 93 Ark. 1, 123 S.W. 768, 26 L.R.A. (N.S.) 403, it is held that "a statement contained in a pleading filed by a party in another action between the same parties may be proved against him, but such admission is not conclusive and is subject to explanation." That referred to a pleading on which the case went to trial between the same parties in the other action. In *Taylor v. Evans*, 102 Ark. 640, 145 S.W. 564, where error was assigned for the refusal of the trial court to permit defendant to read in evidence the original complaint, and where plaintiff had testified that he did not know what allegations were made in the complaint, this court said: "The evidence being competent only for the purpose of showing an admission, or as establishing a contradictory statement of the plaintiff, it is not admissible, where it does not appear that the plaintiff knew of the allegations of the original complaint, or at least where it affirmatively appears that he was not aware of the contents of the complaint. It would be without probative force, either as an admission or as a contradictory statement, unless it was shown that plaintiff was aware of the contents of the paper." In the recent case of *Greer v. Davis*, 177 Ark. 55, 5 S.W.2d 742, it was held that defendant's answer is competent as an admission, whether verified or not. But this was an answer on which the case went to trial and was an answer filed by appellant pro se. It was his own pleading upon

> which the case went to trial, signed by himself, and certainly was competent in the trial of that case. Here, however, as was the case in *Railway Co. v. Clark*, the pleading was withdrawn and a second substituted answer filed. It no longer remained a part of the record in the case, and was incompetent as evidence thereafter. The holding in *Railway Co. v. Clark*, may be a little too broad, for the authorities generally appear to hold that if a pleading is verified by the party in whose interest it is filed, it becomes a judicial admission and remains competent evidence where superseded by a substituted pleading.

Miller, 188 Ark. at 152-153. In *Missouri Pac. R.R. Co., Thompson v. Zolliecoffer*, 209 Ark. 559, 191 S.W.2d 587 (1946), this court again disallowed the introduction of a complaint filed by the defendant in a previous lawsuit because the defendant, who recovered in the previous lawsuit, had not verified, authorized, or adopted the pleading. However, the court noted that authority existed for introduction of such evidence "to prove an admission...and also for the purpose of impeaching him, to read the complaint in evidence, or to prove by him, on cross-examination, that he had made allegation in the original complaint inconsistent with his present contention." *Zolliecoffer*, 209 Ark. at 563.

More recently, this court has discussed the introduction of pleadings as evidence in a case. As noted in *Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994), this court set out the evidentiary law regarding the admission of complaints in *Razorback Cab of Fort Smith, Inc. v. Lingo,* 304 Ark. 323, 325, 802 S.W.2d 444, 445 (1991), stating:

> Over the objection of the defendants, the plaintiffs were permitted to introduce the complaint in evidence. Razorback charges the trial court with reversible error on this count and we sustain the argument. Complaints, normally phrased in the most partisan language, are in no conceivable sense evidentiary. That seems particularly true in a personal injury case, and one in which punitive damages are sought. The introduction of the complaint as an exhibit which the jury is told it should consider [AMI Civ. 3d 101(d)] and which it may take into the jury room, strikes us as arrant error.
>
> While the cases bespeak no hard and fast rule, pleadings, and especially complaints, are generally treated as inadmissible. *Wright v. Hullett*, 245 Ark. 152, 431 S.W.2d 486 (1968) ("Statement or allegation in a pleading, such as a bill in equity, or a petition of

> complaint . . . is inadmissible in behalf of the pleader, in the action in which it is filed, against his opponent. . . ."); *State Farm Mutual Insurance Co. v. Cates*, 261 Ark. 129, 546 S.W.2d 423 (1977); *Fumiko Matsuuchi v. Security-First National Bank of Los Angeles*, 103 Cal.2d 214, 229 P.2d 376 (1951) ("Since when has an allegation in a pleading ever been regarded as evidence against an opposing party? The answer is never at all in the history of the law."); *Kroger Company v. Warren*, 410 S.W.2d 194 (Tex. Civ. App. 1966); *Abramsky v. Felderbaum*, 194 A.2d 501 (1963); *Toney v. Raines*, 224 Ark. 692, 275 S.W.2d 771 (1955).

Greenlee, 318 Ark. at 194-195 (quoting *Lingo*, 304 Ark. at 325). However, these cases cited here by the defendants all deal with a party attempting to admit its own pleading as evidence of the allegations contained therein and at trial. Here, however, Dodson attempted to submit the defendants' own counterclaim that they withdrew to show that at one time they alleged that Dodson was performing illegal and improper acts. There is some support for submission for this purpose in Arkansas law.

This court has allowed previous pleadings and transcripts to be admitted against opposing parties as evidence of prior inconsistent statements under Ark. R. Evid. 613. In *McDaniel v. State*, 291 Ark. 596, 726 S.W.2d 679 (1987), the court found that a transcript from a prior plea hearing was admissible to impeach the defendant in a Rule 37 proceeding. The court of appeals also allowed a complaint from a prior case to be used by the defendant as evidence to impeach the criminal complainant in *Jernigan v. State*, 38 Ark. App. 102, 828 S.W.2d 864 (1992). In *Jernigan*, the trial court allowed the defendant in a shooting case to impeach the complainant with a previous civil complaint she filed alleging that the shooting was accidental. In citing to *Lingo*, the court of appeals stated:

> The distinction between that case and this one is that in *Lingo* the plaintiff himself sought to introduce his own complaint as substantive evidence. In the case at bar, the defendant sought to impeach the prosecuting witness with the latter's complaint filed in a civil action. Under these circumstances the complaint qualifies as a prior inconsistent statement under Ark. R. Evid. 613. *See McDaniel v. State*, 291 Ark. 596, 726 S.W.2d 679 (1987).

This case falls more in line with *McDaniel* and *Jernigan* in that Dodson was not attempting to admit his own pleading to bolster his claims, but instead attempted to admit a filed and dismissed pleading adopted by all of the defendants. This pleading

clearly alleges that Dodson was performing illegal, fraudulent acts. As such, it qualifies for use as impeachment evidence to show that despite Allstate's stance at trial that it never asserted that Dodson had done anything wrong, Allstate's own pleadings indicated that they believed Dodson was acting fraudulently. The trial court abused its discretion and committed error in not allowing the defendants withdrawn counterclaim to be used as impeachment evidence.

IV. Admission of Evidence of Results in Other Cases

In his fourth point on appeal, Dodson argues that the trial court erred in allowing the admission of evidence regarding results in other cases involving different parties where Dodson was the treating physician. The issue in the other cases was whether Dodson's medical treatment (the physical therapy) and his charges were reasonable and necessary. Dodson argues that although the trial court originally ordered that these "results" would not be admitted, the trial court then overruled Dodson's objection to cross-examination regarding those very results. He argues that it is basic law that a judgment entered in a case between different parties is inadmissible and is not binding on strangers to that case. Allstate responds that the very nature of this case requires evidence of the outcomes in other cases in which Dodson treated one of the parties. Allstate argues that admission of such evidence is discretionary with the trial court, and that Dodson opened the door to such evidence by calling witnesses who testified about Allstate's handling of their claims in cases where Dodson was the treating physician.

In looking at the citations to the abstract noted by Dodson, although he argues in his brief that the trial court specifically excluded the evidence of the results in other cases, such is not the case. For example, Dodson cites the reader to page 193 of the abstract, where the trial court stated:

> THE COURT: All right. Let's do it this way. You can get in evidence that they have tried these and that they've got various results and they use that for the purpose of evaluating claims. By the same token, you can't go in and say, now, look, Allstate, you tried ten of these and you lost nine of them, didn't you?
>
> MR. HARGIS: Wasn't planning to.

THE COURT: Okay. Now, that'll level that out.

MR. DONOVAN: Sounds good.

THE COURT: That way, both of you get to talk about it but you don't get into specifics which would not be correct.

The most obvious point in this discussion is that the trial court ruled that evidence of outcomes in prior trials could come in, and Dodson's attorney did not object to this ruling. In fact, he acquiesced, as did Allstate's attorney. However, now Dodson asks this court to find that there was error where his own witnesses testified that their settlement success rate decreased on cases where Dodson was the treating physician because of Allstate's allegedly injurious acts, but without showing that juries ruled in favor of Allstate at trial in those cases. The admission of evidence is at the discretion of the trial court, and this court will not reverse absent an abuse of that discretion or absent a showing of prejudice. *O'Fallon, supra*; *Jackson, supra*. Here, we hold that the trial court did not abuse its discretion in admitting this evidence. Furthermore, we hold that Dodson made no showing that he was prejudiced by evidence that he, himself, brought forth and to which he did not object upon the ruling by the trial court.

V. Allstate's Reliance on a Legal Opinion by Counsel

In his fifth point on appeal, Dodson argues that the trial court erred in allowing witnesses to testify about a legal opinion secured by Allstate regarding Dodson's physical therapy clinic and its lawfulness under the Arkansas Physical Therapy Act. Dodson argues that he was "blind-sided" at trial by Allstate's defense of reliance on legal opinion, and that as an affirmative defense, Allstate should have pled it in the answer. Allstate replies that it did not submit this legal-opinion letter at trial, it did not rely on it as a defense, and the jury was never instructed that the legal-opinion was a defense to the defamation claim. However, when it came out in testimony that this legal opinion was obtained by Allstate, the trial court properly admitted the testimony because the evidence showed the defendants' motive and intent, and also showed that Dodson's opinion from the State Medical Board was controverted.

Again, this is an issue regarding the admission of evidence, which is reviewed by this court under an abuse of discretion standard of review. *O'Fallon, supra.* Clearly, Allstate did not assert that it relied on a legal opinion as a defense to liability, and no instructions were given to the jury regarding such a defense. Instead, it appears that Allstate offered the evidence that it sought a legal opinion by counsel to counter the legal opinion obtained by Dodson from the State Medical Board regarding the legality of his physical-therapy practice. Just as in the previous issue, it appears that Dodson attempts to claim the benefit of obtaining a legal opinion, but does not want to allow Allstate to claim the same benefit with its own opinion. Again, under the circumstances, we cannot say that the trial court abused its discretion in admitting this evidence, and Dodson fails to show that he was prejudiced by the admission of this evidence. Furthermore, Dodson fails to offer any sufficient legal authority that such evidence necessarily must be admitted as an affirmative defense rather than as just another piece of evidence. This court will not consider the merits of an argument if the appellant fails to cite any convincing legal authority in support of that argument, and it is otherwise not apparent without further research that the argument is well taken. *Quachita Trek Development Company v. Rowe*, 341 Ark. 456, 17 S.W.3d 491 (2000); *Matthews v. Jefferson Hospital Ass'n*, 341 Ark. 5, 14 S.W.3d 482 (2000).

VI. Exclusion of Sid McMath's Testimony

In his sixth point on appeal, Dodson argues that the trial court improperly excluded Sid McMath's testimony regarding a summary of Allstate's voluminous records submitted at trial. Allstate argues that the trial court did not err in excluding the testimony of McMath on various issues involving conclusions as to issues of law, matters not within his realm of expertise, and matters that had already been presented through various other witnesses.

While Dodson characterizes this as an exclusion of McMath's testimony, in actuality Dodson is arguing that the trial court erred in failing to admit the summary prepared by Attorney Hargis and adopted and verified by McMath. As Dodson's abstract reveals, the trial court, after hearing objections by the defense that McMath was not qualified as an expert on issues of insurance claims handling, overruled the objection and designated McMath as an expert in this area. As such, the trial court did not "exclude" McMath's testimony. However, when Hargis attempted to question McMath about a summary he and Hargis, prepared on over 6,000 pages of

documents in Allstate's claims manuals, the defense objected, arguing that the summary was hearsay because it was prepared by Hargis instead of McMath. McMath acknowledged that Hargis prepared the summary but that he, McMath, "verified" the summary and adopted it. The trial court, however, sustained the defense's objection as to hearsay and ruled that the summary could not be admitted into evidence and that McMath could not testify about its contents. The trial court noted that the over 6,000 pages of documents were part of the record and that the documents had already been testified about.

Again, admission of evidence is at the discretion of the trial court, and this court will not reverse absent an abuse of that discretion or absent a showing of prejudice. *O'Fallon, supra*; *Jackson, supra*. Rule 1006 of the Arkansas Rules of Evidence, which controls the admissibility of summaries, provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

As this rule indicates, the court "may" accept a summary, but is not bound to under the rule. This court has addressed Rule 1006 in two cases. In *Ward v. Gerald E. Prince, Const., Inc.*, 293 Ark. 59, 732 S.W.2d 163 (1987), the court upheld the trial court's acceptance of a summary of an accounting for construction costs offered by the construction company in its claim to recover costs for a project. On appeal, appellant claimed it was error to accept the summary. This court stated:

> Appellant argues that while no Arkansas case has addressed Rule 1006 as yet, other jurisdictions and Arkansas decisions rendered prior to the adoption of the rule support the conclusion that the original underlying documents of a summary must be (1) shown to be admissible and (2) made available in court in order to assure the accuracy of the summary and to allow for effective cross-examination. He further urges this court to adopt the procedure of our sister state, Missouri, which requires that, in order to introduce a summary of records, a party must give notice of such intention within a reasonable time prior to actual use of the summary. *See Union Electric Co. v. Mansion House Redevelopment Co.*, 494 S.W.2d 309 (Mo. 1973).

> Rule 1006 does not require that a party notify an opposing party that he intends to introduce a summary. Instead, it merely mandates the originals, or duplicates, which are underlying documents of a summary, be made available for examination or copying or both, by other parties at a reasonable time and place. *See Square Liner 360-Degrees, Inc. v. Chisum*, 691 F.2d 362 (8th Cir. 1982). In addition, the rule allows the trial court discretion to order those documents be produced in court. Our court ordered production of such documents in *Mhoon v. State*, 277 Ark. 341, 642 S.W.2d 292 (1982). There, the trial court directed the state, during trial, to produce documents located in the Washington county collector's office, after permitting an auditor to testify concerning his summary of findings extracted from those documents. Although the trial court offered defendant's counsel a continuance to afford him an opportunity to examine the documents, counsel declined the offer. This court volunteered approval of the manner in which the trial court handled the matter.

Ward, 293 Ark. at 61. As noted in *Ward*, this court in *Mhoon v. State* also allowed an auditor to testify regarding his summary of documents from the Washington County collector's office. In these two cases, the preparer of the summary testified as to its contents. Here, however, McMath did not prepare the summary, but instead testified that he "verified" Hargis's summary against the original records. The trial court determined that this was hearsay evidence, that the documents had already been admitted into evidence, and, further, that Dodson's expert had already testified about the documents. We agree and hold that the trial court did not abuse its discretion in refusing to allow McMath to testify regarding the contents of a summary that he did not prepare himself as being cumulative and, further, that Dodson has not shown that he was prejudiced by the exclusion of the summary.

VII. Non-physician's Testimony Regarding a Physician's Standards

In his next issue on appeal, Dodson argues that the trial court erred in allowing a Ph.D. in physical therapy, Dr. William Bandy, to testify regarding treatment provided by the therapists in Dr. Dodson's clinic. Dodson cites this court to several cases and a model jury instruction regarding who may testify regarding a doctor's treatment. The defense responds that Dodson opened the door to this line of questioning of Dr. Bandy because Dodson had testified that he, himself, trained his therapists and that the State Medical

Board sanctioned the use of unlicensed physical-therapy aides under the supervision of a doctor. The defense notes that Dr. Bandy did not evaluate or comment on Dodson's treatment modalities, but instead commented on the therapy aides's inadequate training and treatment of patients.

Because this is an evidentiary issue, this court reviews the trial court's ruling for an abuse of discretion, and we hold that the trial court did not abuse its discretion in allowing Dr. Bandy to testify. In reading Dr. Bandy's testimony, it is clear that he was giving his opinion regarding whether the therapy aides lacked training and provided inadequate treatment of certain patients based on the records he reviewed, and that as an expert in physical therapy, he retained the requisite knowledge to render such an opinion on the physical therapy provided at Dodson's clinic. *See* Ark. R. Evid. 702. Allstate is correct that Dr. Bandy never commented on Dodson's ability or licensing to train physical-therapy aides. Instead, Dr. Bandy gave his opinion about the sufficiency of the patients's physical-therapy treatment rather than the medical treatment provided by Dodson.

VIII. Use of Other Depositions Given by Dodson in Previous Cases

In his next issue on appeal, Dodson argues that the trial court erred in allowing Allstate to read into the record testimony given by Dodson in depositions in prior legal cases

of his patients. Dodson objected that Allstate could not read into the record this testimony without the proper procedure, that being to allow Dodson to comment during cross-examination or impeachment regarding the deposition testimony. Allstate responds that Rule 32 of the Arkansas Rules of Civil Procedure allows the admission of this deposition testimony because Dodson is a party in the case.

This issue revolves around the unclear language of Rule 32 and the purpose for which Allstate presented the deposition evidence. Rule 32 states in pertinent part:

> (a) *Use of Depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used

against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any other purpose permitted by the Arkansas Rules of Evidence.

(2) The deposition of a party or of anyone who, at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this state, unless it appears that the absence of a witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. A deposition taken without leave of court pursuant to a notice under Rule 30(b)(2) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced; and any party may introduce any other parts.

Under section (a)(1) of this rule, a party may use a witness's prior deposition testimony to impeach or contradict that witness's testimony in the present case. The rule does not limit the use of this rule to non-party witnesses, but presumably allows a party's deposition in a prior action to be used against him or her in a case in which that person is a party. Furthermore, Rule 613 of the Arkansas Rules of Evidence governs when a witness's prior statements can be used at trial against him. This rule states:

> (a) *Examining Witness Concerning Prior Statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) *Extrinsic Evidence of Prior Inconsistent Statement of Witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801 (d)(2).

According to this rule, when prior inconsistent statements are to be used by a party, the party must provide the witness an opportunity to respond. However, as noted in section (b), this rule does not apply to admissions by a party-opponent under Rule 801 (d)(2). Again, the admission of this evidence is subject to the trial court's discretion, and we find that the trial court did not abuse its discretion in allowing Allstate to read into evidence deposition testimony given previously by Dodson.

IX & X. Alleged Errors in Jury Instructions Given and Refused at Trial

In his final points on appeal, Dodson raises alleged errors in the jury instructions given and refused by the trial court. He recites a list of instructions that were refused, pointing out why his instructions were preferable over those given to the jury, and then also notes that two instructions were given to the jury regarding "reasonable medical expenses" in personal injury cases. Allstate responds first by noting that Dodson's instructions refused by the trial court either contained erroneous statements of law or were unclear, and

that the trial court offered clearer and legally proper instructions instead. Allstate also argues that the instructions read by the court were proper statements of law applicable to the issues in this case.

This court has consistently held that a party is entitled to a jury instruction when it is a correct statement of the law, and there is some basis in the evidence to support the giving of the instruction. *Coca-Cola Bottling Co. v. Priddy*, 328 Ark. 666, 945 S.W.2d 355 (1997); *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996); *Parker v. Holder*, 315 Ark. 307, 867 S.W.2d 436 (1993). However, we will not reverse a trial court's refusal to give a proffered instruction unless there was an abuse of discretion. *Coca-Cola Bottling Co., supra*. Furthermore, it is not error for the trial court to refuse a proffered jury instruction when the stated matter is correctly covered by other instructions. *Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997).

In his argument, Dodson acknowledges that the first instruction on multiple claims contained an explanatory provision that was rejected by the court. However, as Allstate notes, the standard instructions on this issue were given, and the court explained to the jury the provision Dodson attempted to include in his proffered instruction. On Dodson's defamation instructions, his proposed initial instruction contained language regarding defamation per se, which, as Allstate notes, was abolished in *United Ins. Co. of America v. Murphy, supra*. As such, that instruction was an improper statement of the law. Furthermore, Dodson's instruction on privilege was not as clear as that offered by the trial court, a fact admitted by Dodson at the instruction hearing. Therefore, we cannot say that the trial court abused its discretion in using different instructions than those proffered by Dodson. On the last refused instruction, it is unclear from the record whether Dodson waived this instruction or whether he objected to it. Furthermore, despite Dodson's argument that this instruction was not submitted to the jury, in actuality a modified version was submitted, and the jury was instructed on most of the provisions in the instruction.

Finally, Dodson objected to two instructions offered by Allstate that instructed the jury about reasonable and necessary medical expenses in personal-injury cases, and that the jury in those cases decides whether such expenses are reasonable and necessary. The trial court read these instructions to the jury over Dodson's objections that using these instructions resulted in the trial court adopting Allstate's theory of the case. However, Dodson's argument cannot be considered by this court because Dodson fails to offer any

legal authority to support his argument. We have stated 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, and it is otherwise not apparent without further research that the argument is well taken. *Matthews v. Jefferson Hospital Ass'n, supra.*

On the merits, the Arkansas Rules of Civil Procedure set out the requirement for properly preserving a jury-instruction objection on appeal as follows:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, and no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue.

Ark. R. Civ. P. 51. Under this rule, any objections must be made before or at the time the instructions are given. *Fisher v. Valco Farms*, 328 Ark. 741, 945 S.W.2d 369 (1997). While Dodson timely objected to the giving of these instructions, the objection had no basis for support. Rather, part of Allstate's defense was the reasonableness of medical treatment provided by Dodson, and these instructions addressed that issue. Again, a party is entitled to a jury instruction when it is a correct statement of the law, and there is some basis in the evidence to support the giving of the instruction. *Coca-Cola Bottling Co., supra*; *Yocum, supra*; *Parker, supra.* We hold that the trial court did not abuse its discretion in giving these instructions.

Reversed and remanded.

JAMES PHILLIPS, SPL. J., joins.

MIKE KINARD, SPL. J., and THORNTON, J., concur in part and dissent in part.

GLAZE and IMBER, JJ., not participating.

MIKE KINARD, Special Justice, concurring in part; dissenting in part. While I concur with the majority opinion on all other points on appeal, I must respectfully dissent with the majority's disposition of the sixth point on appeal. Thus, I write only to say that I believe it was error for the trial court to disallow

Sid McMath's testimony concerning a summary of 6,000 pages of records that had been introduced and received into evidence.

As a witness, Mr. McMath was accepted as an expert and the trial court allowed him to testify about the 6,000 pages of records, denying him only the right to utilize the summaries he had acknowledged and adopted. I believe that this was error for several reasons.

First, not allowing Mr. McMath's testimony violates the purpose of Rule 1006 of the Arkansas Rules of Evidence. Rule 1006 controls the admissibility of summaries. The purpose of Rule 1006 is to allow the trier of facts to better understand the admissible evidence otherwise made available to the court. *Ward v. Gerald E. Prince Construction, Inc.*, 293 Ark. 59, 732 S.W.2d 163 (1987). The requirements of *Ward* were met when the 6,000 pages of business records had been made a part of the record before the jury and testimony had been allowed regarding their contents.

Second, an expert may rely on facts and data made known to him at or before the trial. Rule 703 of the Arkansas Rules of Evidence in relevant part states:

> The facts on data in the particular case upon which an expert bases an opinion or inference may be those perceived by *or made known to him at or before* the hearing

Id. (emphasis added). We have held that the lack of personal knowledge does not require exclusion of the testimony, it merely presents a jury question as to the weight of the testimony. *Scott v. State*, 318 Ark. 747, 888 S.W.2d 628 (1994); *see also Ark. Highway Comm. v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985).

Finally, the trial court has broad discretion in determining whether summaries should be admitted. However, the trial court in exercising this discretion should remain mindful of the fact that there is no requirement in the rule that it be impossible to examine underlying records before summaries may be used and the requirement for the rule to apply is that underlying "writings" be "voluminous" and that in-court examination not be convenient. *United Sates v. Scales*, 594 F.2d 558 (S.D. Ohio 1979).

In the case now before us, the jury was presented 6,000 pages of documents and the trial court allowed testimony regarding their contents. Mr. McMath was eminently qualified and appropriately

grounded in the summaries and he could have provided the jury assistance in understanding the evidence. Additionally, we note that if Mr. McMath had been permitted to testify his testimony would have been subjected to cross examination, and his opinions would have been subjected to the jury's evaluation as to validity and credibility. Considering the voluminous and technical nature of the documents, the jury's ability to examine and appreciate the evidence was throughly hampered without Mr. McMath's testimony. Thus, I would hold that to withhold Mr. McMath's testimony constituted an abuse of discretion. Accordingly, I would reverse the trial court on this point and I would remand with instructions to allow Mr. McMath to testify about the contents of the summaries.

I am authorized to state that Justice THORNTON joins in this opinion.

Brad BUTLER *v.* HEARST-ARGYLE TELEVISION, INC.; Arkansas Hearst-Argyle Television, Inc.; and Rhonda Justice

01-126 49 S.W.3d 116

Supreme Court of Arkansas
Opinion delivered July 9, 2001

The Mulkey Attorneys Group, P.A., by: *Bruce L. Mulkey*, for appellant.

Warner, Smith & Harris, PLC, by: *G. Alan Wooten*, *James M. Dunn*, and *Matthew C. Carter*, for appellees.

W.H. "DUB" ARNOLD, Chief Justice. Appellant, Brad Butler, brings the instant appeal challenging the Benton County Circuit Court's order granting summary judgment in favor of appellees, Hearst-Argyle Television, Inc., its Arkansas affiliate, KHBS/KHOG-TV, and one of its reporters, Rhonda Justice. Butler, a former Benton County prosecuting attorney, complained that appellees committed the torts of defamation, invasion of privacy, and outrage by broadcasting portions of Benton County inmate Stephanie Roberts's videotaped affidavit alleging a sexual relationship with Butler. The Court of Appeals certified this first-impression case for us to consider whether the "fair-report privilege" shields appellees from liability under the instant facts. Our jurisdiction is authorized pursuant to Ark. R. Sup. Ct. 1-2(d) and 1-2(b)(1) and (6) (2000).

Background

Butler sued appellees on September 28, 1999, after KHOG-TV aired a report containing clips from Stephanie Roberts's videotaped affidavit, detailing her alleged sexual relationship with Butler. In particular, Roberts claimed that she had sexual intercourse with Butler in his office during a time when she was being prosecuted by the prosecutor's office. According to Butler, he first met Roberts when she offered to wear a wire while sharing a jail cell with Brandi Orman, a murder suspect. The prosecutor's office utilized Roberts as an informant in a number of cases. Roberts was ultimately released on probation, subject to home detention and monitoring. Then, in late January 1999, Roberts told Butler that she was being sexually harassed by members of the Benton County Sheriff's Department. Although Butler never confirmed Roberts's allegations, he acknowledged that he investigated the complaint, took recorded statements from Roberts, and reviewed jail files.

On June 2, 1999, Roberts cut off her ankle-monitoring device and held herself at gunpoint inside a home in Bella Vista. According to witnesses, Roberts demanded to speak with Butler. Authorities eventually disarmed Roberts but allowed her to remain in the home until Butler arrived. Roberts explained that she wanted to tell Butler that she had miscarried his baby. KHOG-TV reporter Rhonda Justice, who had previously met with Butler about Roberts's sexual-harassment allegations against the jailers, observed the "strange treatment" Roberts received during the stand-off and decided to visit her in the Benton County Jail later that evening. During their meeting, Roberts reported that she had miscarried Butler's baby. Justice met with Roberts again, a few days later, and also visited with her by telephone several times. During these interviews, Roberts admitted that she had numerous sexual encounters with Butler in his office and once in his Suburban while parked in front of her mother's home.

In light of Roberts's remarks, her attorneys questioned Butler about the allegations, which Butler denied. Her attorneys also informed Butler that he had "twenty-four hours to resign or else." In response, Butler filed a motion to voluntarily recuse from prosecuting Roberts's case. Roberts's attorneys then filed a cross-motion seeking Butler's recusal and the appointment of a special prosecutor. As an exhibit to the motion, Roberts's attorneys attached her videotaped affidavit detailing four alleged incidents of sexual intercourse with Butler, including three encounters in the prosecutor's

office and one in his vehicle. She also discussed the events surrounding her stand-off with the police. Notably, Roberts explained that she made the affidavit in response to Rhonda Justice's claim that she had pictures of Butler and Roberts and planned to release them.

On July 2, 1999, KHOG-TV broadcast a report stating that Butler had been asked to recuse from Roberts's case because of allegations that " . . . Butler and Roberts had . . . an inappropriate sexual relationship while Roberts was on probation for check forgery. Attorneys also provided a video affidavit in which Roberts says she had sex with Butler on four occasions." The video clip contained Roberts's statement, "I mean, to be blunt, we had sex in his office." The televised report also indicated that Butler called the allegations false, that he welcomed the appointment of a special prosecutor, and was "confident that there will be no evidence of criminal wrongdoing by him or his office."

Special Prosecutor John Everett issued a report on December 1, 1999, concluding that, while there had been no criminal conduct involved, Butler and Roberts were certainly engaged in a relationship characterized as "unprofessional, far outside the ordinary, [and] reflected adversely on the Prosecuting Attorney's Office, the criminal justice system in Benton County, the legal profession, and Brad Butler himself." Everett's report also noted that the relationship involved numerous late-night phone calls from Butler to Roberts, Butler's intervention in some of Roberts's criminal cases and probation matters, and Roberts's knowledge of matters about Butler "which would not normally be known by a defendant in a criminal case," including the location of a scar on Butler's stomach and Butler's very new home address and phone number. Finally, Everett observed that Butler's response to the allegations was "non-committal" and "less than convincing as a denial and could be construed as a tacit admission." A footnote to the report addressed the existence of the rumored pictures but explained that "no such photographs have been found and [Everett] believe[d] that none exist."

For his part, Butler complained that Rhonda Justice "precipitate[d] Roberts' actions and . . . influence[d] Roberts' allegations against Butler . . . [and] intentionally manufactured the news story about Butler and Roberts as there [was] no sexual contact between Butler and Roberts." Although he conceded that the "fair-report privilege" protects the publication of statements made during a judicial proceeding if the report is fair, accurate, and complete, Butler asserted that KHOG-TV's report was not privileged because

it was not fair, accurate, or impartial. Along those lines, Butler averred that appellees knew that Roberts's allegation that Justice had pictures was important to the story but delayed reporting that fact for twelve days following its initial report. Butler further reasoned that appellees should not be entitled to the privilege because they were "involved in promulgating the story, and Justice had knowledge of the likely falsity of the allegations behind the story."

Appellees responded to Butler's lawsuit by filing a motion for summary judgment, attaching Special Prosecutor Everett's report as an exhibit and asserting the fair-report privilege. Based on the pleadings and exhibits, the trial court granted appellees' motion for summary judgment. From that order, Butler filed the instant appeal challenging the application of the fair-report privilege to appellees. Specifically, appellant argues that the privilege does not apply "when the defamatory statement results from elicitation and coercion" and when the report was not fair, truthful, or accurate. We find no merit in appellant's arguments, and we affirm the trial court's grant of summary judgment.

I. Fair-report privilege

Appellant first argues that the fair-report privilege does not protect appellees because the televised report was not a fair and substantially true account of official court proceedings. Because the First Amendment is involved in this case, we are "obligated to make an independent examination of the whole record to make sure the judgment does not constitute a forbidden intrusion on the field of free expression." *Southall v. Little Rock Newspapers, Inc.*, 332 Ark. 123, 133-34, 964 S.W.2d 187, 193 (1998) (citing *Fuller v. Russell*, 311 Ark. 108, 112, 842 S.W.2d 12, 14 (1992) (citing *Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S. 485 (1984))). Similarly, where the appellees' First Amendment right to free expression is at stake, we apply a heightened standard of review. *Southall*, 332 Ark. at 134, 964 S.W.2d at 193.

The fair-report privilege is defined in the *Restatement (Second) of Torts* § 611 (1977), captioned "Report of Official Proceeding or Public Meeting." Section 611 provides that:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if

> the report is accurate and complete or a fair abridgment of the occurrence reported.

According to the comments to section 611, the basis of the privilege is the "interest of the public in having information made available to it as to what occurs in official proceedings and public meetings." *Id.*, cmt. *a*. Significantly, the privilege exists "even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding." *Id.*

With regard to the accuracy and fairness of the report, it is enough that it conveys a substantially correct account of the proceedings. *Id.*, cmt. *f*. Furthermore, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression. *Id.* The privilege does not apply where a person testifies in a proceeding solely for the purpose of obtaining the fair-report shield for himself or in collusion with a third party. *Id.*, cmt. *c*.

This court has addressed the fair-report privilege under the *Restatement (Second) of Torts* in one other case.[1] In *KARK-TV v. Simon*, 280 Ark. 228, 656 S.W.2d 702 (1983), the appellant argued that it was entitled under § 611, cmt. *h*, of the *Restatement (Second) of Torts*, to report the fact of an arrest. We declined to apply the privilege in that case because "the substance of the news story contained no truth at all." Indeed, there had been no robbery attempt or arrest. *Id.*, 280 Ark. at 231, 656 S.W.2d at 703. In so doing, we recognized that the privilege granted under § 611 can be lost "if abused by failure to give an accurate and fair report under [comment *f*]," but also noted that "[t]he report need not be *precisely* correct, as long as it is *substantially* correct." *Id.*, 280 Ark. at 231, 656 S.W.2d at 704.

Furthermore, in testing the accuracy of the reporting under the fair-report privilege, this court applied the "substantial truth" doctrine previously recognized in *Pritchard v. Times Southwest Broadcasting, Inc.*, 277 Ark. 458, 642 S.W.2d 877 (1982) (citing *Prosser,*

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[1] The fair-report privilege as defined in section 611 of the first *Restatement of the Law of Torts* was previously addressed by this court in *Brandon v. Gazette Publishing Co.*, 234 Ark. 332, 352 S.W.2d 92 (1961), and *Jones v. Commercial Printing Co.*, 249 Ark. 952, 463 S.W.2d 92 (1971).

Handbook of the Law of Torts, 798-99 (4th ed. 1971)). *Id.* Under that doctrine, the literal truth is not necessary and substantial truth, sometimes referred to as the "gist" or the "sting," will suffice. *Id.* In other words, under the fair-report privilege, the gist or the "sting" of an official action or proceeding must be accurately conveyed in the report.

Other jurisdictions have used a similar standard in the context of the fair-report privilege to test the accuracy of the reporting. *See First Lehigh Bank v. Cowen,* 700 A.2d 498, 503 (Sup. Ct. Pa. 1997) ("The question of whether the fair report privilege has been abused has been distilled by the federal court to a 'gist' or 'sting' test. 'A statement is substantially accurate if its "gist" or "sting" is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced.' "); *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1436 (9th Cir. 1992); *Williams v. WCAU-TV,* 555 F. Supp. 198, 202 (E.D. Pa. 1983).

The original Restatement applied the privilege if it was an "accurate and complete or fair abridgment of such proceedings," but the privilege could be lost if the report was "made solely for the purpose of causing harm to the person defamed." *Brandon v. Gazette Publishing Co.,* 234 Ark. 332, 334, 352 S.W.2d 92, 94 (1961) (quoting the first *Restatement of the Law of Torts*, Vol. 3, § 611). Thus, the fair-report privilege could be lost if published with malice under the original Restatement. The modern view, codified in the Second Restatement, removes the malice requirement such that the privilege is lost only by a "showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgment." *Restatement (Second) of Torts* § 611, cmt. *b. See also Rosenberg v. Helinski,* 616 A.2d 866, 678 (Md. App. 1992); *Lawton v. Georgia Television Co.*, 22 Media L. Rep. 2046 (Ga. Super. 1994); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1124, n. 15 (N.D. Cal. 1984) (noting that the difference between the actual malice standard and neutral reporting privilege is that the privilege applies regardless of the defendant's state of mind); *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977), *cert denied sub nom., Edwards v. New York Times, Co.*, 434 U.S. 1002 (1997).

■ Here, appellant first argues that the fair-report privilege does not protect appellees because the televised report was not a fair and substantially true account of official court proceedings. However, a review of the media reports, including Roberts's videotaped affidavit, evidences no distortion of either Roberts's allegations or Butler's denials. In each report, Roberts's video clip alleging a

sexual encounter was followed by a statement of Butler's denial of any such occurrence. Further, KHOG-TV provided coverage when Butler filed his motion in response to Roberts's allegations and specifically noted that Butler's motion "includes a complete denial of the allegations made by Stephanie Roberts. In addition, Butler's attorneys provide thirteen documents they say support the denials. Included are various affidavits, plus a time sheet that contradicts the times given for the alleged sexual relationship."

Butler relies heavily on comment c to section 611 and argues that a person cannot confer the privilege upon himself by making the original defamatory statement and then reporting to others what he stated. For example, he may not confer the privilege upon a third person, "even a member of the communications media, by making the original statement under a collusive arrangement with that person for the purpose of conferring the privilege upon him." *Id.*, cmt. *c.* Given Butler's claim that Rhonda Justice colluded in the creation of Roberts's defamatory statements, he concludes that appellees are denied the privilege.

A later televised report addressed the alleged involvement of Rhonda Justice in the events and aired Roberts's statement that she came forward in response to Justice's intimation that she had photographs of Roberts and Butler. The report also included an interview with Justice, who denied having any photographs or telling Roberts or Butler that she had pictures. This particular story concluded by noting that Butler had no comment and that the station had been advised to refrain from further comment on the unfinished investigation.

In short, Butler's claim, that Justice colluded with Roberts and participated in the creation of the defamatory statements by threatening Roberts with the exposure of photographs, is unsupported by the record. Justice denied Butler's allegation, and Butler offered no proof that Justice made the original defamatory statements about Butler to Roberts. Similarly, Butler presented no proof that Justice made any statements to Roberts in order to induce her to repeat an account for the purpose of conferring the fair-report privilege upon Justice. Neither is there evidence that Justice arranged, in any way, to have the story published. Special Prosecutor Everett also concluded that it was unlikely that any photographs existed.

As a result, we find no factual basis in the record for Butler's conclusory allegations and, indeed, observe evidence supporting a contrary conclusion. For example, Roberts's attorneys explained their decision to disclose the allegations to the court via videotaped affidavit as furthering their obligation to provide Roberts with the proper representation. They related that the "video affidavit was not instigated by Rhonda Justice nor did she have any participation in the production of the video. The video was produced for the sole reason of defending Roberts and for placing what appeared to be truthful allegations before the proper forum." Thus, we conclude that no genuine issue of material fact has been presented on the question of whether the fair-report privilege applies. *See Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996).

Butler's contention that the privilege should not apply because the affidavit was not part of an "official proceeding" is likewise unpersuasive. Butler reasons that the affidavit was filed as an exhibit to a motion for recusal but no "official action" was taken. Section 611 does state that a "report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are thus reported." Section 611 cmt. *e*. However, as appellees point out, the abstract of the record is devoid of any indication that Butler raised this issue before the trial court. Butler also failed to dispute this point in his appellate reply brief. Accordingly, we decline to reach the merits of his argument where the abstract does not reflect that appellant raised the issue below. *See Rainey v. Hartness*, 339 Ark. 293, 5 S.W.3d 410 (1999); *Barber v. Watson*, 330 Ark. 250, 953 S.W.2d 579 (1997).

In light of the foregoing, we cannot say that the trial court erred by finding that appellees' report was a fair and substantially true account of official court proceedings entitled to the fair-report privilege. Accordingly, we affirm the trial court's order granting appellees summary judgment as a matter of law.

Sammy O. SMITH *v.* STATE of Arkansas

CR 01-434 48 S.W.3d 529

Supreme Court of Arkansas
Opinion delivered July 9, 2001

John Wesley Hall, for appellant.

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

TOM GLAZE, Justice. This appeal arises from the trial court's denial of bail on appeal under Ark. R. App. P.—Crim. 6(b)(3), and requires us to examine the constitutionality of that rule. We thus have jurisdiction under Ark. Sup. Ct. R. 1-2(a)(1) and (b)(6).

Sammy Smith was convicted of first-degree murder on September 1, 2000, and sentenced to forty years' imprisonment. That same day, he was released on a $50,000 appeal bond after the trial court made a finding that he would not be a flight risk. In March of 2001, however, the prosecutor sent a letter to the trial court, stating that he had just been informed of Smith's release and requesting that the court revoke the appeal bond under Rule 6. On March 30, 2001, the court issued a show cause order directing Smith to appear and show cause why his bond should not be revoked. At the show-cause hearing, held April 2, 2001, Smith argued that a blanket

denial of bail on appeal in certain classes of cases was unconstitutional. The prosecutor responded by pointing to Rule 6, which does not allow for an appeal bond when the defendant has been convicted of first-degree murder. The trial court agreed with the State that the appeal bond was inconsistent with Rule 6, and revoked Smith's bail. From that decision, Smith brings this appeal, arguing that Rule 6 amounts to a violation of the prohibition against excessive bail found in the Eighth Amendment of the United States Constitution, as well as in Ark. Const. art. 2, § 9.

This court treats an appeal from the denial of bail as a petition for a writ of certiorari. *See, e. g.*, *Meeks v. State*, 341 Ark. 620, 9 S.W.3d 25 (2000); *Larimore v. State*, 339 Ark. 167, 3 S.W.3d 680 (1999). In *Meeks* we stated the standard of review in such cases as follows:

> Certiorari lies to correct proceedings erroneous on the face of the record where there is no other adequate remedy, and it is available to the appellate court in its exercise of superintending control over a lower court that is proceeding illegally where no other mode of review has been provided. *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993). A demonstration of a plain, manifest, clear, and gross abuse of discretion is essential before this court will grant a petition for writ of certiorari. *Shorey v. Thompson*, 295 Ark. 664, 750 S.W.2d 955 (1988).

Meeks, 341 Ark. at 621; *see also Larimore*, 339 Ark. at 170.

We first examine the rule in question here. Ark. R. App. P.—Crim. 6(b)(3) provides as follows:

> *When the defendant has been found guilty,* pleaded guilty, or pleaded nolo contendere to *murder in the first degree,* rape, aggravated robbery, or causing a catastrophe, or kidnapping or arson when classified as a Class Y felony, and *he has been sentenced to* death or *imprisonment, the trial court shall not release him on bail or otherwise, pending appeal or for any reason.*[1] (Emphasis added.)

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[1] Rule 6 was formerly Ark. R. Crim. P. 36.5. In March of 1994, the General Assembly passed Act 3, governing bail on appeal after conviction. This court, however, struck down that statute in *Casement v. State*, 318 Ark. 225, 884 S.W.2d 593 (1994), having found that the act conflicted with postconviction appeal procedures established by rules of the court. However, the language of Rule 6 is nearly identical to that of Act 3 of 1994, reflecting only minor differences in wording that do not change the substance of the rule. *See In re: In re: Adoption of Revised Rules of Appellate Procedure*, 321 Ark. Appx. 663, 900 S.W.2d 560 (1995)

Smith contends that this rule is in conflict with the right to be free from excessive bail. However, we note certain internal inconsistencies in his argument and essential flaws in his reasoning. Namely, at one point in his brief, Smith insists that the right to bail is a fundamental constitutional right under the Eighth Amendment, yet a mere two pages later, he asserts that he does not argue that there is a constitutional right to bail. Rather, he contends that he has a right not to have bail denied by arbitrary means, and he urges this court to fall back on the common law view that the right to bail pending appeal after conviction was a matter of judicial discretion. *See Lane v. State*, 217 Ark. 428, 230 S.W.2d 480 (1950).

As we recently pointed out, this common-law rule was modified by Act 3 of 1994, which provided the right to bail pending appeal in certain cases only. *Meeks v. State*, 341 Ark. 620, 622-23, 19 S.W.3d 25, 26 (2000). Further, even though this court struck down Act 3, the language in the current version of Rule 6 tracks that of the act. *Id.* at 623. Of course, this court is free to amend the common law, *see Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997), and the General Assembly has that power as well. *See Hartford Ins. Co. v. Mullinax*, 336 Ark. 335, 984 S.W.2d 812 (1999). Were it not so, and we were required to "read constitutional provisions . . . to say that the common law must remain as it stood in 1874[, it] would prevent the legislature from adjusting the law to the changes of time and circumstance." *White v. City of Newport*, 326 Ark. 667, 933 S.W.2d 800 (1996).

Smith cites several United States Supreme Court memorandum opinions which state that the Eighth Amendment's requirement that excessive bail shall not be required "at the very least obligates judges passing on the right to deny such bail only for the strongest of reasons." *Sellers v. United States*, 89 S. Ct. 36, 38 (1968) (Black, J., in chambers); *Harris v. United States*, 404 U.S. 1232, 1232-33 (1971) (Douglas, J., in chambers). However, these memoranda are not decisions of the entire Court, but rather are written by individual justices in their capacity as Circuit Justices for the federal circuit courts of appeal. As such, they are not binding on this court. *See, e. g., State v. Maccioli*, 265 A.2d 561 (N.J. Super. 1970).

Simply stated, there is a distinction between pretrial bonds and appeal bonds. Article 2, § 8, of the Arkansas Constitution

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(per curiam).

provides that "[a]ll persons shall, *before conviction*, be bailable by sufficient sureties, except for capital offenses, when proof is evident or the presumption great." (Emphasis added.) This court emphasized the difference between pretrial and appeal bonds in *Larimore v. State*, 339 Ark. 167, 3 S.W.3d 680 (1999), where we noted that a criminal defendant has an absolute right before conviction, except in capital cases, to a reasonable bail; however, a bond on appeal is not an absolute right. *Id.* at 171 (citing *Henley v. Taylor*, 324 Ark. 114, 918 S.W.2d 713 (1996); *Perry v. State*, 275 Ark. 170, 628 S.W.2d 304 (1982)). We noted further that "[b]ail on appeal is governed by Rule 6 of the Arkansas Rules of Appellate Procedure—Criminal. Most notable for this case is that bail on appeal is not available for one who has been found guilty of murder in the first degree." *Id.*

Because nothing in our constitution or the United States Constitution guarantees a person convicted of a crime the right to bail pending appeal, *Meeks*, 341 Ark. at 622, we therefore hold that Rule 6's denial of bail to those convicted of certain crimes does not constitute an "excessive bail" in violation of the Eighth Amendment or Ark. Const. art. 2, § 9.[2] The trial court, therefore, did not err when it revoked Smith's appeal bond.

ETHYL CORPORATION and Albemarle Corporation *v.* Larry JOHNSON and Nancy Johnson

00-1378 49 S.W.3d 644

Supreme Court of Arkansas
Opinion delivered July 9, 2001

[2] Ark. Const. art. 2, § 9, in pertinent part, provides that "[e]xcessive bail shall not be required."

[redacted]

Chisenhall, Nestrud & Julian, P.A., by: *Jim L. Julian* and *Mark W. Hodge*; and *Bell Law Firm, P.A.*, by: *Ronny J. Bell*, for appellants.

McHenry & McHenry Law Firm, by: *Donna McHenry*, *Robert McHenry*, and *Connie L. Grace*; and *Kinard, Crane & Butler, P.A.*, by: *Mike Kinard*, for appellees.

DONALD L. CORBIN, Justice. Appellee Larry Johnson was injured when part of a metal trash container fell on his foot. At the time of his injury, Johnson was on the premises of a chemical plant owned by Appellant Ethyl Corporation and run by its subsidiary, Appellant Albemarle Corporation. As a result of his injury, Johnson filed suit in the Ouachita County Circuit Court, alleging that Appellants' negligence caused his injury.[1] A jury found in favor of Johnson and awarded him damages of $165,851.50. We conclude that there was not substantial evidence of negligence to support the verdict, and we reverse.

The record reflects that Johnson and his wife, Nancy, were over-the-road truck drivers employed by the Jack B. Kelly Company. On May 10, 1993, around 6:30 a.m., the Johnsons took their tanker truck to Appellants' facility in Magnolia to be loaded with hydrobromic acid. The Johnsons had been to Appellants' facility numerous times in the past. On this occasion, Nancy was driving the truck, while Larry stayed in the bunk of the cab. It took approximately forty-five minutes to an hour to load the tanker that morning. Once loaded, Nancy proceeded to drive the truck out of the loading dock and back to the scales, so that the load could be weighed before beginning their trip. Instead of taking the ordinary route back to the scales, however, Nancy chose an alternate route

[1] Johnson's wife, Nancy, also filed a claim for loss of consortium. That claim was rejected by the jury and is not involved in this appeal.

that took the truck into the parking lot of the plant's maintenance shop. Nancy intended to make a U-turn in the parking lot and proceed onto the main roadway back to the scales. While attempting the turn, Nancy realized that the rear wheels of the trailer were not going to clear a metal trash container that was situated at the edge of the parking lot, adjacent to a rack of pipe lines.

The container is not what is ordinarily thought of as a trash container or dumpster. It is a three-sided object that holds two separate trash bins. The container weighs 2,180 pounds and is stationary, *i.e.*, it does not have wheels or rollers. The two bins that fit inside the container are kept inside the maintenance shop until they require emptying. They are then loaded into the metal container, and the container is picked up by a special truck and emptied. The container is designed so that the bottom will collapse or open when it is being emptied, thus allowing the trash to fall out.

On the date in question, Larry Johnson decided to attempt to move the container out of the truck's path. He initially attempted to push the container by leaning into it with his shoulder. He felt it move a short distance, but not enough for the trailer to clear. He then went around to the front of the container and began to jerk on its handle, like a weight lifter jerks to lift heavy weights. Johnson continued to jerk on the handle until part of the container collapsed and fell on his foot. Appellants' emergency medical team came to Johnson's assistance and subsequently transported him to the Magnolia City Hospital.

Appellants moved for a directed verdict at the end of Johnson's case and again at the close of all the evidence. They argued that Johnson's injury was not foreseeable and that they had no duty to guard against an occurrence that was not foreseeable. The trial court denied the motion, and the case was submitted to the jury on the theories of negligence and premises liability. The jury was also instructed on the theory of comparative fault, as Appellants claimed that Johnson's damages were proximately caused by his own negligence. The jury returned a general verdict in favor of Johnson. Following the verdict, Appellants filed a motion for judgment notwithstanding the verdict (JNOV), again arguing that there was insufficient proof of foreseeability. The trial court denied the post-trial motion, and this appeal followed.

Our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence. *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000). Similarly, in reviewing the denial of a motion for JNOV, we will reverse only if there is no substantial evidence to support the jury's verdict and the moving party is entitled to judgment as a matter of law. *Conagra, Inc. v. Strother*, 340 Ark. 672, 13 S.W.3d 150 (2000). Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Caddo Valley*, 340 Ark. 203, 9 S.W.3d 481. It is not this court's place to try issues of fact; rather, this court simply reviews the record for substantial evidence to support the jury's verdict. *Id.* In determining whether there is substantial evidence, we view the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *State Auto Prop. & Cas. Ins. Co. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999); *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997).

Appellants argue that there was insufficient evidence of negligence. Particularly, they assert that they were not negligent because they had no duty to guard against the unforeseen harm that Johnson suffered. Negligence is defined as the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably careful person would not do, under the circumstances. *New Maumelle Harbor v. Rochelle*, 338 Ark. 43, 991 S.W.2d 552 (1999); *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998). "To constitute negligence, an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner." *Id.* at 67, 961 S.W.2d at 715 (citing AMI Civ. 3d 301). Foreseeability is thus a necessary ingredient of actionable negligence in this state. *Benson v. Shuler Drilling Co., Inc.*, 316 Ark. 101, 871 S.W.2d 552 (1994); *First Electric Coop. Corp. v. Pinson*, 277 Ark. 424, 642 S.W.2d 301 (1982); *Dollins v. Hartford Acc. & Indem. Co.*, 252 Ark. 13, 477 S.W.2d 179 (1972). "Conduct becomes negligent only as it gives rise to appreciable risk of injury to others, and there is no negligence in not guarding against a danger which there is no reason to anticipate." *Id.* at 18, 477 S.W.2d at 183 (citing *North Little Rock Transp. Co. v. Finkbeiner*, 243 Ark. 596, 420 S.W.2d 874 (1967)). In other words, "negligence cannot be predicated on a failure to anticipate the unforeseen." *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 299, 652 S.W.2d 2, 5 (1983).

Arkansas law has long since recognized that there is no duty to guard against merely possible, as opposed to likely or probable, harm. In *St. Louis-San Francisco Ry. Co. v. Burns*, 186 Ark. 921, 56 S.W.2d 1027 (1933), this court observed:

> It is a matter of ordinary observation that frequently there is some danger attendant upon the most common and ordinary transactions, but the care required is only to provide against such dangers as ought to be foreseen in the light of the attendant circumstances, and the ideal "prudent person" will therefore not neglect what he can foresee as probable nor divert his attention to the anticipation of events barely possible, *but will order his conduct by the measure of what appears likely in the ordinary course of events.*

Id. at 925, 56 S.W.2d at 1028 (citations omitted) (emphasis added). *See also St. Louis-San Francisco Ry. Co. v. Ward*, 197 Ark. 520, 124 S.W.2d 975 (1939). In short, to demonstrate foreseeability, the harm must be "within the range of probability as viewed by the ordinary man," and must, therefore, be more than "merely possible." *Larson Machine, Inc. v. Wallace*, 268 Ark. 192, 208, 600 S.W.2d 1, 9 (1980) (citing *Hayes v. Missouri Pac. R.R. Co.*, 208 Ark. 370, 186 S.W.2d 780 (1945)). It is not necessary, however, that the actor foresee the particular injury that occurred, only that he or she reasonably foresee an appreciable risk of harm to others. *Broyles*, 331 Ark. 58, 961 S.W.2d 712.

In the present case, there is no dispute that Johnson and his wife were invitees on Appellants' property. As such, Appellants had a duty to use ordinary care in maintaining the premises in a reasonably safe condition. *See Like v. Pierce*, 326 Ark. 802, 934 S.W.2d 223 (1996); *Derrick v. Mexico Chiquito, Inc.*, 307 Ark. 217, 819 S.W.2d 4 (1991). The duty owed is not without bounds; rather, it is limited to the risk of harm that is reasonably foreseeable. *See Lindle v. Shibley*, 249 Ark. 671, 460 S.W.2d 779 (1970); *Hartsock v. Forsgren, Inc.*, 236 Ark. 167, 365 S.W.2d 117 (1963). The concept of risk is thus an aspect of foreseeability. As Professor Dobbs explains:

> Courts are likely to use the term "foreseeable" to mean that harm was not only foreseeable but also too likely to occur to justify risking it without added precautions.... Along the same lines, when courts say that harm is unforeseeable, they may mean that although harm was actually foreseeable on the facts of the case, a reasonable person would not have taken action to prevent it because the risk of harm was low, and harm was so improbable that a reasonable

> person would not have taken safety precautions. [Footnote omitted.]

1 Dan B. Dobbs, *The Law of Torts* § 143, at 336-37 (2001).

Here, the alleged negligent act committed by Appellants was the placement of a metal trash container at the edge of a parking lot, adjacent to a pipe rack. Based on the evidence presented below, Appellants' act did not amount to an unreasonable risk. It was not foreseeable that an invitee would injure himself by attempting to manually move the 2,180 pound container on his own. Appellants' only duty under the circumstances was to provide reasonable care to guard against any harm that appeared "likely in the ordinary course of events." *Burns*, 186 Ark. at 925, 56 S.W.2d at 1028. Appellants simply had no duty to take added precautions to guard against the remote chance that someone would injure himself by attempting to move the heavy container. Indeed, it was undisputed that there had never been any previous incidents, within the fourteen years that the container was on Appellants' property, in which anyone, employee or otherwise, had been injured in conjunction with the container.

In contrast, Johnson should have been fully aware of any danger associated in attempting on his own to move a 2,180 pound stationary trash container. In fact, Johnson admitted that he recognized the container as a "potential hazard, but not to the hazard that it was." There were no exigent or emergency circumstances that would have left Johnson with no other option but to attempt to move the object on his own. Given that he recognized the object as a potential hazard, Appellants owed no duty to warn him of the potential harm that could occur if he attempted such a move. The duty to maintain the premises in a reasonably safe condition for an invitee or to warn him of the dangerous condition "applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls and the like, in that they are known to the invitor but not known to the invitee and would not be observed by the latter in the exercise of ordinary care." *Jenkins v. Hestand's Grocery, Inc.*, 320 Ark. 485, 488, 898 S.W.2d 30, 31 (1995) (quoting *McClure v. Koch*, 433 S.W.2d 589, 593 (Mo. App. 1968)). Because any danger associated with moving the heavy object was not hidden and was readily apparent to anyone exercising ordinary care, Appellants owed no duty to warn Johnson of the consequences of attempting to move the object without assistance.

Moreover, it is of no significance whether Appellants should have reasonably foreseen that trucks leaving their loading dock would seek alternate routes back to the plant's scales. Contrary to Johnson's urging, the issue is not whether Appellants were negligent in failing to create a better system for getting truck traffic through the plant. Assuming, *arguendo*, that it is reasonably foreseeable that trucks would take alternate routes to get back to the scales and that trucks would attempt a U-turn in the maintenance-shop parking lot, it does not follow that it is reasonably foreseeable that individual truck drivers would attempt to move this 2,180 pound object out of the way without assistance. Indeed, the evidence showed that Appellants' employees had assisted the Johnsons in moving obstructions in the past. Nancy Johnson testified that on at least three prior occasions, she had asked Appellants' employees to move similar containers out of her way before, and that they had done so.

In sum, to hold that Appellants were under a duty to "guard against the remote chance of what actually occurred in this case would be in effect to strike the element of foreseeability from the concept of negligence in such a situation and thus to impose an absolute liability" upon any business that has a trash container or similar receptacle situated on its premises. *Hartsock*, 236 Ark. 167, 170, 365 S.W.2d 117, 118. Accordingly, we hold that there was not substantial evidence presented below demonstrating that Appellants were negligent or that they failed in their duty to maintain their premises in a reasonably safe condition. We thus reverse and dismiss this case.

GLAZE and IMBER, JJ., dissent.

ANNABELLE CLINTON IMBER, Justice, dissenting. The majority has decided, as a matter of law, that the injury Mr. Johnson suffered on the premises of Albemarle on May 10, 1993, was not foreseeable. Even if the injury was foreseeable, the majority holds that Albemarle had no duty to warn Mr. Johnson of the potential danger of the dumpster on its premises because Mr. Johnson recognized the dumpster as a hazard. I believe that a question of fact existed that was properly sent to the jury; thus, I must dissent.

When we review the denial of a motion for directed verdict or motion for new trial, we must 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. *Conagra, Inc. v.*

Strother, 340 Ark. 672, 675-76 (2000); *City of Caddo Valley v. George*, 340 Ark. 203, 211 (2000); *Croom v. Younts*, 323 Ark. 95, 101, 913 S.W.2d 283 (1996). In the case at hand, therefore, we must view the evidence in the light most favorable to Mr. Johnson, not Albemarle.

Furthermore, we review the trial court only to determine if there is substantial evidence to support the jury verdict. *City of Caddo Valley v. George, supra.* Substantial evidence is 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). When there is a conflict in the evidence or when the evidence is such that fair-minded people might reach different conclusions, a jury question is presented, and a motion for directed verdict should be denied. *Conagra, Inc. v. Strother, supra.* A question for the jury is presented "in any case where there might be reasonable difference of opinions as to the foreseeability of a particular risk . . . ." *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 302, 652 S.W.2d 2, 7 (1983). In this case, the trial court properly denied Albemarle's motions for directed verdict, judgment notwithstanding the verdict, and new trial because Mr. Johnson presented evidence from which fair-minded persons might reach different conclusions on the issue of foreseeability; therefore, a jury question was presented.

The majority's determination that Mr. Johnson's injury was not foreseeable as a matter of law improperly views the evidence in the light most favorable to Albemarle. According to the majority's opinion today, "the alleged negligent act committed by Appellants was the placement of a metal trash container at the edge of a parking lot, adjacent to a pipe rack." By viewing the evidence in the light most favorable to Mr. Johnson, as this court is required to do, it is evident that the alleged negligent act committed by Albemarle was actually its placement of a collapsible dumpster at the edge of a driveway on the premises of a chemical plant where there is constant tanker-truck traffic. The question that was properly submitted to the jury was whether Albemarle should have foreseen the fact that the dumpster, in its location partially obstructing the drive, would impede traffic, creating the need to move it. If so, Albemarle had a duty to exercise ordinary care and to warn Mr. Johnson of the danger posed by the dumpster. The trial court properly presented this question to the jury because reasonable minds could differ, based upon the evidence presented at trial, as to whether Albemarle should have foreseen the risk of harm posed by the dumpster. The evidence presented by Albemarle revealed that

the dumpster was located adjacent to the maintenance building in an area marked "no thru traffic." Yet, the evidence presented by Mr. Johnson revealed that the "no thru traffic" sign was not visible to the driver of the truck until the truck had already entered the drive. Further evidence revealed that roadways not designated for trucks to use on the Albemarle premises were ordinarily barricaded. Roads that were not barricaded were not restricted. Finally, Mr. Johnson presented evidence that the roadways on the Albemarle facility were frequently blocked by obstructions, forcing truck drivers to find alternate routes in and out of the facility. In light of all of this evidence, it is clear that a question of fact was created as to whether Albemarle should have foreseen the risk posed by a collapsible dumpster partially obstructing a roadway on its premises.

The majority likewise improperly focuses upon the foreseeability of the particular injury sustained by Mr. Johnson. While acknowledging that it is not necessary that Albemarle foresee the particular injury that occurred, only that it reasonably foresee an appreciable risk of harm, *Broyles v. Wallace*, 331 Ark. 58, 961 S.W.2d 712 (1998), the majority concludes that it was not foreseeable "that an invitee would injure himself by attempting to manually move the 2,180 pound container on his own." It is irrelevant to an inquiry of foreseeability whether Mr. Johnson attempted to move the container on his own, or if he and five of his best buddies tried to move the container as a group. If Albemarle could have foreseen the need to move the container out of the roadway and knew that the container could break apart if moved improperly, yet failed to warn of that danger, then a jury could properly conclude that Albemarle had been negligent. For that reason, I cannot agree that, as a matter of law, the risk of harm to Mr. Johnson was not foreseeable, and would affirm the denial of directed verdict.

Having taken the extraordinary step of removing a question of fact from the decision-making realm of the jury, the majority then proceeds to declare the whole issue of foreseeability irrelevant because, the majority concludes, Albemarle had no duty to warn Mr. Johnson of the risk posed by the dumpster. According to the majority, Mr. Johnson recognized the dumpster as a hazard, and Albemarle has no duty to warn invitees of known hazards. The basis of a business owner's duty of care to invitees is his superior knowledge of a condition that poses an unreasonable risk of harm of which the invitee does not or should not know. *Jenkins v. Hestand's Grocery, Inc.*, 320 Ark. 485, 898 S.W.2d 30 (1995). In the case at hand, Mr. Johnson admitted that he was aware that the dumpster posed a hazard, because it was a large object that was obstructing

the path of his truck. However, Mr. Johnson testified that he did not know the dumpster would fall apart. Even if it could be said, as a matter of law, that Mr. Johnson should have known he could injure himself by moving a heavy object without help, we cannot say as a matter of law that he should have known that the container would break apart when moved. The evidence revealed that there were no warning labels or instructions on the container. The container was a solid-looking large object. And, finally, the container had a handle. It was not until Mr. Johnson pulled on the handle that the dumpster collapsed on his foot. Whether Albemarle had a duty to warn Mr. Johnson of the fact that the dumpster could collapse if the handle is pulled was a question of fact properly submitted to the jury under the facts of this case. For the foregoing reasons, I dissent.

GLAZE, J., joins in this dissent.

Robert L. PLANT *v.* Gary WILBUR and
Linda Wilbur *d/b/a* Northwest Arkansas Speedway

00-1116 47 S.W.3d 889

Supreme Court of Arkansas
Opinion delivered July 9, 2001

Mashburn & Taylor, by: *Timothy L. Brooks*, for appellant.

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

DONALD L. CORBIN, Justice. Appellant Robert L. Plant was injured by some flying debris while watching an auto race at the Northwest Arkansas Speedway. Plant sued Appellees Gary and Linda Wilbur, the owners and operators of the Speedway, alleging that his injuries resulted from their negligence. Appellees countered that Plant had signed an agreement releasing the Speedway from any liability, and therefore he could not maintain a cause of action against them. Appellees filed a motion for summary judgment based on the existence of the release, and the Benton County Circuit Court granted the motion, finding that the release was enforceable under Arkansas law. For reversal, Plant argues that the release is void as against public policy and, thus, the trial court erred in granting summary judgment. As this appeal presents an issue of first impression, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We affirm.

The record reveals that the Speedway is an oval-shaped dirt track located in Pea Ridge, that has been in operation since 1992. Plant was a member of a pit crew for one of the drivers who raced at the Speedway. He testified during his deposition that he believed that he had been frequenting the track since it opened, and that he believed that he had signed the release on at least twelve occasions prior to the day his accident occurred. On the night of the accident, Plant paid $15 in order to gain admission to an area of the racetrack, known as the pit.[1] Before entering the pit area, Plant signed a document entitled "Release and Waiver of Liability and Indemnity Agreement," as was required of anyone who wanted to enter the pit area. The release, which contains twelve signature lines, was prepared by North American Racing Insurance, Inc., and

[1] The admission price to the pit area was more expensive than the $6 admission price for entrance to the grandstand.

is commonly used at racetracks across the country. The release provides as follows:

> IN CONSIDERATION of being permitted to enter for any purpose any RESTRICTED AREA (herein defined as including but not limited to the racing surface, pit areas, infield, burn out area, approach area, shut down area, and all walkways, concessions and other areas appurtenant to any area where any activity related to the event shall take place), or being permitted to compete, officiate, observe, work for, or for any purpose participate in any way in the event, EACH OF THE UNDERSIGNED, for himself, his personal representatives, heirs, and next of kin, acknowledges, agrees and represents that he has, or will immediately upon entering any of such restricted areas, and will continuously thereafter, inspect such restricted areas and all portions thereof which he enters and with which he comes in contact, and he does further warrant that his entry upon such restricted area or areas and his participation, if any, in the event constitutes an acknowledgment that he has inspected such restricted area and that he finds and accepts the same as being safe and reasonably suited for the purposes of his use, and he further agrees and warrants that if, at any time, he is in or about restricted areas and he feels anything to be unsafe, he will immediately advise the officials of such and will leave the restricted areas:
>
> 1. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoter, participants, racing association, sanctioning organization or any subdivision thereof, track operator, track owner, officials, car owners, drivers, pit crews, any persons in any restricted area, promoters, sponsors, advertisers, owners and lessees of premises used to conduct the event and each of them, their officers and employees, all for the purposes herein referred to as "releasees", from all liability to the undersigned, his personal representatives, assigns, heirs, and next of kin for any and all loss or damage, and any claim or demands therefor on account of injury to the person or property or resulting in death of the undersigned, whether caused by the negligence of the releasees or otherwise while the undersigned is in or upon the restricted area, and/or, competing, officiating in, observing, working for, or for any purpose participating in the event.
>
> 2. HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the releasees and each of them from any loss, liability, damage, or cost they may incur due to the presence of the undersigned in or upon the restricted area or in any

way competing, officiating, observing, or working for, or for any purpose participating in the event and whether caused by the negligence of the releasees or otherwise.

3. HEREBY ASSUMES FULL RESPONSIBILITY FOR AND RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE due to the negligence of releasees or otherwise while in or upon the restricted area and/or while competing, officiating, observing, or working for or for any purpose participating in the event.

4. EACH OF THE UNDERSIGNED expressly acknowledges and agrees that the activities of the event are very dangerous and involve the risk of serious injury and/or death and/or property damage. EACH OF THE UNDERSIGNED further expressly agrees that the foregoing release, waiver, and indemnity agreement is intended to be as broad and inclusive as is permitted by the law of the Province or State in which the event is conducted and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

5. THE UNDERSIGNED HAS READ AND VOLUNTARILY SIGNS THE RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT, and further agrees that no oral representations, statements or inducements apart from the foregoing written agreement have been made.

Sheldon England, an employee of North American, testified that this release is known as "participant legal coverage," and is required where a racetrack allows people into restricted areas, such as the pit area, because of the dangerous activities that take place in these areas.

On the evening of his accident, Plant was standing on a track compactor, located near the spot where the cars exit the track. While standing there, Plant was struck by a wheel and tire that became dislodged from one of the race cars. The wheel and tire went through and over the fencing that separated the track from the pit area. Plant sustained injuries to his neck, left shoulder, and left arm. Plant's left arm was eventually amputated, although it is not clear from the record before this court what led to this amputation or when it occurred. Plant testified in his deposition that the only time he was in the pit area was when his team's car was racing, otherwise he would watch the races from the grandstand area.

Plant filed a complaint against Appellees, alleging that Appellees were negligent in: (1) failing to provide adequate safety barriers between the racetrack and persons admitted into the pit area; (2) failing to properly maintain the existing fence between the racetrack and the pit area; and (3) failing to warn persons admitted to the pit area about dangers related to flying debris from race cars. In his complaint, Plant stated that he had accumulated medical expenses in excess of $45,000, and sought compensatory damages of $1,000,000. Appellees pled the affirmative defenses of waiver and release in response to the complaint, and also stated that they had paid $10,000 to Springdale Memorial Hospital in partial payment of Plant's medical bills.

Appellees, in turn, filed a motion for summary judgment, asserting that Plant could not maintain a cause of action against them because he had signed the release. Initially, the trial court denied the motion, but the trial court later granted Appellees' motion for reconsideration and conducted a hearing on the summary-judgment motion. During that hearing, the trial court ruled from the bench that the release was valid, and therefore, summary judgment was proper in this case. From that order, comes the instant appeal.

The appropriate standard of review to be employed when reviewing a grant of summary judgment was set forth by this court in *Worth v. City of Rogers*, 341 Ark. 12, 14 S.W.3d 471 (2000):

> We have repeatedly held 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. *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999); *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its 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. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998); *Pugh*, 327 Ark. 577, 940 S.W.2d 445. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. *Wallace v. Boyles*, 331 Ark. 58, 961

> S.W.2d 712 (1998); *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997). After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts. *George*, 337 Ark. 206, 987 S.W.2d 710.

Id. at 20, 14 S.W.3d at 475.

For reversal, Plant asserts that the trial court erred in granting summary judgment because the release he signed is void and has no effect under Arkansas law. Specifically, he contends that the release is an exculpatory contract, and our court has stated that such contracts are not favored under the law. Appellees counter that this is an issue of first impression, as no Arkansas court has considered and ruled upon the validity of exculpatory agreements involving dangerous recreational activities, such as auto racing.

It is true that this court has long stated a strong disfavor for exculpatory contracts that exempt a party from liability, because of the public-policy concern encouraging the exercise of care. *See Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990); *Middleton & Sons v. Frozen Food Lockers*, 251 Ark. 745, 474 S.W.2d 895 (1972); *Arkansas Power & Light Co. v. Kerr*, 204 Ark. 238, 161 S.W.2d 403 (1942). This court has further stated that exculpatory contracts are to be strictly construed against the party relying on them. *Farmers Bank*, 301 Ark. 547, 787 S.W.2d 645.

While this court disfavors exculpatory contracts, it has never ruled that such contracts are invalid *per se*. "When construing such release contracts, this court has said that it is not impossible to avoid liability for negligence through contract; however, to avoid such liability, the contract must at least clearly set out what negligent liability is to be avoided." *Farmers Bank*, 301 Ark. at 550-51, 787 S.W.2d at 646-47 (citing *Middleton & Sons*, 251 Ark. 745, 474 S.W.2d 895). Moreover, this court has never before been presented with a situation where a release was executed in the context of a dangerous recreational activity.

We are persuaded by the Eighth Circuit Court of Appeals' analysis of this very issue in *Haines v. St. Charles Speedway, Inc.*, 874 F2d 572 (8th Cir. 1989). There, the court of appeals stated that a release, containing language identical to the release at issue here, signed by the appellant prior to his entering the restricted infield

area constituted an adhesion contract. The court of appeals, however, analyzed the validity of the contract under a "total transaction" approach, as opposed to simply reviewing the literal language of the release, in order to determine the intent of the parties. *Id.* at 575. In holding that the release was valid, the court of appeals found it significant that the appellant had been involved in the sport of racing for quite some time, and that he admitted to being aware of the dangerous nature of this activity, both for participants and spectators. Finally, the court noted that the lower court correctly considered the circumstances surrounding the execution of the release and properly found that while the appellant was functionally illiterate, he had the responsibility of finding out what the contract said.

We are also mindful that numerous jurisdictions have found that releases containing similar, and sometimes identical language to this one, are not void as against public policy. The general rationale behind allowing these types of releases in the context of auto racing is that they involve a very narrow segment of the public, rather than situations involving a public utility, a common carrier, or a similar entity connected with the public interest. *See Dunn v. Paducah Int'l Raceway*, 599 F. Supp. 612 (W.D. Ky. 1984); *Rhea v. Horn-Keen Corp.*, 582 F. Supp. 687 (W.D. Va. 1984); *Grbac v. Reading Fair Co., Inc.*, 521 F. Supp. 1351 (W.D. Pa. 1981).

An additional reason stated by some jurisdictions in affirming the validity of these releases is that situations involving auto racing are ones where the parties have equal bargaining power. In *LaFrenz v. Lake County Fair Bd.*, 360 N.E.2d 605 (Ind. Ct. App. 1977), the Indiana Appeals Court found that a release signed by a racing participant was valid in light of the relationship between the parties. "The decedent was under no compulsion, economic or otherwise, to be in the restricted pit area." *Id.* at 395. *See also Dunn*, 599 F. Supp. 612. Finally, some courts have expressed a concern that if they disallow releases, fewer promoters would be willing to sponsor auto races because of the unlimited liability they may face. *Grbac*, 521 F. Supp. 1351; *Gore v. Tri-County Raceway, Inc.*, 407 F. Supp. 489 (M.D. Ala. 1974).

Keeping these factors in mind, we now turn to the release executed by Plant and the circumstances surrounding that execution. Plant was a regular participant in auto races and admitted to having frequented the Speedway. He also stated that he had signed the exact same release form on at least twelve prior occasions. Plant has made no allegations that he was forced to sign the release, and

he admitted that he never asked any questions regarding the contents of the document he was signing. Moreover, Plant was familiar with the pit area and its proximity to the racetrack. He stated that he was only in the pit area when his team's car was racing, and that when he was there as a mere spectator, he stayed in the grandstand area. More importantly, as a participant, Plant was certainly familiar with the dangers inherent in the sport of auto racing. In fact, he admitted to having witnessed numerous wrecks that occurred during racing events. With this knowledge, Plant continued to voluntarily participate in this activity.

As for the release itself, it contained certain key phrases in bold, such as "releases," "discharges," and, "covenants not to sue," that should have put Plant on notice about the import of what he was signing. We also disagree with Plant's assertions that the release was overly vague. It specifically references releasing the Speedway of claims for "negligence" in three different passages. It also states that the pit area is a restricted area to which the release applies.

In granting the Appellees' motion for summary judgment, the trial court took into consideration the circumstances surrounding the execution of the release and stated:

> I don't find an unequal bargaining position type of argument sustained by the record before me. . . . I don't find that this is the type of enterprise in which the courts have acknowledged that it is improper to let them, — in other words, an enterprise that people have to rely upon like public transportation or other types of enterprises where people of necessity have to go just to get through life and conduct regular business activities, making a living. This is nothing but a — this is, this is recreation, dangerous recreation, exciting recreation, but it's recreation. And, I certainly don't find a compelling reason for this Court to start drawing up public policy. I just don't think that it's called for here. I don't think it has been established as something that the Arkansas courts would clearly see as against public policy, and, uh, so I am going to reverse my earlier opinion and grant summary judgment.

■ Considering the facts and circumstances surrounding the execution of the release by Plant, we agree with the trial court that this release was valid, and therefore, summary judgment was appropriate. Accordingly, we affirm the order of the trial court.

■ We note that Plant also argues that the release is not enforceable because it was not the result of a mutual agreement, nor

supported by sufficient consideration. Specifically, Plant contends that neither Appellees, nor himself, understood the meaning of the release. The abstract before us does not reveal, however, that this argument was raised at the trial court level. It is well settled that where the abstract does not reflect that the argument, or any similar argument, was made in the trial court, we will not reach the merits of the argument on appeal. *Barber v. Watson*, 330 Ark. 250, 953 S.W.2d 579 (1997); *Betts v. Betts*, 326 Ark. 544, 932 S.W.2d 336 (1996). Nor will we turn to the record to decide such an issue. *Reeves v. Hinkle*, 326 Ark. 724, 934 S.W.2d 216 (1996). This court will not be placed in a position of deciding an issue for the first time on appeal. *Id.* Accordingly, we decline to address Plant's argument on this point.

Affirmed.

GLAZE and IMBER, JJ., dissent.

TOM GLAZE, Justice, dissenting. In reaching its decision, the majority opinion relies on the Eighth Circuit Court of Appeals case, *Haines v. St. Charles Speedway, Inc.*, 874 F.2d 572 (8th Cir. 1989). The Haineses brought action against the promoter of an automobile race and a racetrack owner to recover damages for injuries sustained when Mr. Haines, the race car owner, was struck by his own car while attempting to have it started. The Haineses sought to defeat a summary judgment order primarily by arguing that, under controlling Missouri law, the release and waiver constituted a contract of adhesion.[1] The federal court agreed that the release was a contract of adhesion, but determined the release was unambiguous, not overbroad, and the facts surrounding the case were essentially undisputed. In so finding, the *Haines* court held it must apply a "total transaction" analysis in determining the intent of the parties to an exculpatory agreement.

The *Haines* case is far different from the one now before our court. First, as expressed in *Haines*, the federal court looked to Missouri law to decide that case, and in doing so, pointed out that, under Missouri law, an agreement to exempt one from the consequence of negligence is not against public policy. To the contrary, our court has very clearly decided that agreements exculpating parties from liability for their own negligence is against Arkansas's

[1] Missouri law defined a contract of adhesion as a form of contract submitted by one party and accepted by the other on the basis of *this* or *nothing*. *Id.*

strong public policy. *Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990). Rather than adopting another state's law on adhesion contracts in reviewing this case, our court would be better served by adhering to its own well-settled law on the review of orders granting summary judgment, and the analysis of exculpatory agreements set out in *Perry*.

Second, I would further add that, unlike in *Haines*, the instant case involves disputed material facts that need to be tried. In *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998), this court held that "we only approve the granting of the [summary judgment] 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." Unlike the federal courts' interpretation of Fed. R. Civ. P. 56, under our rule the court will not engage in a "sufficiency of the evidence" determination. *Id.* 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.* (quoting *Thomas v. Sessions*, 307 Ark. 203, 818 S.W.2d 940 (1991)). Viewing the evidence here in a light most favorable to Mr. Plant, the party against whom the motion was filed, and resolving all doubts and inferences against the Wilburs, the evidentiary items presented by the Wilburs in support of their motion leave questions of material fact unanswered.

Here, factual disputes remain concerning several material issues: (1) whether the disclosure of the types of negligence addressed in the waiver and release form were clear and specific enough to render a valid exculpatory agreement; (2) whether Mr. Plant was a spectator or a participant in the race at the time of his injury and how that might affect the exculpatory agreement; (3) whether Plant was injured while he was in a "restricted area," covered by the terms of the agreement; and (4) whether Plant knowingly waived all right to hold the Wilburs liable for the specific negligent acts that he alleged in his complaint.

As the majority notes, this court has stated that it is not impossible to avoid liability for negligence through contract if the exculpatory agreement clearly and specifically sets out exactly what negligent acts are covered. *Perry*, 301 Ark. at 550-51, 787 S.W.2d at 646-47 (citing *Middleton & Sons v. Frozen Food Lockers*, 251 Ark.

745, 474 S.W.2d 895 (1972)). Such contracts are strictly construed against the party relying on them. *Id.*

First, I note here that the generic waiver and release form signed by Plant does not specify the types of negligence that it covers. Plant alleged that the Wilburs failed to provide and maintain adequate safety barriers, and failed to warn of the dangers of flying debris. Plant's expert testified that the safety barriers between the track and the pit area, specifically the "wheel fence," had been improperly constructed and that the Wilburs had failed to construct any barrier to keep the spectators away from the wheel fence. The case should be remanded so that a fact-finder may determine whether the agreement clearly set out what negligent liability was to be avoided. *See Middleton & Sons v. Frozen Food Lockers*, 251 Ark. 745, 474 S.W.2d 895 (1972) (citing *Arkansas Power & Light Co. v. Kerr*, 204 Ark. 238, 161 S.W.2d 403 (1942)).

Secondly, I point out that a fact question exists as to whether Mr. Plant was a spectator or a participant member of the race crew at the time he was injured. As the majority notes, Sheldon England, the insurance broker, testified that the release applied to "*participant* legal coverage." Plant testified that he was admitted as a member of the race crew; however, he was admitted by paying the same entry fee and signing the same release form as an ordinary spectator. Plant's testimony reflected that at the time he was injured he was not working as a crew member, but instead was watching the race with other spectators in an area away from the pit area where his race crew was located. In sum, a genuine issue remains as to whether Plant was a spectator or a participant, and whether the exculpatory agreement applied the same, to spectators as it did to participants, or not at all. *See, e.g., Eder v. Lake Geneva Raceway*, 523 N.W.2d 429 (Wis. Ct. App. 1994).

Thirdly, I submit that it is equally unclear whether the area in which Plant was located, when injured, qualified as a "restricted area" under the terms of the exculpatory agreement. *See, e.g., Arnold v. Shawano County*, 317 N.W.2d 161 (Wis. Ct. App. 1982) *overruled on other grounds by Green Spring Farms v. Kersten*, 401 N.W.2d 816 (Wis. 1987); *Eder v. Lake Geneva Raceway*, 523 N.W.2d 429 (Wis. Ct. App. 1994). Although the Wilburs and the trial court presumed that Plant was observing the race from the pit area because that is where he had entered the race track, Plant's deposition reflects, and the Wilburs fail to dispute, that Plant was injured behind a fence near the race course, where he stood with other spectators.

Finally, the record reflects that the broad terms of the exculpatory agreement fail to give a reasonable person signing the release notice that he or she is waiving any right to hold the Wilburs accountable for premises liability. *See, e.g., Yauger v. Skiing Enters., Inc.*, 557 N.W.2d 60 (Wis. Ct. App. 1996) (court must examine whether "overbroad, general terms of exculpatory agreement create ambiguity and uncertainty as to what the signer was releasing"); *see also* AMI Civ. 4th 3012 (Supp. 2000-2001). Here, a disputed factual issue exists as to whether Plant knew or should have known, even upon the inspection required by the release and waiver agreement, that the safety barriers constructed to protect restricted areas were inadequate to prevent the type of injury that he incurred. Similarly, there is a factual issue as to whether Plant was given a reasonable opportunity to read and comprehend that he was signing a complete waiver of liability, especially in light of Plant's undisputed allegations about his signing of the agreement through a truck window while waiting in line for entrance. *See, e.g., Eder v. Lake Geneva Raceway*, 523 N.W.2d 429 (Wis. Ct. App. 1994); *Sexton v. Southwestern Auto Racing Assoc.*, 394 N.E.2d 49 (Ill. App. Ct. 1979).

As noted, this court has never upheld an agreement purporting to release a party from liability for his own negligence before it occurred. *Perry*, 301 Ark. at 550, 787 S.W.2d at 646 (citing *Williams v. U.S.*, 660n F. Supp. 699 (E.D. Ark. 1987)). The rationale behind the numerous decisions invalidating so-called releases given before liability arises is based upon the strong public policy of encouraging the exercising of care. *Id.* Why should we carve out an exception to our rule and public policy disfavoring exculpatory contracts merely because the contractual release covers a dangerous recreational activity? Surely the person charging an admission price to view a car race (or hockey game or wrestling match for that matter) should be held to some duty to use ordinary care for the spectators' safety. We should not, in my opinion, allow parties who promote dangerous sports activities to be effectively immunized from liability when a spectator is injured by a flying wheel (or puck, or folding chair) because the party promoting the dangerous sport failed to afford the spectator, as an invitee, a reasonably safe environment. Although there may be some exception made to allow racing facility proprietors like the Wilburs to place reasonable conditions on the terms of admission, the owners of such facilities should also be charged with taking reasonable steps to insure the safety of the public at such events.

In my view, Mr. Plant is entitled to have a fact-finder resolve the foregoing disputed material issues, and, therefore, I dissent.

IMBER, J., joins this dissent.

STATE of Arkansas,
Arkansas Department of Correction *v.*
Jackie Lee STAPLETON

01-523 51 S.W.3d 862

Supreme Court of Arkansas
Opinion delivered July 9, 2001

Mark Pryor, Att'y Gen., by: *Joseph V. Svoboda*, Ass't Att'y Gen., for appellant.

William R. Simpson, Jr., Public Defender; *Kent C. Krause*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellee.

ROBERT L. BROWN, Justice. This matter involves an appeal by the State from an order granting appellee Jackie Lee Stapleton's petition for a writ of *habeas corpus*. The facts leading up to this order are these. On April 29, 1987, Stapleton pled guilty to two counts of aggravated robbery, two counts of theft of property, and one count of aggravated assault.[1]

At a hearing held on June 24, 1987, before the Pulaski County Circuit Court, the following colloquy took place:

> THE COURT: I'm going to sentence you to the negotiated plea that you negotiated. I don't know what it is but they're going to tell me and I am going to do that. As I understand it, that sentence is going to be served concurrently with the time you're going to get in Tennessee. And we're going to immediately release you to the Tennessee authorities [a]nd they're going to hold you until they sentence you and then our sentence will run concurrent to that.

[1] The written Plea Statement does not include the two counts for theft, although Stapleton admitted to the circuit court that he was also pleading guilty to the theft charges.

....

DEFENSE COUNSEL: He's ready to go.

THE COURT: Okay. He's going to get life over there, is he?

DEFENSE COUNSEL: At least, yes, sir.

THE COURT: At least. If for some reason it doesn't happen, we're going to bring him back here and let him serve this sentence, whatever it is.

DEFENSE COUNSEL: I think Mr. Douglass [the prosecutor] and I are both ...

THE COURT: Satisfied that it's going to happen and Jackie's satisfied it's going to happen, too?

DEFENSE COUNSEL: Yes, sir. And Mr. Stapleton's well aware of what's going on.

THE COURT: What's the recommendation, Mr. Prosecutor?

PROSECUTOR: Your Honor, on count one, aggravated robbery, the state would recommend life. On count two, aggravated robbery, the state would recommend life imprisonment, to be served concurrent to each other. On the remaining counts, counts three, four and five, the state would recommend six years concurrent to each other and concurrent to counts one and two.

DEFENSE COUNSEL: And for the record also, your Honor, it's our understanding that this will be concurrent to time to be received in Tennessee.

....

THE COURT: Do you know of any reason why I shouldn't sentence you at this time?

STAPLETON: No, sir.

THE COURT: State of Arkansas versus Jackie Stapleton, 87-164, it is the judgment and sentence of this court that you be taken by the sheriff of Pulaski County and delivered to the Department of Correction to serve at hard labor for a period of life for count

> one and life for count two. Counts three, four and five, it is the judgment and sentence of this court that you be sentenced to a term of six years in the Department of Correction. These sentences are to be run concurrently, each with the ... all with each other and they are to be concurrent to the sentence that you are to receive in the State of Tennessee and they are to be served in the State of Tennessee Department of Correction. ... It is the intention of the court to grant your request that you be sentenced to these terms and that you be allowed to serve them in the Department of Correction of the state of Tennessee concurrent with the sentence that you receive there. Good luck to you.

On June 25, 1987, a judgment and commitment order was entered wherein Stapleton was sentenced to life imprisonment at "hard labor" for the counts of aggravated robbery, six years for theft of property, and six years for first-degree assault. The judgment and commitment order stated that the sheriff is directed to transport Stapleton to the Arkansas Department of Correction to commence his sentence. Under "Explanatory Notes," the judgment read that the sentence would be "current [*sic*] with time in Tennessee to be served in Tennessee."

Thereafter, Stapleton was transferred to representatives of the State of Tennessee for purposes of resolving the criminal charges brought against him in that state. On January 12, 1988, a judgment was entered in the criminal court of Sullivan County, Tennessee, which stated that Stapleton had been found guilty of second-degree burglary in two cases, grand larceny, and possession of burglary tools. He was sentenced to twenty years on each burglary conviction, six years for grand larceny, and five years for possession of burglary tools. The sentences were to be served concurrently in the Tennessee Department of Correction and concurrently with the Arkansas sentences. The Tennessee judgment provided that Stapleton would have to serve thirty percent of his sentence before he would be eligible for release.

On January 17, 1992, Stapleton was released on parole by the Tennessee Department of Correction to the Knoxville, Tennessee parole office. Parole was to be continued, according to Stapleton, until the year 2014. On January 13, 1998, Stapleton was arrested in Tennessee and later extradited back to Arkansas. At the time he was arrested in Tennessee, he had married, received custody of his four-year-old granddaughter, and was working as a truck driver for Goodwill Industries. Stapleton was denied a hearing by the Pulaski

County Circuit Court and was committed to the Arkansas Department of Correction to serve his life sentence. An order by the circuit court was entered to that effect on March 30, 1998. Stapleton filed a notice of appeal from the circuit court's order, but his record was rejected by the Clerk of the Supreme Court because it did not contain a notice of appeal. No additional action was taken by Stapleton to perfect his appeal.

On January 12, 2000, Stapleton filed a petition for writ of *habeas corpus* with the Lincoln County Circuit Court. In that petition, he contended that in 1987, the Pulaski County Circuit Court "waived jurisdiction or otherwise implicitly pardoned" him when it authorized that he serve his Arkansas sentence in Tennessee and that the circuit court in 1998 lacked jurisdiction to modify the 1987 judgment and recommit him to the Arkansas Department of Correction. The State responded to the petition and argued that the initial commitment to the Arkansas Department of Correction in 1987 was not invalid on its face and that the circuit court did not lack subject-matter jurisdiction to enter the 1987 judgment and commitment order.

A hearing was held on the petition on September 7, 2000, and Stapleton testified in support of his petition. On February 27, 2001, the Lincoln County Circuit Court entered its order granting *habeas corpus* relief to Stapleton. In that order, the court found and concluded as follows:

> At the time Petitioner Stapleton was arrested in Tennessee and extradited back to Arkansas, he was on parole from the Tennessee Department of Correction and thereby subject to the supervision of the Tennessee Department of Correction. This Court specifically finds that until such time as he is no longer under the supervision of the Tennessee Department of Correction, Petitioner Stapleton's Arkansas sentence should be served concurrently with his Tennessee sentences and supervised by the Tennessee Department of Correction. That this Court does not reach, as it is not before the Court, what will happen when Petitioner Stapleton completes his Tennessee sentence and is no longer under supervision of the Tennessee Department of Correction. That to the extent necessary to effect this order, the Respondent is hereby directed to disregard the order of the Pulaski County Circuit Court, First Division, dated March 30, 1998.

On May 9, 2001, the State filed a motion for stay of the order granting *habeas corpus* relief to Stapleton and expedited review of the

matter. This court granted the stay and set an expedited briefing schedule. *See State v. Stapleton*, 345 Ark. 47, 43 S.W.3d 157 (2001) (*per curiam*).

In its appeal, the State contends that *habeas corpus* relief is not available when a petitioner is merely questioning where he is to be incarcerated. Rather, the remedy, according to the State, is limited to the question of whether a person should be incarcerated at all. The State further maintains that no one disputes the validity of the 1987 Arkansas judgment or the jurisdiction of the circuit court to enter that order.

Stapleton, on the other hand, argues that the Pulaski County Circuit Court lost jurisdiction to modify the 1987 Arkansas sentence after it was placed into execution in Tennessee. Under his theory, the Pulaski County Circuit Court sentenced him to serve his life sentence in Tennessee and, thus, waived subject-matter jurisdiction over him to modify that sentence. Thus, he contends, the Pulaski County Circuit Court was without jurisdiction to commit him to the Arkansas Department of Correction in 1998 so long as the Tennessee sentence, albeit parole rather than incarceration, was still in effect. This action by the Pulaski County Circuit Court, he claims, constituted a modification of the 1987 judgment and resulted in his illegal incarceration in Arkansas.

Habeas corpus is a vital privilege that is protected by the Arkansas Constitution. Ark. Const. Art 2, § 11. A writ of *habeas corpus* will be granted forthwith upon a showing by affidavit or other evidence that there is probable cause to believe a person is being detained without lawful authority. Ark. Code Ann. § 16-112-103 (a) (1987). This court has made it clear that a writ of *habeas corpus* will issue when a commitment is invalid on its face or when the sentencing court lacked subject-matter jurisdiction to enter or modify the sentence. *Renshaw v. Norris*, 337 Ark. 494, 989 S.W.2d 515 (1999); *Sawyer v. State*, 327 Ark. 421, 938 S.W.2d 843 (1997).

As both parties agree, our beginning focus must be on the 1987 judgment and commitment order entered by the Pulaski County Circuit Court. Neither party contends that that judgment was invalid. The salient parts of that judgment are:

- Stapleton received several sentences on several convictions, including a life sentence.

- His sentence was described as "hard labor" and the sheriff was directed to transport him to the custody of the Arkansas Department of Correction.

- The Arkansas sentences were to run concurrently.

- Under "Explanatory Notes," the judgment said the Arkansas sentences would run concurrently with the Tennessee sentences.

As an initial matter, we disagree with Stapleton that the Pulaski County Circuit Court had the authority to determine where Stapleton would serve his Arkansas sentence. The 1987 order was a valid judgment and commitment order for incarceration in the Arkansas Department of Correction. Furthermore, a circuit court has no authority to order where a sentence will be served. That authority rests solely with the executive branch of government and particularly in Arkansas with the Arkansas Department of Correction. *See* Ark. Code Ann. § 5-4-402(a) (Supp. 1999); Ark. Code Ann. § 12-27-113(a)(1) (Repl. 1999). In short, it was the decision of the Arkansas Department of Correction, and only the Department of Correction, as to where Stapleton's sentence would be served. An "explanatory note" in the judgment that the life sentence be served in Tennessee does not diminish that fact. We do note, however, that it would be nonsensical to sentence Stapleton to life in prison for Arkansas crimes and then order, in effect, that that sentence be served concurrently with a twenty-year sentence in Tennessee. Of course the circuit court in 1987 did not know what the Tennessee judgment would be, but nonetheless it would be an absurd interpretation of the 1987 judgment to limit its effect to a term of twenty years.

In short, the transfer of Stapleton to Tennessee for service of his Arkansas life sentence concurrently with his Tennessee sentences did not void that life sentence. Nor did it postpone Arkansas's ability to have its life sentence of "hard labor" carried out when Stapleton was placed on parole in Tennessee. In support of our conclusion, we turn to our decision in *George v. State*, 285 Ark. 84, 685 S.W.2d 141 (1985). In *George*, the *habeas corpus* petitioner had been convicted of burglary in Texas and placed on probation. He returned to Arkansas and was convicted of second-degree murder. While on appeal bond, the Desha County Circuit Court turned the petitioner over to the Texas authorities, and in Texas, his probation on the burglary conviction was revoked. He was sentenced to five years in Texas. He was paroled in Texas, and

he returned to Arkansas where he was arrested and sent to the Arkansas Department of Correction to serve time on the second-degree murder conviction.

Petitioner filed a *habeas corpus* petition and claimed that the Desha County Circuit Court had lost jurisdiction to commit him to the Arkansas Department of Correction because that court had released him to Texas. This court disagreed that the commitment was illegal. We said:

> While one effect of the Arkansas commitment may be to place [petitioner] in violation of his Texas parole obligation, that is not a consideration in determining whether the Desha County Circuit Court had the power to commit him.

285 Ark. at 87, 685 S.W.2d at 143. We held that the petitioner was not entitled to a writ.

The same holds true in the case at bar. The Pulaski County Circuit Court never relinquished its power to require Stapleton to serve his life sentence. Nor was that court's commitment of Stapleton in 1998 to the Arkansas Department of Correction a modification of the original 1987 judgment. The circuit court had the power to require Stapleton to serve his Arkansas sentence regardless of his parole in Tennessee. Indeed, the fact that Tennessee placed Stapleton on parole did not undercut the Pulaski County Circuit Court's authority any more than the Texas parole undercut the authority of the Desha County Circuit Court to commit the petitioner in the *George* case.

The order of the Lincoln County Circuit Court granting a writ of *habeas corpus* is reversed and this matter is remanded for entry of an order consistent with this opinion.

STATE of Arkansas *v.* Victor WARREN

CR 00-1179 49 S.W.3d 103

Supreme Court of Arkansas
Opinion delivered July 9, 2001

[redacted]

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

McCullough Law Firm, by: *R.S. McCullough*, for appellee.

ANNABELLE CLINTON IMBER, Justice. On March 1, 2000, the State charged Victor Warren in Pulaski County Circuit Court with being a felon in possession of a firearm (FIP) in violation of Ark. Code Ann. § 5-73-103 (Repl. 1997).[1] The State's FIP charge was predicated upon its assertion that Mr. Warren had previously been convicted of a felony. The facts in this matter are not disputed. In 1977, the Cross County Circuit Court had placed Mr. Warren on five years' probation after he entered a plea of guilty to felony charges of burglary and theft of property. This disposition by the Cross County Circuit Court was subject to the expungement provisions of Act 346 of 1975, a first-offender statute later codified in Ark. Code Ann. § 16-93-301 *et seq*. (1987).[2] Eventually, Mr. Warren went to the Cross County Circuit Court and obtained an order dated July 31, 1997, which found that he had complied with its 1977 orders. Pursuant to the expungement provisions of Ark. Code Ann. § 16-93-301 *et seq*, the Cross County Circuit Court sealed and expunged Mr. Warren's record.

Mr. Warren filed a motion to dismiss the FIP charge in Pulaski County, asserting that the State could demonstrate no predicate felony necessary to prove that he was a felon in possession of a firearm because his prior record had been properly expunged under section 16-93-303(b)(1). The State argued that, pursuant to Act 595 of 1995, the expunged felony record in Cross County could still be used as a predicate felony sufficient for an FIP prosecution. The trial court rejected the State's argument and granted Mr. Warren's motion to dismiss the FIP charge.

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[1] Section 5-73-103(a) and (b) in relevant part provide: "(a) No person shall possess or own any firearm who has been convicted of a felony; . . . (b) A determination by a jury or a court that a person committed a felony (1) shall constitute a conviction for purposes of subsection (a) of this section even though the court . . . placed the defendant on probation, ..."

[2] This Act was subsequently amended in 1995. *See* Act 998 of 1995, codified at Ark. Code Ann. § 16-93-301 *et seq* (Supp. 1999).

The State now brings this appeal under Arkansas Rules of Appellate Procedure—Criminal Rule 3(b) and (c), asserting that the trial court improperly granted Mr. Warren's motion to dismiss the State's FIP charge. The State maintains in its jurisdictional statement that review of the trial court's ruling is necessary to insure the correct and uniform administration of the criminal law, "particularly as the interpretation of statutes and Acts of the General Assembly is required."[3] Before addressing the merits of the State's claim in this case, we must first determine whether this issue is properly before us under Rule 3(c). The principles governing our acceptance of appeals by the State in criminal cases are well-settled and clear:

> We accept appeals by the State when our holding would be important to the correct and uniform administration of the criminal law. Rule 3(c). As a matter of practice, this court has only taken appeals "which are narrow in scope and involve the interpretation of law." *State v. Banks*, 322 Ark. 344, 345, 909 S.W.2d 634, 635 (1995). Where an appeal does not present an issue of interpretation of the criminal rules with widespread ramifications, this court has held that such an appeal does not involve the correct and uniform administration of the law. *State v. Harris*, 315 Ark. 595, 868 S.W.2d 488 (1994). Appeals are not allowed merely to demonstrate the fact that the trial court erred. *State v. Spear and Boyce*, 123 Ark. 449, 185 S.W. 788 (1916).

State v. Thompson, 343 Ark. 135, 138-39, 34 S.W.3d 33, 35 (2000) (quoting *State v. Stephenson*, 330 Ark. 594, 595, 955 S.W.2d 518 (1997)).

Based upon the above-stated principles, we conclude that this case presents no issue essential to the correct and uniform administration of the criminal law. To the contrary, the case at bar raises exactly the same issue that this court addressed and decided in *State v. Ross*, 344 Ark. 364, 39 S.W.3d 789 (2001). In that case, the trial court dismissed a felon-in-possession charge against Mr. Ross

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[3] The State's Senior Assistant Attorney General, David R. Raupp, also avers in the jurisdictional statement that "this appeal is of substantial public interest and raises a significant issue needing clarification of the law concerning the construction of statutes and the acts of the General Assembly." This statement, required by Ark. Sup. Ct. R. 1-2(c)(1)(B)(ii), relates to the division of cases between the Supreme Court and the Court of Appeals under Ark. Sup. Ct. R. 1-2(b) rather than the State's authority to take an appeal in a criminal case, which is governed by Ark. R. App. P.—Crim. 3. Under Rule 3(c), the Office of the Attorney General must certify that the correct and uniform administration of the criminal law requires review by an appellate court.

because his prior felony conviction had been expunged. The State appealed the trial court's ruling and argued before this court that Act 595 of 1995 allowed the use of Mr. Ross's expunged record to support a felon-in-possession prosecution. *Id.* Act 595 prohibits the possession of a firearm by anyone who has been determined by a court or a jury to have committed a felony, even if that conviction has been expunged pursuant to any act. However, Act 595 was not enacted until after Mr. Ross pled guilty and was placed on probation under Ark. Code Ann. § 5-64-401 *et seq.* (1987), a first offender statute; and section 5-64-407 of that statute mandated that the circuit court "discharge Ross and dismiss the proceedings against him upon Ross's fulfillment of the terms and conditions of his probation." *State v. Ross*, 344 Ark. at 366-67, 39 S.W.3d at 790-91. Specifically, at the time Mr. Ross was placed on probation in 1994, § 5-64-407, in pertinent part, provided:

> Whenever any person who has not previously pleaded guilty or been found guilty, . . . pleads guilty to or is found guilty of possession of a controlled substance under § 5-64-401 . . . this court . . . may defer proceedings and place him on probation for a period of not less than one year. . . . Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualification or disabilities imposed by law upon conviction of a crime. . . .

We rejected the State's argument that Act 595 should be applied retroactively and affirmed the trial court's order of dismissal. *State v. Ross*, 344 Ark. at 368, 39 S.W.3d at 791.

As in *State v. Ross*, the State's FIP prosecution in this case depends upon proof of a felony conviction that has been expunged. Mr. Warren was placed on probation in 1977 under Act 346 of 1975, another first-offender statute. Upon expungement, pursuant to the terms of that Act, Mr. Warren was "discharged without court adjudication of guilt," the charges against him were dismissed, the records were sealed, and Mr. Warren was "completely exonerated of any criminal purpose." Act 346 of 1975, codified at Ark. Code Ann. § 16-93-301, -303(b)(1) and (2) (1987).[4] The State again

[4] At the time Mr. Warren was placed on probation in 1977, section 16-93-303(b) (1) and (2) provided: "(1) Upon fulfillment of the terms and conditions of probation or upon release by the court prior to the termination period thereof, the defendant shall be discharged without court adjudication of guilt, whereupon the court shall enter an appropriate order

argues, as it did in *State v. Ross, supra*, that Act 595 of 1995 authorizes the prosecution of Mr. Warren despite the expungement of his record and that Act 595 should be applied retroactively to Mr. Warren. In light of our holding in *State v. Ross, supra*, it is clear that the State cannot now rely upon Mr. Warren's expunged record to prosecute him as a felon in possession of a firearm pursuant to Act 595 of 1995.

We decided *State v. Ross, supra*, on April 5, 2001, and the State petitioned for rehearing on April 18, 2001. On May 3, 2001, we denied the State's petition for rehearing and our mandate issued. At that time, briefing in the instant matter was ongoing. The State does not dispute the application of *State v. Ross, supra*, to the instant case. To the contrary, the Office of the Attorney General, through Senior Assistant Attorney General David R. Raupp, acknowledges in its May 21 reply brief, that *State v. Ross, supra*, is controlling, but urges us to overrule that decision. Following our decision in *Ross* and denial of rehearing, the State had more than ample time to review the decision and file a motion to dismiss the pending appeal in this case. The State chose not to do so. Instead of dismissing the State's appeal against Mr. Warren, the Office of the Attorney General decided to pursue a frivolous and meritless appeal because it was "not happy with the *Ross* decision" and because it thinks *Ross* was "wrongly decided."

In the recent case of *Stilley v. Hubbs*, 344 Ark. 1, 40 S.W.3d 209 (2001), Mr. Stilley continued to pursue issues in his appeal that we had clearly decided adversely to him in *Stilley v. Henson*, 342 Ark. 346, 28 S.W.3d 274 (2000), only four months earlier. Mr. Stilley refused to concede the merits of the issues that had been decided by the *Henson* decision and urged this court to reverse itself and rule in his favor in the *Hubbs* appeal. Pursuant to Ark. R. App. P.—Civil 11, we imposed a sanction in the amount of $2,000 against Mr. Stilley for his failure to dismiss that portion of his appeal that had already been decided in *Stilley v. Henson, supra. Stilley v. Hubbs*, 344 Ark. 1, 7, 40 S.W.3d 209, 213 (2001) (supplemental opinion imposing Rule 11 sanctions). Civil rule 11 authorizes the imposition of sanctions for civil appeals that are not "well grounded in fact, . . .

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which shall effectively dismiss the case, discharge the defendant, and expunge the record. (2) The order shall completely exonerate the defendant of any criminal purpose and shall not affect any civil rights or liberties of the defendant."

warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; [or] filed for an improper purpose."

The Rules of Appellate Procedure—Criminal do not authorize the imposition of sanctions for frivolous appeals in criminal cases. However, in appeals by the State, the Office of the Attorney General is required by Ark. R. App. P.—Crim. 3(c) to certify that it "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 review by the Supreme Court." As in the case of *Stilley v. Hubbs*, *supra*, the State has acknowledged that only three months ago we handed down our decision in *State v. Ross*, *supra*, which directly controls the issues presented by the State in this appeal. We will not allow the State to pursue frivolous appeals of criminal matters without recourse when we have held that such actions in a civil case warrant sanctions. On a prior occasion, when it has been clear to this court that the State has not acted responsibly or with diligence in a criminal matter, a copy of our opinion has been forwarded to the Committee on Professional Conduct. *Bowen v. State*, 320 Ark. 342, 895 S.W.2d 941 (1995).

This appeal is dismissed under Ark. R. App. P.—Crim. 3(c), and a copy of this decision will be forwarded to the Committee on Professional Conduct.

GHEGAN & GHEGAN, INC., On Behalf of Itself
and All Taxpayers Similarly Situated *v.*
Richard A. BARCLAY, Director of the Arkansas
Department of Finance and Administration

01-15 49 S.W.3d 652

Supreme Court of Arkansas
Opinion delivered July 9, 2001

Timothy Davis Fox, PLLC, by: *Timothy Davis Fox*; and *Will Bond*, for appellants.

William E. Keadle, for appellee.

RAY THORNTON, Justice. This is an illegal-exaction case that involves a challenge on equal protection grounds of the constitutionality of portions of the Soft Drink Tax Act ("Act"),

which is codified at Ark. Code Ann. § 26-57-901 *et seq.* (Repl. 1997). We previously considered in *Ghegan v. Weiss*, 338 Ark. 9, 991 S.W.2d 536 (1999), the question whether Ghegan & Ghegan, Inc. ("Appellant" or "Ghegan"), had standing to bring an action based upon allegations of violations of constitutional requirements of equal protection. *Id.* Upon reviewing the trial court's granting of the Department of Finance and Administration's ("DFA") motion to dismiss for lack of standing, we concluded that accepting Ghegan's allegations in the light most favorable to the plaintiff, the matter should not be summarily dismissed, but Ghegan should be given the opportunity to present evidence in support of its claims because the traditional standing requirements had been met. *Id.*

A trial then ensued in the Pulaski County Chancery Court, at the conclusion of which the chancellor found that Ghegan had failed to establish that the disparity between the taxes imposed upon syrups used in making soft drinks and the taxes imposed upon both finished soft drinks made from powders and bottled soft drinks resulted in an unconstitutional violation of the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States or Article 2, Section 3, of the Constitution of the State of Arkansas. Appellant argues that a rational basis test is applicable, and further argues that: (1) the trial court erred in its determination that the Act does not treat persons differently, (2) the trial court erred in its determination that there are rational bases for the discrimination against retailers selling soft drinks made from syrup, (3) the DFA is violating the Act and its own regulation by taxing cherry syrup and vanilla syrup used to flavor soft drinks, and (4) the Act's border city exemption as written violates equal protection. We find no reversible error and affirm.

Ghegan is a corporation that runs a small pizzeria in Hot Springs and is a retailer that sells soft drinks made from syrup. During the pendency of this litigation, Ghegan has sold both Coca-Cola soft drinks made from syrup and Pepsi soft drinks made from syrup. Ark. Code Ann. § 26-57-904 (Repl. 1997) provides, in relevant part:

> (a) There is hereby levied and there shall be collected a tax upon every distributor, manufacturer, or wholesale dealer, to be calculated as follows:
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> > (1) Two dollars ($2.00) per gallon for each gallon of soft drink syrup or simple syrup sold or offered for sale in the State of Arkansas;

(2) Twenty-one cents (21¢) per gallon for each gallon of bottled soft drinks sold or offered for sale in the State of Arkansas;

(3) Where a package or container of powder or other base product, other than a syrup or simple syrup, is sold or offered for sale in Arkansas, and the powder is for the purpose of producing a liquid soft drink, then the tax on the sale of each package or container shall be equal to twenty-one cents (21¢) for each gallon of soft drink which may be produced from each package or container by following the manufacturer's directions. This tax applies when the sale of the powder or other base is sold to a retailer for sale to the ultimate consumer after the liquid soft drink is produced by the retailer.

(b)(1) Any retailer or retail dealer, who purchases bottled soft drinks, soft drink syrup, simple syrup, powder, or base product from an unlicensed distributor, manufacturer, or wholesale dealer shall be liable for the tax levied in subsection (a) of this section on those purchases.

. . . .

Id.

Under Ark. Code Ann. § 26-57-904, Ghegan and all other persons who purchase concentrated syrup, to be mixed with water for use as a soft drink, must pay a tax of $2.00 per gallon of concentrated syrup. This tax is levied on the concentrated syrup regardless of the amount of soft drink made from the syrup. Retailers that sell bottled soft drinks pay a soft-drink tax of $.21 per gallon of soft drink. Retailers that use powder to make a resulting soft drink pay a soft-drink tax of $.21 per gallon of finished product, based upon how many gallons of soft drink should be produced from the powder, assuming that it is mixed according to the manufacturer's mixing directions. With regard to soft drinks made from concentrated syrup, the manufacturers recommend ratios of 4.75:1, 5:1, or 5.25:1 when mixing syrup with water, depending on the manufacturer and whether the soft drink is a diet or sugar soft drink, but these ratios are not mandatory. If mixed according to the suggested ratios, testimony shows that the computation of the effect of the $2.00 tax upon each gallon of concentrated syrup would be equivalent to a tax between $.32 and $.35 per gallon, for each gallon of finished product.

Appellant brought a declaratory judgment action seeking a declaration, in relevant part, (1) that Ark. Code Ann. § 26-57-904 is unconstitutional as being violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and of Article 2, Section 3, of the Arkansas Constitution and, thus, null and void, (2) that an accounting be ordered, (3) that an interest bearing escrow account be established, and (4) that such escrow account be held pending further court order.

At the conclusion of the trial, the trial court found that Ark. Code Ann. § 26-57-904 is not unconstitutional as being violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or Article 2, Section 3, of the Arkansas Constitution because Ghegan failed to establish that any disparity in the taxing of soft-drink syrups and soft-drink powders resulted in an illegal discrimination between persons similarly situated and denied and dismissed appellant's complaint for declaratory judgment. It is from this order that appellant brings this appeal.

I. The Trial Court Did Not Err in its Determination That the Soft Drink Tax Act Does Not Treat Persons Differently

We review decisions of the chancery court *de novo*, but we do not set aside findings of fact unless they are clearly erroneous. *E.g.*, *Wisener v. Burns*, 345 Ark. 84, 44 S.W.3d 289 (2001) (citing *Kinghorn v. Hughes*, 297 Ark. 364, 367, 761 S.W.2d 930 (1988)); *Lotz v. Cromer*, 317 Ark. 250, 878 S.W.2d 367 (1994). We also review issues of statutory construction *de novo*, as it is for us to decide what a statute means. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (citing *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999)).

The burden of showing a violation of equal protection is very high. Our understanding of this principle was illuminated by the Supreme Court in *Madden v. Commonwealth of Kentucky*, 309 U.S. 83 (1940), where the Court stated, "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized." *Id.* "[T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against persons and classes." *Id.*

In *Davies v. City of Hot Springs*, 141 Ark. 521, 217 S.W. 769 (1920), we stated, "The only restriction which the law imposes on the exercise of power is that there shall not be a discrimination between persons in like situations and pursuing the same class of occupation." *Id.* (citing *Waters-Pierce Oil Co. v. Hot Springs*, 85 Ark. 509, 109 S.W. 293 (1908)). In addition, in *City of Ft. Smith v. Scruggs*, 70 Ark. 549, 69 S.W. 679 (1902), we stated, "But the rule of equality only requires that the tax shall be collected impartially of all persons in similar circumstances." *Id.*

We have outlined on numerous occasions the elements that are necessary in order to determine whether an equal protection challenge is warranted. In *Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 823 S.W.2d 852 (1992), we stated, "In deciding whether an equal protection challenge is warranted, there must first be a determination that there is a state action which differentiates among individuals." *Id.* (quoting *Bosworth v. Pledger*, 305 Ark. 598, 810 S.W.2d 918 (1991)). "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." *Bosworth, supra* (quoting U.S. Const. amend. 14). The federal equal protection clause prohibits arbitrary classifications by the state resulting in different treatment of persons similarly situated in the exercise of its powers. *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983).

With regard to appellant's designated "Point I" on appeal, we note that the "rational basis" test is not relevant unless there is a disparate tax treatment between persons similarly situated. Only if there exists a discrimination between persons similarly situated is it necessary that a rational basis for such discrimination be established. *Bosworth, supra.* Accordingly, we first address appellant's designated "Point II" that the trial court erred in its determination that the Act does not treat persons differently. Appellant argues that the trial court's finding that the discrimination is against products, not people, is contrary to the definitions in the Act, to the testimony and evidence, to the findings made by the trial court, to the law of the case, as well as being contrary to the border city tax statutes. We will briefly address each of these points before turning our attention to the underlying issue whether the trial court's findings were contrary to the facts and the applicable law as articulated in our case law on this issue.

A. Trial Court's Findings of Fact

Appellant contends that the trial court's legal conclusion that the discrimination is against products, not people, is contrary to the findings of fact issued by the trial court. Appellant cites paragraph 7 of the trial court's order in support of its argument, where the trial court stated "that retailers who sell soft drinks produced by syrup pay a higher tax *per gallon of soft drink produced* than retailers who sell bottled soft drinks or soft drinks by powder." (Emphasis supplied.) Appellant asserts that this finding of fact is contrary to the trial court's determination that the discrimination is against products, not people. We disagree.

The language appellant relies on for its assertion is taken out of the context of the trial court's order. Paragraphs 6 and 7 of the trial court's order provide, in relevant part:

> Plaintiff has attempted to classify a retailer who sells soft drinks that are made from syrup as a different class of persons than a retailer who sells bottled soft drinks or soft drinks that are made from powder. The retailer makes a choice regarding the form of the product it elects to sell to the consumer.... It is the taxing of the form of the product about which the plaintiff complains, not that it is treated differently than any other person subject to the Soft Drink Tax, as a result of the tax. The plaintiff has consistently assumed that it was a purpose of the legislation to equally tax a resultant gallon of soft drink. As pointed out to the plaintiff at the summary judgment hearing, nowhere in the statute does it state such a purpose. However, the court will address the issue as the plaintiff presents it.
>
> 7. The plaintiff has failed to meet its very high burden by simply proving that retailers who sell soft drinks produced by syrup pay a higher tax per gallon of soft drink produced than retailers who sell bottled soft drinks or soft drinks produced by powder.

The trial court's recitation of appellant's claim "that retailers who sell soft drinks produced by syrup pay a higher tax per gallon of soft drink produced than retailers who sell bottled soft drinks or soft drinks produced by powder" was made after first pointing out that such a showing did not meet the burden of establishing discrimination between persons. It is clear from the context of both paragraphs 6 and 7 that the trial court disagreed

with appellant's contention that individuals are being taxed differently, not products. Therefore, we find no merit in appellant's argument that the trial court's findings of fact were contrary to the trial court's conclusion that the discrimination is against products, not people.

B. "Border City" Tax Provision As Controlling the Imposition of Soft-Drink Taxes

Appellant next contends that the trial court's determination that the discrimination is against products, not people, is contrary to the "border city" tax provision of the Act. Specifically, appellant contends that Ark. Code Ann. § 26-57-907 (Repl. 1997) provides further evidence that this is not a case involving differentiation between products, but between individuals, in this case, retailers. That section provides, in relevant part:

> (a) If a distributor, manufacturer, or wholesale dealer sells bottled soft drinks, soft drink syrups, powders, or base products to retailers or retail dealers located in a city or incorporated town which is subject to the border city tax rate provided in § 26-52-303, then the tax shall be at the same rate as imposed by the adjoining state on distributors, manufacturers, or wholesale dealers, not to exceed the rate imposed by § 26-57-904.

Id.

We are not persuaded by appellant's attempt to utilize Ark. Code Ann. § 26-57-907, a statutory section regarding an exemption, to illustrate its contention that the trial court's determination that the discrimination is against products, not people, is contrary to the "border city" tax provision of the Act. It is true that Ark. Code Ann. § 26-57-907 provides a benefit to retailers located in a border city or incorporated town, and is thus a benefit to individuals. However, an exemption for an individual can apply to a tax that is imposed on products or services as well.

For example, Ark. Code Ann. § 26-52-401 (Supp. 1999) provides exemptions for sales by churches and charitable organizations, which can be viewed as exemptions for individuals. *See id.* However, Ark. Code Ann. § 26-52-401 also provides an exemption for sales of certain products, such as newspapers and certain publications, regardless of the identity of the seller or buyer. *See id.*

Because it is clear that an act can provide for both exemptions for individuals and on products and services at the same time, and vice versa, one cannot determine the nature of a tax by looking at an exemption provision. Consequently, appellant's argument that, because the border city tax provision of the Act refers to individuals, this indicates that the Act discriminates against individuals, not products, must fail.

C. Law of the Case

Appellant also argues that the trial court's determination that the discrimination is against products, not people, is contrary to the law of the case. It is well settled that the decision on the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal. *Morris v. Garmon*, 291 Ark. 67, 722 S.W.2d 571 (1987). In support of its argument, appellant cites our decision in the prior appeal of this case in *Ghegan v. Weiss*, 338 Ark. 9, 991 S.W.2d 536 (1999). However, in *Ghegan*, *supra*, we were only addressing the issue whether Ghegan had standing to bring an illegal-exaction challenge under Article 16, Section 13 of the Arkansas Constitution. *See Ghegan*, *supra*. We stated:

> The sole issue on appeal is whether the trial court erred when it ruled that Ghegan did not have standing under Article 16, Section 13, of the Arkansas Constitution to challenge the constitutionality of section 26-57-904(a) of the Arkansas Soft Drink Tax Act. When reviewing a trial court's ruling on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint.

Id. (citations omitted). Applying our standard of review regarding motions to dismiss, we based our ruling only on the allegations made in the complaint, and our decision was limited to the context of whether appellant had met the general requirements necessary for standing to warrant our reversal of the trial court's order granting appellee's motion to dismiss. *See id.* We were not addressing the merits of appellant's substantive arguments. In the context of a standing case, appellant was not required to prove any individual disparate treatment necessary to support an equal protection violation claim. Nor were we providing a ruling on a substantive equal protection claim that was not properly before us. Accordingly, we hold that the trial court's determination that the discrimination is

against products, not people, is not contrary to the law of the case in *Ghegan, supra.*

D. Definitions Enacted by the General Assembly in the Soft Drink Tax Act

Appellant also contends that the trial court's determination that the discrimination is against products, not people, is contrary to the definitions enacted by the General Assembly in the Act. Appellant contends that the only difference between the definitions of "powder" and "syrup" is that "powder" is a "solid" and "syrup" is a "liquid," but that the two definitions are the same in all other respects.

The definitions for "powder" and "syrup" are provided in Ark. Code Ann. § 26-57-902 (Repl. 1997), and state, as follows:

> (10) "Powder" or "other base" means *a solid mixture of basic ingredients used in making, mixing, or compounding soft drinks* by mixing the powder or other base with water, ice, syrup or simple syrup, fruits, vegetables, fruit juice, vegetable juice, or any other product suitable to make a complete soft drink.
>
> . . . .
>
> (15) "Syrup" means the *liquid mixture of basic ingredients used in making, mixing, or compounding soft drinks* by mixing the syrup with water, simple syrup, ice, fruits, vegetables, fruit juice, vegetable juice, or any other product suitable to make a complete soft drink.

Id. (emphasis added). Appellant contends that because the wording of these two definitions are so similar, "[t]he General Assembly has legislatively defined 'powder' and 'syrup' as the exact same thing, 'a mixture of basic ingredients used in making, mixing, or compounding soft drinks.' "

As authority for its argument, appellant relies on our decision in *Bird v. Pan Western Corp.*, 261 Ark. 56, 546 S.W.2d 417 (1977), where we stated that "in construing an act, the courts are bound by specific definitions of a word by the legislature in that act.... " *Id.* Appellant also cites *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389 (1928), where the Supreme Court held that the practical operation of the section levying tax is to be regarded

and dealt with according to its effect. *Id.* (citing *Frick v. Pennsylvania*, 268 U.S. 473 (1925); *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218 (1928)). Appellant asserts that because of the decision in *Quaker City Cab Co.*, *supra*, we should look to the practical operation of the soft-drink tax legislation, which, they assert, is to levy a substantially higher soft-drink tax against retailers making soft drinks from syrup than is levied against retailers making soft drinks from powder.

We note that the cases cited by appellant do not support its assertion that because the definitions of "powder" and "syrup" are similar, the General Assembly has legislatively defined these words as the exact same thing. For example, *Bird*, *supra*, dealt with the issue of whether a subcontractor who was not licensed as a contractor under Arkansas law could claim money for work under a contract, and we held that the subcontractor met the definition of "contractor" by the nature of the work that it did, but that since the subcontractor was not licensed, it could not prevail in its claim for money under the contract. *Id.* In addition, the quotation appellant cites from *Bird*, *supra*, is taken out of its context. The full quotation states:

> The ordinary and generally accepted meaning of words used in a statute must yield to the meaning intended by the General Assembly when it is clear from the context of the act that a different meaning is intended. Thus, in construing an act, the courts are bound by specific definitions of a word by the legislature in that act, regardless of the usual and ordinary meaning of that word; unless the definition is arbitrary, creates obvious incongruities in the statute, defeats a major purpose of the legislation or is so discordant to common usage as to generate confusion.

Id. This quotation lends more credence to the proposition that the tax is one on products, not individuals, because the words are to be construed in the context of the Act, and in the present case, it is clear from the context of Ark. Code Ann. § 26-57-901 *et seq.* that two different products were intended. We further note that Ark. Code Ann. § 26-57-904 specifically distinguishes syrups from powders in its imposition of taxes.

In addition, *Quaker City Cab Co.*, *supra*, which appellant cites for the proposition that the practical operation of the section levying the tax is to be regarded and dealt with according to its effect, is factually distinguishable to the present case. In that case, the Court invalidated a Pennsylvania statute that imposed a tax on

the gross receipts derived by corporations from their operation of taxicabs in intrastate transportation of passengers, while not taxing the like receipts of individuals and partnerships in the same kind of business. *Id.* The Court found this tax to be in violation of equal protection, stating that valid tax classification cannot rest solely on the character of the taxicab operator as being corporate or non-corporate when there is no other difference in the situation or the circumstances of the operators. *Id.* On the other hand, in this case, the trial court found that appellants were purchasing different products, and that it was the products that were taxed differently. Here, unlike in *Quaker City Cab Co.*, *supra*, the applicable tax on syrups, powders, and soft drinks is the same for all customers, regardless of the character of the purchaser. Finding no reversible error, we affirm on this subpoint.

E. Case Precedent

Having concluded that there is no merit in appellant's contentions on these subpoints, we turn our attention to an analysis of the statutes and case law as applied to the factual circumstances of the case before us. Appellant strongly contends that the trial court's finding that the facts do not show a different treatment of persons is contrary to applicable case law, and, accordingly, must be reversed. We disagree. The trial court found:

> The Soft Drink Tax statutes do not treat retailers-or the distributors, wholesalers, or manufacturers-differently. All are taxed the same. They have to pay $2.00 on every gallon of syrup; $.21 on every gallon of bottled drink; and $.21 on every gallon of soft drink produced by powder. It is the product that is taxed differently. Plaintiff has attempted to classify a retailer who sells soft drinks that are made from syrup as a different class of persons than a retailer who sells bottled soft or soft drinks that are made from powder. The retailer makes a choice regarding the form of the product it elects to sell to the consumer. Plaintiff sells Coca-Cola fountain drinks by mixing syrup with carbonated water in a machine. Thus, it pays the $2.00 per-gallon-of-syrup tax. Plaintiff could sell Coca-Cola soft drinks in cans, bottles, or even "pre-mix," which is the same product as the soft drink produced by syrup on location, and pay the $.21 per-gallon-of-soft-drink tax. It is the taxing of the form of the product about which the plaintiff complains, not that it is treated differently than any other person subject to the Soft Drink Tax, as a result of the tax.

The trial court's analysis is consistent with our decision in *Potts v. McCastlain*, 240 Ark. 654, 401 S.W.2d 220 (1966), *cert. denied*, 385 U.S. 946 (1967). *Potts, supra*, involved an equal protection challenge to a privilege tax statute imposing automobile licensing fees of (1) $75.00 for taxicabs (five-passenger cars for hire); (2) $19.00 for other five-passenger cars (pleasure vehicles) of the same weight category as taxicabs; (3) $15.00 for city buses of much greater weight; and (4) special consideration by a reduction of license fees for vehicles hauling natural resources. *See id.* In upholding the statute, we stated, "In the case at bar the statute applies equally and without discrimination to all persons of the classification made and thereby taxed." *Id.*

Appellant contends that the trial court failed to follow our opinion in *Bosworth v. Pledger*, 305 Ark. 598, 810 S.W.2d 918 (1991) in reaching its conclusion that the soft-drink tax discriminates against products, not people. We disagree. *Bosworth, supra*, involved an equal protection challenge to the Arkansas gross-receipts tax on long distance telephone service. *See id.* The gross-receipts tax statute, which is codified at Ark. Code Ann. § 26-52-301 (Supp. 1999), imposed a tax on subscribers to "regular" long distance telephone service, those who are billed on a per-call basis. *Bosworth, supra.* However, that statute specifically exempted from taxation those subscribers who purchased long distance telephone service in bulk, thereby according a tax advantage based upon the amount of service purchased through a WATS agreement. *See id.* WATS service, where the subscriber is charged a flat fee for the service, receiving then a lower rate for each call made or received, is entirely exempted from the tax. *See id.* We ultimately held that the imposition of tax upon some subscribers while exempting other subscribers from payment of any tax was discriminatory, but did not violate equal protection because there was a rational basis for the disparate tax rate. *See id.* We first addressed the question whether there was a state action that differentiated among individuals and concluded that there was. *See id.* The Director of the DFA argued that discrimination between individuals was not shown because the only distinction made by the taxation statute was between services, not people, and cited our decision in *Potts, supra. See Bosworth, supra.* We concluded that the imposition of taxes upon some members of the pool of subscribers for long distance service, while exempting other members of that pool from any payment of taxes for long distance services, was disparate treatment requiring a rational basis. *See id.*

We note that we did not overrule *Potts, supra,* in our *Bosworth* decision, thereby suggesting, as we now conclude, that the principles articulated in the two cases can be harmonized and applied to the case now under review. In *Bosworth, supra,* we were required to decide whether the state could discriminate by imposing taxes upon some of its long distance telephone subscribers while exempting other purchasers of long distance bulk telephone service from payment of any taxes without being required to show a rational basis for that discrimination. *See id.* We concluded that the taxes levied discriminated between individuals similarly situated, but found that the disparate treatment was not unconstitutional because there was a rational basis. *See id.* We ultimately held that the state could rationally impose a tax upon one group of long distance telephone service subscribers while imposing no tax upon another group of long distance telephone service subscribers. *See id.* By contrast, *Potts, supra,* applied the same $75.00 license tax to all taxicabs, the same $19.00 license tax to all private automobiles, and the same $15.00 license tax to all buses. *Id.*

In the case now before us, the same tax, $2.00 per gallon of syrup, is assessed on each gallon of concentrated syrup sold, whether to Ghegan or to any other purchaser of that product. No reduction or remission of the $2.00 per gallon tax is made as a result of the volume of syrup purchased by an individual customer. Every customer pays a tax of $.21 per gallon of finished soft-drink product in cans or bottles and a tax of $.21 per gallon of finished soft drinks that are mixed from powder in accordance with manufacturer's suggested directions. No person is exempted from payment of exactly the same taxes imposed upon the particular product purchased, except border-city sales. Ghegan has the choice whether to purchase syrup, powder, or finished soft drinks, and is not restricted from making any selection he may prefer, and all other dealers have exactly the same choices. Accordingly, we agree with the trial court that "[t]he Soft Drink Tax statutes do not treat retailers-or the distributors, wholesalers, or manufacturers-differently. All are taxed the same. They have to pay a tax of $2.00 on every gallon of syrup; $.21 on every gallon of bottled drink; and $.21 on every gallon of soft drink produced by powder."

We conclude that the trial court did not commit error in its determination that appellant has not met the burden of showing a disparate tax upon persons or classes. Therefore, it is not necessary for us to further explore appellant's designated "Point I" and "Point III" relating to the question whether a rational basis exists to justify the different tax rates upon concentrated syrups, finished soft

drinks, or powders used to mix finished soft drinks. Every retailer pays exactly the same tax upon the product that is purchased, and is free to choose what product he desires to buy — there is no discrimination between individuals.

II. Cherry and Vanilla Syrup

Appellant next argues that the DFA is violating the Act and its own regulation by taxing cherry syrup and vanilla syrup that is used to flavor soft drinks. As authority for its argument, appellant cites Soft Drink Tax Regulation 1993-8, which was promulgated by the DFA, and states, in relevant part,

> 17. ..."Soft drink" does not includes products used solely for coloring or flavoring other beverages.

Id. Appellant also cites paragraph 7 of the trial court's order, which cited testimony from Mr. Jim Wright, an auditor for the Miscellaneous Tax Division of the DFA:

> Mr. Jim Wright, an auditor for the Miscellaneous Tax Division of the Department of Finance and Administration, testified, there are other taxed syrups, like cherry and vanilla, which are used in fountain drinks by adding a "dab" to the finished drink for flavor and that attempting to tax the type of syrup per gallon produced would be difficult.

We first note that the abstract indicates that this issue was never raised in the trial court. It is well settled that an argument that was never raised below will not be considered for the first time on appeal. *E.g., Qualls v. White*, 342 Ark. 681, 30 S.W.3d 735 (2000) (citing *Western Foods, Inc. v. Weiss*, 338 Ark. 140, 992 S.W.2d 100 (1999)).

Moreover, the trial court did not issue a ruling on this argument in its order. It is well settled that issues not ruled on below will not be considered on appeal. *E.g., Junkin v. Northeast Arkansas Internal Medicine Clinic*, 344 Ark. 544, 42 S.W. 3d 432 (2001) (citing *Flowers v. State*, 342 Ark. 45, 25 S.W.3d 422 (2000)). The portion of the testimony cited in the trial court order did not consider the argument that the DFA was violating its own regulations by imposing a tax on cherry syrup and vanilla syrup used to flavor soft drinks. It is clear from reading this portion of the trial court's order in context that the trial court was not ruling on the

issue whether the DFA is violating the Act and its own regulation by taxing cherry syrup and vanilla syrup that is used to flavor soft drinks. Rather, the trial court cited this testimony with regard to its finding that appellant had failed to meet its burden of proving that the State did not have a rational basis for the discrimination. We further note that appellant concedes the appealability of this issue in its brief when it states, "These problems are not for consideration in this appeal and will no doubt be considered on another day if DFA doesn't voluntarily decide to assess tax in accordance with the Act as written." Because this issue has not been preserved, we cannot address its merits on appeal.

III. Border City Tax Exemption As Violation of Equal Protection

Appellant finally argues that the border city exemption provided in Ark. Code Ann. § 26-57-907, as written, violates equal protection. However, we note that appellant has failed to preserve this issue for appeal because the language of the trial court's order indicates that the trial court did not rule on the constitutional argument. The trial court's order states:

> The court has had some difficulty understanding plaintiff's border tax exemption argument. As the state points out, the Arkansas Supreme Court has upheld the legitimacy of economic border town incentives. *Boyd v. Weiss*, 333 Ark. 684, 971 S.W.2d 237 (1998). Plaintiff contends that the "application of the border city rate is determined exclusively by whether the 'retailer' is 'located in a city or incorporated town which is subject to the border city tax rate.' " The fact that the retailer, and not the wholesaler, is located in the border city is the reason for the border tax exemption. The purpose of the border tax exemption is to promote the economic security of retailers so that, as a result of the tax, they will not have to charge prices that are higher than a competitor in the border state. The exemption benefits, not penalizes, the retailer.

Having made these general observations, the trial court did not rule on whether the border tax exemption violates equal protection, and appellant did not seek a clarification or insist upon a ruling upon this issue. It is well settled that issues not ruled on below will not be considered on appeal. *E.g., Junkin, supra* (citing *Flowers v. State*, 342 Ark. 45, 25 S.W.3d 422 (2000)). Because this issue has not been preserved, we cannot address its merits on appeal.

Finding no reversible error, we affirm.

BROWN, J., concurs.

CORBIN, J., dissents.

ROBERT L. BROWN, Justice, concurring. I agree with the majority opinion that the chancellor's order should be affirmed. However, I am unpersuaded by the majority's futile attempt to distinguish the case of *Bosworth v. Pledger*, 305 Ark. 598, 810 S.W.2d 918 (1991), from this case. Thus, I find it necessary to analyze Ghegan's equal protection argument.

In *Bosworth, supra*, we examined the constitutionality of a 1987 Act of the General Assembly which excepted WATS long distance telephone service from the state sales tax. The appellants argued that this discriminated against long distance subscribers who did not subscribe to the WATS service. We examined the question of whether the imposition of the long distance tax discriminated among individuals or whether discrimination did not occur because individuals were simply choosing a different long distance service which was available to any customer. We said:

> Appellees argue that the threshold element of classification of individuals is not met because the only distinction made by the statute is between *services,* not people. Appellees cite *Potts v. McCastlain,* 240 Ark. 654, 401 S.W.2d 220 (1966), *cert. denied,* 385 U.S. 946 (1967), where this court upheld a privilege tax imposed on taxicabs but not on other vehicles using the same streets. They argue that as long as all "regular" long distance subscribers are taxed the same, just as all taxicab operators were taxed the same, there is no differentiation among individuals, all being treated equal. In addition, appellees cite the chancellor's finding that "all three types of service—MTS, private line, and WATS—are available to any customer; there are no eligibility requirements," to bolster their argument that this is a tax imposed on services, not individuals.
>
> Although it is true that the tax is imposed on one type of long distance service and not another, it is also true that taxes are paid by individuals, and the record reflects that subscribers to "regular" long distance service pay the tax, while subscribers to WATS service do not. This disparate treatment under the statute of classes of individuals is sufficient to raise the equal protection challenge and require our further analysis.

Bosworth, 305 Ark. at 604, 810 S.W.2d at 920-21.

Similarly, in the case at bar, the Tax Code provides that the distributor of the soft drinks is taxed, not the product:

> (a) There is hereby levied and there shall be collected a tax upon every distributor, manufacturer, or wholesale dealer, to be calculated as follows:
>
> (1) Two dollars ($2.00) per gallon for each gallon of soft drink syrup or simple syrup sold or offered for sale in the State of Arkansas;
>
> (2) Twenty-one cents (21¢) per gallon for each gallon of bottled soft drinks sold or offered for sale in the State of Arkansas;
>
> (3) Where a package or container of powder or other base product, other than a syrup or simple syrup, is sold or offered for sale in Arkansas, and the powder is for the purpose of producing a liquid soft drink, then the tax on the sale of each package or container shall be equal to twenty-one cents (21¢) for each gallon of soft drink which may be produced from each package or container by following the manufacturer's directions. This tax applies when the sale of the powder or other base is sold to a retailer for sale to the ultimate consumer after the liquid soft drink is produced by the retailer.

Ark. Code Ann. § 26-57-904(a) (Repl. 1997). Moreover, although all retailers are taxed a certain amount depending upon the product purchased, there appears to be disparate treatment among the amounts taxed, that is, $2.00 per gallon of syrup regardless of the amount of product produced; $ .21 per gallon for each gallon of bottled soft drink sold or offered for sale; and $ .21 for each gallon of soft drink that may be produced from powder pursuant to the manufacturer's directions. This disparate treatment among retailers is sufficient, in my judgment, to raise Ghegan's equal protection challenge.

In *Medlock v. Leathers*, 311 Ark. 175, 842 S.W.2d 428 (1992), this court discussed the power to tax and classifications which invidiously discriminate:

> "Inherent in the power to tax is the power to discriminate in taxation." *Leathers,* ___ U.S. at ___, 111 S. Ct. at 1446. Courts should defer to local legislative determinations as to the desirability

of imposing discriminatory measures. *City of New Orleans v. Dukes,* 427 U.S. 297 (1976). A court will not strike down a classification merely because it is underinclusive. The law must be "purely arbitrary" in its classification; thus the only classification not allowed in taxing is invidious discrimination. *Id.* If a taxation statute discriminates in favor of one class it is not determined to be arbitrary so long as the discrimination is based upon a reasonable distinction, and if there is any hypothesized set of facts to uphold a rational basis. *Streight v. Ragland,* 280 Ark. 206, 655 S.W.2d 459 (1983). Appellants argue that hypothesizing a rational basis, as in *Streight,* should be beyond the power of this court. We view hypothesizing a rational basis the same as conceiving a rational basis; a practice that is available to the courts without question. We point to the language of *Streight* and conclude that any rational basis for a taxation statute may be developed at any time.

> In any event, the judiciary is allowed to hypothesize and . . . reach a conceivable basis for the exemptions which [it] conclude[s] are rational, reasonably distinctive and not arbitrary. It causes us to defer to legislative purpose because there is a rational basis for the tax. . . .
>
> . . . .
>
> Before it is said that such hypothesizing is far afield, we re-emphasize that our role is not to discover the *actual basis* for the legislation. Our task is merely to consider if *any* rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose.

Streight, 280 Ark. at 214-15, 655 S.W.2d at 464.

Medlock, 311 Ark. at 179-80, 842 S.W.2d at 430-31.

In the case before us, the chancellor concluded that "administrative convenience" qualified as a rational basis for treating the taxation of syrup, powder, and soft drinks differently:

> Clearly, the legislature could have assumed that taxing syrup by the gallon would have been easier to administer at the time the law was enacted. In fact, the testimony of Mr. Wright supported the State's argument. Syrup is sold only in one or five gallon measures, thereby making the tax quite simple to calculate. Bottled drinks are

> sold in cans and a variety of sizes of bottles, but each container exhibits the volume of the soft drink. Soft drinks made from powders are sold in numerous and various containers and weights. Since there are somewhat limited taxpayers, the calculation of the number of gallons of soft drink produced has been easier. However, there is nothing in the record to indicate the General Assembly was aware of the ease with which gallons of soft drink could be calculated. The General Assembly could have concluded that gallons of syrup would be easy to calculate and tax, and that gallons of bottled soft drink would be easy to calculate and tax, but that gallons of soft drink produced by powders that vary greatly in weight and mixing instructions might be more difficult to compute. The court's task is not to discover the actual basis for the legislation but to determine whether there is any rational basis for the classification.

In my opinion, the chancellor correctly found a reasonable basis for the disparate treatment in taxing distributors who use different soft drink products. For that reason, I, too, would affirm the chancellor's order upholding the tax.

DONALD L. CORBIN, Justice, dissenting. I respectfully dissent because I believe that there is no rational basis for taxing retailers differently based upon whether the soft drinks they sell are made with powder or syrup. I concur with Justice Brown's opinion that the majority has failed in its attempt to distinguish the facts of this case from those in *Bosworth v. Pledger*, 305 Ark. 598, 810 S.W.2d 918, *cert. denied*, 502 U.S. 995 (1991). This case undoubtedly presents an issue of equal protection.

I believe, contrary to the trial court and the majority herein, that the Soft Drink Tax statutes *do* treat retailers or the distributors, wholesalers, or manufacturers differently. I see no rational basis that justifies the differing tax rates upon syrups, finished soft drinks, and powders used to mix finished soft drinks. While I can understand that it may be more convenient to assess the tax on powder mixes on the basis of how much finished product the mixes will produce, I fail to see why that amount should be less than that charged to retailers who use syrup to mix their soft drinks. The majority points out that, when broken down, the computation of the effect of the $2.00 tax upon each gallon of syrup would equal between $0.32 and $0.35 per gallon for each gallon of finished product. Meanwhile, the tax on soft drinks made with powder is only $0.21 per gallon of finished product. The State has offered no rational basis for this disparate taxing treatment, and I can see none.

Moreover, while I acknowledge the holding in *Medlock v. Leathers*, 311 Ark. 175, 842 S.W.2d 428 (1992), *cert. denied*, 508 U.S. 960 (1993), that our task is only to determine whether any rational basis exists, I do not believe that any such basis exists here. I am not questioning that it may be easier to calculate the tax on powder according to the amount of finished product it will make, while it may be easier to calculate the tax on syrup based on the amount of syrup in the container. However, I can see no rational reason why the end result of the tax should not be equal. Taxing retailers who use syrup to make soft drinks at a higher rate than those who use powder as a base is nothing but arbitrary.

Furthermore, I am not persuaded by the majority's suggestion that the retailer may avoid the higher tax by using powder, instead of syrup, to mix its soft drinks. This court has no idea what such a switch would entail, *i.e.*, whether it would require the retailer to purchase new equipment or to otherwise change its existing facility. Additionally, this ignores the personal preference of the retailer to choose the process it desires to manufacture the ultimate soft-drink product. The State should only be interested in taxing the ultimate product. Only then could the tax be fairly imposed. Because the current tax scheme treats these similarly situated retailers disparately with no rational basis, I must dissent.

William WYNNE *v.* STATE of Arkansas

CR 01-390 49 S.W.3d 100

Supreme Court of Arkansas
Opinion delivered July 9, 2001

Lessmeister Law Firm, PLLC, by: *James J. Lessmeister*, for appellant.

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

RAY THORNTON, Justice. On March 18, 2000, appellant, William Wynne, was charged in municipal court with a third-offense driving while intoxicated ("DWI"), an unclassified misdemeanor, in violation of Ark. Code Ann. § 5-65-103 (Repl. 1997), the Omnibus DWI Act. On April 22, 2000, appellant was charged with another third-offense DWI, driving with a suspended license, and reckless driving. Both DWI charges were set for trial in municipal court on July 20, 2000. On that date, appellant was found guilty of the March 18th third-offense DWI. At the conclusion of the trial, the city attorney moved for a continuance of the April 22nd charges, and the trial court continued the case.

Subsequently, on July 26, 2000, the State dismissed the charges in municipal court relating to the April 22nd offenses, and filed felony charges for the fourth-offense DWI in Faulkner County Circuit Court. On January 3, 2001, appellant moved to remand the circuit-court case to municipal court and require that the April 22, 2000, felony charge be prosecuted as a misdemeanor third-offense DWI. At a hearing on the matter, the following colloquy occurred:

> THE COURT: Was there any motion to continue either case before you tried the first one?
>
> MR. LESSMEISTER [*COUNSEL FOR APPELLANT*]: No, your honor.
>
> THE COURT: So was it nolle prossed and then refiled, or was it just continued and amended?
>
> MR. CLARK [*COUNSEL FOR THE STATE*]: Well, your honor, it was — clearly was not continued and amended because if it was amended in municipal court, your honor —
>
> THE COURT: It'd still be in municipal court.
>
> MR. CLARK: — it would still be in municipal court. The charges were dismissed in municipal court, and they were filed in circuit court as felony charges. Your honor, once that felony information is filed, he is apprised of the nature of the charges before

> him. He knows the elements we're talking about. There is no surprise. There is no prejudice, your honor. There's — There is no basis to have this reduced to a misdemeanor offense, your honor.
>
> THE COURT: . . . [O]nce there are three prior convictions, then the fourth — then subsequent offenses become felonies. So when the — the previous case resulted in a conviction, at that point, municipal court would basically have lost jurisdiction as to the next one because it would have been by counting a fourth offense. Counsel, I — I can't agree with you on your motion as far as dismissing this charge and remanding it. . . . So I'm going to deny your motion. This case will proceed to trial as a DWI 4th offense.

The trial court then denied appellant's motion to remand the case to municipal court.

On April 2, 2001, appellant filed a notice of interlocutory appeal, as follows:

> Notice is hereby given that the defendant William Wynne appeals to the Arkansas Supreme Court from the order in favor of the State of Arkansas against William Wynne entered in this case on March 19, 2001 and filed on April 2, 2001.
>
> This interlocutory appeal is taken to the Supreme Court pursuant to Ark. Sup. Ct. R. 1-2(a)(3) "Writ of Prohibition."

Appellant brings this appeal from the circuit court's denial of appellant's motion to remand the case to municipal court. We dismiss the appeal.

For his sole point on appeal, appellant argues that he was deprived of his Fifth Amendment right of due process when the prosecutor moved for a continuance. Specifically, he argues that the State's continuance and subsequent refiling of the fourth-offense DWI in circuit court changed the nature and the degree of the offense. In response, the State argues that we lack jurisdiction over appellant's appeal because it is an interlocutory appeal, and that we must dismiss for lack of jurisdiction.

We first consider whether appellant seeks to bring an interlocutory appeal. Only final orders are appealable. Ark. R. App. P.—Civil 2(a)(1).[1] An order is final if it dismisses the parties from the action or concludes their rights in the matter in controversy. *Payne v. State*, 333 Ark. 154, 968 S.W.2d 59 (1998). In *Payne*, we stated:

> The requirement that an order be final to be appealable is a jurisdictional requirement. The purpose of the finality requirement is to avoid piecemeal litigation. An order is final and appealable if it dismisses the parties from the court, discharges them from the action, or concludes their rights to the subject matter in controversy. The order must put the judge's directive into execution, ending the litigation, or a separable branch of it.

Id. (citations omitted). We have held on numerous occasions that an order that contemplates further action by a party or the court is not a final, appealable order. *Id.*

In the present case, the circuit court's order denying appellant's motion to remand to municipal court is not a final, appealable order because, when the circuit court's order contemplates further action in the case, the order is not final. *Payne, supra.* Here, the circuit court's order contemplates further action by the parties, namely appellant's DWI trial, and jurisdiction remained in the circuit court.

We also observe that a writ of prohibition is not an appropriate remedy under these circumstances. A writ of prohibition is an extraordinary writ that is only appropriate when the court is wholly without jurisdiction. *Ibsen v. Plegge*, 341 Ark. 225, 15 S.W.2d 686 (2000). The writ will not be granted unless it is clearly warranted. *Id.* Prohibition is never issued to prohibit a trial court from erroneously exercising its jurisdiction. *Id.* A writ of prohibition cannot be invoked to correct an order already entered. *Arkansas Public Defender Comm. v. Burnett*, 340 Ark. 233, 12 S.W.3d 191 (2000). A writ of prohibition is not directed to the jurisdiction of the individual judge but to the court itself. *Lee v. McNeil*, 308 Ark. 114, 823 S.W.2d 837 (1992).

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[1] Ark. R. App. P.—Civil 2 governs criminal cases pursuant to Ark. R. App. P.—Crim. 4(a).

The Arkansas Constitution provides that the circuit courts of this state have jurisdiction over felony charges. Ark. Const. art. 7, § 11; *State v. Pulaski County Circuit Court*, 326 Ark. 886, 934 S.W.2d 915 (1996). Here, appellant is not entitled to the issuance of a writ of prohibition because the Faulkner County Circuit Court clearly has jurisdiction over felony DWI cases. *Pulaski County, supra.* Accordingly, we hold that a writ of prohibition is not appropriate in this matter because the Faulkner County Circuit Court does not wholly lack subject-matter jurisdiction.

The State argues that, under *Burnett, supra*, we have discretion to treat both improper appeals and improper prohibition requests as a writ of *certiorari*, and that a writ of *certiorari* would not lie in the circumstances of this case. The State is correct. A writ of *certiorari* will lie 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. *Burnett, supra.* A writ of *certiorari* is only appropriate when the lower court does not have jurisdiction to hear a claim or to issue a particular type of remedy. *Id.* Appellant is not entitled to a writ of *certiorari* for the same reasons that he is not entitled to a writ of prohibition, and the interlocutory appeal from the denial of appellant's motion to remand is dismissed.

Dismissed.

Frankie IRVIN *v.* STATE of Arkansas

CR 00-1086 49 S.W.3d 635

Supreme Court of Arkansas
Opinion delivered July 9, 2001

J. Eric Hagler, P.A., by: *J. Eric Hagler*, for appellant.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Justice. Appellant Frankie Irvin appeals his conviction by a Desha County jury of aggravated robbery and theft of property for which he was sentenced to thirty years' and fifteen years' imprisonment respectively. On appeal, Irvin raises one issue, arguing that the trial court abused its discretion in failing to recuse. We affirm.

On April 3, 1996, Irvin was charged as an habitual offender with aggravated robbery, theft of property, and attempted capital murder, for his part in a November 13, 1995, robbery of a store operated by Bill Montgomery, who was a victim of the crime. Prior to trial, the prosecution dismissed the attempted-capital-murder charge but continued to pursue the remaining felony charges.

As early as March 6, 1997, Circuit Judge Sam Pope indicated in a letter to Irvin's first defense counsel, A. Wayne Davis, that he was under the impression that a motion for continuance may have been meant as a motion for recusal based on an attached affidavit from Irvin asking for the judge's recusal. In the judge's letter to counsel, the judge requested that if such were the case, then Irvin should file a formal motion for the judge's recusal.

On the night before trial in April 1997, Davis faxed a scathing motion to the circuit clerk's office requesting the judge's recusal. Irvin appeared the next day for trial, but Davis did not. Irvin requested a continuance until he could have an attorney present to represent him. After a hearing in chambers, the trial court ordered that Irvin proceed to trial without his attorney, and the court took evidence on the motion to recuse and denied the same. Apparently,

the trial court believed that Davis's failure to appear for trial was, in part, calculated by both Davis and Irvin as an attempt to get the case continued. Irvin, representing himself, was convicted on both charges and sentenced to 240 months in prison. Irvin appealed, and in a decision issued May 27, 1998, the Arkansas Court of Appeals reversed Irvin's conviction finding that the trial court violated Irvin's Sixth Amendment right to assistance of counsel at trial. *See Irvin v. State*, 62 Ark. App. 143, 972 S.W.2d 948 (1998). The court remanded the case for a new trial.

On remand, Irvin retained the services of attorney William McArthur. On November 2, 1998, the trial court held a routine pretrial hearing at which McArthur orally moved for the trial judge to recuse on the basis that the judge, while the elected prosecutor in that district, had previously prosecuted the defendant. The trial court denied the motion, finding that it had already ruled on that issue prior to the first trial and that because it had not been challenged on appeal by Irvin's appellate attorney, it could not be raised again.

Irvin was tried a second time in this matter on March 16, 1999. On the morning of trial before the jury was brought in, Irvin's counsel again requested that the trial judge recuse, based on the judge's prior prosecutions of Irvin. In addition, defense counsel questioned Irvin regarding this motion, and Irvin testified that he believed the judge should recuse because he had been involved in approximately six prior prosecutions of Irvin. The trial court denied the motion finding that Arkansas case law does not require a judge in such a situation to recuse. The trial ended in a hung jury on March 18, 1999.

At a pretrial hearing on June 21, 1999, neither Irvin nor his attorney appeared for the hearing. The trial judge issued a bench warrant for Irvin's arrest for his failure to appear. On August 30, 1999, another hearing was held at which the trial court indicated that McArthur, who was not present, had requested to be relieved of counsel due to Irvin's failure to cooperate with him in the case. Irvin, who was present, indicated that he had not received any notice of the pretrial hearing for June 21, 1999, but that he wanted McArthur to continue to represent him. During this hearing, Irvin indicated that he wanted to retain McArthur again, but that he did not have the money to do so. Irvin requested that his bond be reinstated, but the court denied this request in part because of Irvin's failure to appear on June 21, 1999. The court declined to relieve McArthur, in part because the trial court did not want Irvin

to be without counsel during a pending video deposition, and again denied Irvin's second request for bond until he had an attorney present. McArthur's motion to be relieved as counsel was denied in writing on September 3, 1999.

On October 4, 1999, at a pretrial hearing, Irvin made an oral motion to the trial court to set bond as it had done prior to the other trials. No notice was given to the State, and the State recommended that bond be set in the amount of $75,000. On that same day, the court granted McArthur's motion to be relieved as counsel, as Irvin had apparently hired Attorney Dale West to represent him. However, on October 6, 1999, the State filed a motion to reconsider the bond amount arguing that it had not been prepared for Irvin's oral motion on October 4, and only afterwards found out that Irvin had charges pending against him in Arkansas County, Arkansas, and New Hampton, Iowa, where Irvin apparently fled at some point in the prior proceedings. The State alleged in its motion that based on Irvin's prior conduct, he was a flight risk. The State asked that bond be increased to $400,000, that Irvin have no contact with the victims in the case, and that he not be allowed to visit his father whose property is adjacent to the victims's property.

A hearing was held on October 15, 1999, for the court to consider arguments on this motion. Irvin appeared without counsel because West apparently had decided not to represent him. As such, the trial court appointed public defender Gary Potts to represent Irvin. Potts, however, was not present at that hearing. Irvin told the court that he did not want Potts to represent him because Potts had refused in a prior case to file a motion for the judge's recusal. The trial judge denied Irvin's request, and Irvin then "fired" Potts. The trial court indicated that Irvin had the option to represent himself, but that even if he did that, Potts would remain to offer guidance in the case. Irvin then argued that Potts would have a conflict of interest representing him because his codefendant was represented by a public defender from the same office. Again, the court indicated that Potts would remain on the case unless Irvin hired a private attorney.

The State then presented its evidence on its motion to revoke or reset bond. This evidence indicated that Irvin had fled from police on two occasions, and that he was a flight risk. Irvin conducted his own cross-examinations of the witnesses. The trial court then ruled, over Irvin's numerous objections and under threat by the court that Irvin's mouth would be taped closed, that his bond would be set at $400,000. On October 21, 1999, the trial court

entered an order modifying Irvin's bail bond to $400,000. This order also indicated that the trial date was set for December 9 and 10, 1999. In addition, the trial court appointed public defender Gary Potts to represent Irvin at trial. Irvin did not file a writ of certiorari challenging this modification of bond.

On November 3, 1999, Potts moved to be released as counsel on the case, citing in his motion that Irvin failed to turn over any of his prior attorneys's previous records in the case because Irvin believed that Potts would not work in his best interest. Potts's motion also indicated that Irvin claimed to have hired a private attorney, but would not release the name to Potts. Furthermore, Potts's motion indicated that Irvin did not want Potts's representation because Potts had been a prosecutor in Monticello Municipal Court while the trial judge was the elected prosecuting attorney in that district.

Irvin, himself, filed a *pro se* motion for the trial judge's recusal on November 3, 1999. In his motion, Irvin alleged that the trial judge was biased, prejudiced, and "less than fair and impartial" based on the judge's prior ruling in the first trial requiring Irvin to represent himself. He also stated that the judge abused his discretion in denying Irvin a continuance to find new counsel on April 17, 1997, and that the judge attributed Attorney Davis's "dirty language" in the first motion to recuse to Irvin, and that this was unfair. Furthermore, Irvin's attached affidavit indicated that he believed the judge had been unfair by setting his bond at $400,000 on October 15, 1999. Five days later, Irvin's new attorney, Jack Bell, filed a supplemental motion for recusal on November 8, 1999. This motion adopted Irvin's *pro se* motion, and included as additional grounds that the trial judge, during his term as prosecuting attorney in the 10th Circuit, had prosecuted Irvin on more than one occasion for various matters. These motions were again denied by the trial court.

At a prehearing on January 31, 2000, Irvin's attorney again asked that the trial judge recuse. The trial court again denied the motion.

This case finally proceeded to trial, and Irvin was convicted and sentenced. He filed his notice of appeal on February 29, 1999.

In his only issue on appeal, Irvin argues that the trial court abused its discretion in failing to recuse. Irvin raises several points to attempt to show that the trial judge was biased and prejudiced

against him. He argues that the judge showed bias where the court required him to represent himself at the first trial, the judge had prosecuted Irvin several times as the elected prosecuting attorney in that district, the judge indicated that he did not believe that Irvin had not gotten notice of a prehearing on June 21, 1999, the judge increased the amount of bond from $75,000 to $400,000, the judge denied his right to an attorney at the bond hearing, and the judge dealt harshly with him at this hearing, at one point telling him to "shut up" and that he would tape Irvin's mouth closed if Irvin continued with his outbursts.

The State responds that only two issues were raised by Irvin below that are preserved for review here, those being the issues on the denial of Irvin's right to counsel at his first trial and the trial judge's prosecutions of Irvin when the judge was the prosecuting attorney in the district. The State notes, however, that none of the other alleged errors by the trial court were raised in the recusal motions below to preserve them for appeal. Regardless, on those issues, the State argues that the trial court did not abuse its discretion in failing to recuse because none of the judge's statements to Irvin over the course of the prosecution, including the threat of taping Irvin's mouth closed, occurred in front of the jury to prejudice Irvin in their eyes, nor did these statements indicate the trial judge's feelings, other than frustration, towards Irvin. Regarding the issue of the increase in the bond, the State argues that the proper vehicle to challenge a bond revocation is through a writ of certiorari, and that issue has been waived. Regardless, the State argues that the trial court was acutely aware of Irvin's right to counsel throughout the proceedings, and, in fact, continued the case at several points to allow Irvin to retain counsel. Overall, the State argues that Irvin cannot show any bias on the judge's part that prejudiced him in this case.

The Arkansas Constitution, Article 7, § 20, as well as the Arkansas Code of Judicial Conduct, Canon 3(c), provide that judges must refrain from presiding over cases in which they might be interested and must avoid all appearances of bias. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998); *Matthews v. State*, 313 Ark. 327, 854 S.W.2d 339 (1993). However, a judge is not required to recuse because of his or her life experiences. *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994). In addition, there exists a presumption of impartiality. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996). The decision to recuse is within the trial court's discretion, and it will not be reversed absent abuse. *Ayers, supra; Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000); *Gates v. State*, 338 Ark. 530, 2 S.W.3d 40

(1999). An abuse of discretion can be proved by a showing of bias or prejudice on the part of the trial court, and the burden is on the party seeking to disqualify. To decide whether there has been an abuse of discretion, we review the record to see if prejudice or bias was exhibited. *Black v. Van Steenwyk*, 333 Ark. 629, 970 S.W.2d 280 (1998); *Dolphin v. Wilson*, 328 Ark. 1, 942 S.W.2d 815 (1997); *Reel, supra.*

A trial judge's development of opinions, biases, or prejudices during a trial do not make the trial judge so biased as to require that he or she recuse from further proceedings in the case. *Noland v. Noland*, 326 Ark. 617, 932 S.W.2d 341 (1996); *Allen v. Kizer*, 294 Ark. 1, 740 S.W.2d 137 (1987). Absent some objective demonstration by the appellant of the trial judge's prejudice, it is the communication of bias by the trial judge which will cause us to reverse his or her refusal to recuse. *Noland, supra*; *Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983). The mere fact of adverse rulings is not enough to demonstrate bias. *Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999). Whether a judge has become biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge. *Matthews, supra*; *Walker v. State*, 241 Ark. 300, 408 S.W.2d 905 (1966); *Narisi v. Narisi*, 229 Ark. 1059, 320 S.W.2d 757 (1959). The reason is that bias is a subjective matter peculiarly within the knowledge of the trial judge. *Id.*

Initially, we note that Irvin's allegations of bias are based on remarks made by the trial judge during various pretrial hearings. However, while the abstract contains those hearings, it does not contain any part of his trial. This, in and of itself, necessarily limits our review. When the judge's communications are the basis for an allegation of bias, it is necessary to view the communications that the judge makes to, or in front of, the jury. *Walker, supra.* Statements made before the jury is impaneled and in no way communicated to the jury cannot constitute bias or prejudice. *Id.* As such, because it is the appellant's duty to present a record on appeal demonstrating error, and the record is limited to that which is abstracted, *see Johnson v. State*, 342 Ark. 357, 28 S.W.3d 286 (2000), we can only review the statements made by and actions of the judge during the pretrial hearings, as that is all that is abstracted. In *Walker,* for example, the trial court made several strong remarks prior to empaneling the jury, but we held no showing of disqualifying prejudice had been shown, pointing out that the fact that a trial judge may have a personal opinion as to the merits of the case does not make the trial court so biased and prejudiced as to require his

disqualification, and commenting that the "mischief occurs when the trial court communicates to the jury by word or deed a personal bias, prejudice or animus toward the accused, causing the accused to be denied a fair and impartial trial." *Walker*, 241 Ark. at 309. Certainly, the jury could not have been swayed by any of the trial court's remarks because the jury was not present during any of those statements. Therefore, Irvin cannot show that the trial court's remarks prejudiced him in front of the jury.

As such, we must then consider whether any of the trial court's pretrial actions were prejudicial to Irvin. In reviewing Irvin's complaints of bias by the trial court, his claims have no merit. Regarding Irvin's representation of himself at the first trial, this court has been resolute in holding that reversal and remand due to error by the trial judge do not automatically require recusal of the trial judge who erred. *Walls v. State*, 341 Ark. 787, 20 S.W.3d 322 (2000); *Wilson v. Neal*, 341 Ark. 282, 16 S.W.3d 228 (2000). A judge has a duty to sit on a case unless there is a valid reason to disqualify. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993). As such, just because the court of appeals reversed and remanded this case after Irvin's first trial and conviction does not point to bias or prejudice on the part of the trial judge after the case was remanded. In *Walls*, for example, this court dealt with a recusal motion based on statements made to the press by the trial judge. There, after the defendant had been convicted, the trial judge, prior to Walls's sentencing, made statements to the press regarding the defendant's case and the effects of the defendant's actions. On appeal, this court affirmed the convictions but remanded for resentencing. On remand, the same trial judge heard the action and modified the sentences. The defendant presented a motion for recusal, which was denied. On second appeal from resentencing, this court decided that the judge's decision not to recuse was not an abuse of discretion. This court stated:

> In the instant case, mere suspicion or conjecture that the judge's heart and mind were so tainted by events that occurred more than a year earlier that he could not view the matter afresh on remand is not enough. We take as a given that a judge is able to preside over a matter on remand with a clean slate, absent proof or some indication to the contrary. The record in this matter simply does not support Walls's contention that Judge Hanshaw was biased towards him at the resentencing. For all of these reasons, we hold that the trial judge did not abuse his discretion in declining to recuse in this matter.

Walls, 341 Ark. at 793.

Such is the case here where Irvin has wholly failed to show that any of the trial court's actions or statements indicate that he was biased or prejudiced towards Irvin based on the reversal and remand for the court's error in the first trial. To the contrary, the record indicates that the trial judge was particularly accommodating to Irvin over the course of the subsequent proceedings. The court was highly cognizant of the fact that Irvin needed an attorney during the pretrial proceedings, and delayed several hearings and reset several trial dates to allow Irvin to retain a private attorney. Furthermore, the court denied several attorneys's motions to be dismissed as counsel so that Irvin would have counsel at the proceedings. Irvin's conduct actually made this very difficult for the court in that Irvin appeared before the court without counsel because of Irvin's failure to hire counsel or accept a court-appointed attorney.

Unless there is an objective showing of bias, there must be a communication of bias in order to require the recusal for implied bias. *State v. Clemmons*, 334 Ark. 440, 976 S.W.2d 923 (1998). No such showing was made here. In *Clemmons*, for example, this court concluded that the fact that the defendant threatened the trial judge was not enough to raise questions of bias and prejudice. The court stated, "Such reasoning, if adopted, would mean a defendant, by misbehaving in court or confronting the judge, could force the judge's recusal. We have held that it is impermissible for a party or counsel to create an infirmity for purposes of requiring a judge's recusal. *See Seeco, Inc. v. Hales*, 334 Ark. 134, 969 S.W.2d 193 (1998)." As the record indicates in this case, Irvin retained several attorneys, and then either refused to cooperate with them or fired them, often just prior to trial. The trial court's requirement that Irvin proceed was merely the court's attempt at maintaining order and control of his own court despite the defendant's apparent attempts to delay prosecution of the case.

On the second issue, Irvin argues that the judge should have recused because the judge had formerly prosecuted Irvin while serving as the elected prosecuting attorney in the 10th Circuit. In *Beshears v. State*, 329 Ark. 469, 947 S.W.2d 789 (1997), the defendant argued that the trial judge should have recused from considering his posttrial petition because the trial judge, before he assumed the bench, prosecuted him on an unrelated matter ten years prior to the filing of the charges on which he was presently incarcerated. He also argued that the trial judge gained additional

knowledge about him when the trial judge represented him on a civil matter, and that the judge played a role in Beshears's return from the Act 309 program in Lawrence County. Beshears contended that these circumstances warranted the trial judge's recusal in order to avoid the appearance of impropriety. This court, however, disagreed, finding that despite these facts, the defendant could not point to any exhibition of bias or prejudice on the part of the trial court. This ruling indicates that it is not, in and of itself, error for a trial judge to preside over a case involving a defendant whom the judge previously prosecuted. *See also*, *Green v. State*, 21 Ark. App. 80, 729 S.W.2d 17 (1987) (citing *Jordon v. State*, 274 Ark. 572, 626 S.W.2d 947 (1982)). Here, Irvin offered no evidence that the trial judge was biased or prejudiced against him merely because he had acted as prosecutor in Irvin's prior prosecutions. This bare fact proves nothing and, absent any actual showing of bias or prejudice, cannot suffice to require the trial judge to recuse.

Even though the following additional matters were not raised below, because we review the record to see if prejudice or bias was exhibited, we will also consider Irvin's additional allegations of bias. *See Black, supra; Dolphin, supra; Reel, supra.* Regarding the trial court's disbelief of Irvin's assertion that he had not received notice of the June 21, 1999, prehearing, this does not itself show bias. It merely shows disbelief on the judge's part that Irvin, who had received prior notices at that address, had not received this notice although he was made aware at the mistrial that his case had been reset for trial in late June 1999. Whether the court believed Irvin is of no concern because Irvin cannot show that the trial court's disbelief of Irvin was ever communicated to the jury to prejudice him in any way.

Next, the trial court's resetting of bond from $75,000 to $400,000 was based on a legitimate concern that Irvin would flee. The State presented evidence that Irvin had fled law enforcement on two prior occasions, and that he had been arrested in Iowa during the time that he was supposed to be present in Arkansas awaiting this prosecution in Desha County and another in Arkansas County. The court determined that these facts were sufficient here to increase or deny bond. Furthermore, although Irvin argues that this increase in bond and the court's denial of his request to be released without bond indicates the trial judge's bias against him, Irvin's argument is not persuasive. As the State notes, this court treats an appeal from the denial of bail as a petition for a writ of certiorari. *Meeks v. State*, 341 Ark. 620, 19 S.W.3d 25 (2000); *Larimore v. State*, 339 Ark. 167, 3 S.W.3d 680 (1999); *Duncan v.*

State, 308 Ark. 205, 823 S.W.2d 886 (1992) (citing *Thomas v. State*, 260 Ark. 512, 542 S.W.2d 284 (1976)); *Perry v. State*, 275 Ark. 170, 628 S.W.2d 304 (1982). This court has stated that a writ of certiorari is the appropriate vehicle for relief in bail proceedings. *Larimore, supra.* Here, however, Irvin did not petition for a writ of certiorari from the setting of the bond at either the $75,000 level or the $400,000 level. Therefore, the proper vehicle for challenging this increase was abandoned. In addition, adverse rulings against a party are not enough to show bias or prejudice. *Gates, supra.*

Regarding the trial court's proceeding at the bond hearing where Irvin was not represented by counsel, Irvin cannot show that he was prejudiced by this because he has not shown that the amount was unfair or that this amounted to pretrial punishment. The trial court was faced with a dilemma: wait until Irvin retained counsel to consider resetting the bond or proceed with the bond reconsideration. Had the court waited, the proceedings would have been at Irvin's mercy until he eventually retained an attorney. This delay is evidenced by the fact that although Irvin advised the trial court on two occasions that he had spoken to attorneys and was waiting hear back from them, over six weeks had passed from those assurances until the bond reconsideration hearing during which time Irvin had not retained an attorney. In addition, the trial court attempted to appoint Potts to represent Irvin, but Irvin "fired" Potts immediately. As such, the trial court proceeded with the bond hearing instead of subjecting the system to Irvin's dilatory tactics. Again, however, Irvin cannot show that the amount of bond was unjustifiable based on the facts presented by the State at that hearing.

Finally, the trial court's statement to Irvin that he would tape closed Irvin's mouth if he did not stop talking at the hearing on the bond reconsideration does not warrant reversal. The State is correct that the comment demonstrated nothing more than the judge's frustration with Irvin and his interruptions and the judge's attempt to maintain the decorum and dignity of the court proceeding. This exchange was brief, and it was not done in the presence of a jury. Therefore, it cannot constitute bias or prejudice requiring disqualification. *Walker, supra.*

There is no evidence that the trial judge treated Irvin or his defense counsel improperly, that the trial court presided over Irvin's trial in an unfair or impartial manner, that the trial judge made any improper rulings as to Irvin during the trial, or that the trial judge

exhibited any bias or prejudice toward Irvin during the trial. Irvin did not include any part of the trial in the abstract.

Affirmed.

REGIONS BANK & TRUST *v.*
STONE COUNTY SKILLED NURSING FACILITY, INC.

01-312 49 S.W.3d 107

Supreme Court of Arkansas
Opinion delivered July 9, 2001

Sandy McMath, for appellant.

David A. Littleton and *Mariam T. Hopkins*, for appellee.

JIM HANNAH, Justice. This case arises from the sexual assault of a semi-comatose quadriplegic nursing home patient, Vicki Elder, by certified nursing assistant Bill McConnaughey. Appellant Regions Bank, the personal representative of Vicki Elder, argues that the trial court erred in granting summary judgment. The complaint alleges claims of negligence in failing to provide Elder the care and attention reasonably required by her condition, negligence based upon respondeat superior, and negligence in supervision of McConnaughey as an employee. Regions argues there are genuine issues of material fact.

The court of appeals, in a 4-2 decision, held that the sexual assault was not committed in the course and scope of employment and, thus, could not give rise to liability based upon respondeat superior. The court of appeals was unanimous in holding that there was a question of fact under negligent supervision as to whether Stone County Skilled Nursing Facility was negligent in permitting unaccompanied access to helpless female patients by male aides who had little or no previous health care experience.

We hold that there is a question of fact as to the issue of negligent patient care regarding whether there was a breach of the duty to use ordinary care in furnishing Elder the care and attention reasonably required by her condition. Stone County Skilled Nursing Facility had assumed responsibility for virtually every aspect of Elder's well being and was under a duty to use ordinary care to protect her from foreseeable harm. We affirm the trial court on the issues of respondeat superior and negligent supervision of an employee. However, we find that there is a genuine question of material fact on the issue of negligent patient care, the duty to

provide the care and attention reasonably required by her condition. This case is affirmed in part, and reversed and remanded in part.

Facts

On November 3, 1996, Elder was a semi-comatose quadriplegic patient at Stone County Skilled Nursing Facility. Her communication was limited to smiling and communicating with her eyes. On this same date, Marlie O'Dell Foster and Bill McConnaughey were certified nursing assistants (CNA's) working as a team in cleaning and turning patients. They had just completed cleaning and turning Elder, and had placed her on her right side, when another CNA came into the room and asked Foster to assist her in placing a patient in a whirlpool bath.

Foster left McConnaughey in the room with Elder. Their care for her at that time was virtually finished when Foster left. All that had to be done was to pull down her gown and pick up the dirty linen. However, Foster returned to Elder's room a short time later and discovered McConnaughey sexually assaulting Elder. Foster indicated that Elder had been moved by McConnaughey after she left the room. Elder was repositioned on her back with her legs spread to facilitate McConnaughey's sexual assault on her with his hand. Foster testified in deposition that she was so taken aback by what she was seeing that she just stood there for some time observing the act. In her deposition, she described the act in graphic detail that leaves no doubt as to what was occurring.

When McConnaughey realized he had been caught, he flushed red and pulled down Elder's gown. Foster did not confront McConnaughey, but rather first spoke with a fellow CNA who counseled Foster to wait and see if it happened again. However, Foster instead went to the charge nurse, Becky Diaz, and reported what she had seen. Diaz told Foster she would report it to Kathy Baldwin, the director of nursing. However, Baldwin was off that day and Diaz was unable to contact her or the administrator, Vicki Sandage. Diaz did check Elder that evening and found that she was resting peacefully and showed no signs of bruising or injury. Diaz reported the assault to Sandage the next day, twenty-two hours after the assault. Sandage then reported the assault to Elder's father, Elder's doctor, and to the police. McConnaughey was suspended.

Prior to these events, McConnaughey originally began work at Stone County Skilled Nursing Facility in housekeeping. He was

hired based upon an interview and a recommendation from a local plumber. After two months, he transferred to a CNA's position. This transfer required McConnaughey to undergo a seventy-two-hour CNA's course. The first sixteen hours were spent in a classroom, and the remaining hours were spent under instruction while working with patients. Prior to hiring McConnaughey, Stone County Skilled Nursing Facility checked the DNA registry and the abuse hotline. These calls did not reveal any previous problems with McConnaughey.

McConnaughey had been a CNA for about a month when the assault occurred. He had completed a six-and-one-half-page, single-spaced checklist of skills, all showing completion and approval by the same nurse on the same day.

It appears McConnaughey had done well in housekeeping and, until this assault, had done well in nursing, so far as his superiors were aware. They testified in deposition that nothing in his interview, conduct at work, or anything done in his duties caused them concern that he might commit such an assault as this. There was no evidence to put Stone County Skilled Nursing Facility on notice that McConnaughey posed a danger of committing a sexual assault on a patient.

Standard of Review

As we have often stated, summary judgment is to be granted by a trial court 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 Donley v. Pace Indus.*, 336 Ark. 101, 984 S.W.2d 421 (1999); *Mashburn v. Meeker Sharkey Financial Group*, Inc., 339 Ark. 411, 5 S.W.3d 469 (1999). Once the moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents or depositions, the motion's opponent cannot rely on a bare denial or contrary allegation but must meet proof with proof and demonstrate the existence of a material issue of fact. *Flentje v. First National Bank Of Wynne,* 340 Ark. 563, 11 S.W.3d 531 (2000); *Rankin v. City*, 337 Ark. 599, 990 S.W.2d 535 (1999); *George v. Jefferson Hospital Assoc.*, 337 Ark. 206, 987 S.W.2d 710 (1999); *Pugh v. Griggs,* 327 Ark. 577, 940 S.W.2d 445 (1997). *Chapman v. Bevilacqua,* 344 Ark. 262, 42 S.W.3d 378 (2001).

This case came to us when we granted appellant's petition for review pursuant to Ark. Sup. Ct. R. 1-2(e)(iii). When we grant review following a decision by the court of appeals, we review the case as though it had been originally filed with this court. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999); *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

Causes of Action at Issue

The complaint does not specifically set out the causes of action. Some confusion also arises because Regions chose to use the term 'negligent supervision' to refer to both negligent supervision of McConnaughey as an employee and to negligent supervision of Elder's care as an infirm and helpless patient. However, the complaint contains three basic allegations: that the sexual assault was committed in the course and scope of employment and Stone County Skilled Nursing Facility was thus liable under respondeat superior; that Stone County Skilled Nursing Facility negligently supervised employee McConnaughey; and that Stone County Skilled Nursing Facility failed to provide the proper staffing and staffing policies necessary for the required treatment, attention, and medical services needed by patients. This included an allegation of a failure to properly provide for the protection of patients from criminal assault.

The argument made by Regions to the trial court in opposition to the motion for summary judgment bears out the conclusion that the three claims were at issue in the motion for summary judgment. Although respondeat superior and negligent supervision are discussed in greatest detail, the allegation of the failure to properly provide for patient safety was at issue. At the hearing before the trial court on the motion for summary judgment, counsel for Regions argued, "All of the foregoing provide strong circumstantial evidence which would lead the trier of fact to conclude that there was faulty patient-safety supervision in a facility charged with the custodial care of disabled and infirm patients, some of them, such as plaintiff's deceased, who were totally helpless." The same argument is found in Region's brief in opposition to the motion for summary judgment. A review of the trial court's order reveals that the trial court ruled on all three claims. In the order, the trial court granted summary judgment on the issues of respondeat superior and negligent supervision of an employee and then stated, "The Arkansas Supreme Court has not had occasion to expand the negligent supervision cause of action to include the elements argued by the

plaintiff in its memorandum brief." Clearly the trial court, in granting the motion for summary judgment, was including the negligent patient-care claim.

The wording of the order might give rise to a concern that this court is considering a claim not decided by the trial court. It is incumbent on the appellant to bring to the trial court's attention the fact that the court has failed to decide a specific claim raised by the appellant. *See Oglesby v. Baptist Med. Sys.*, 319 Ark. 280, 891 S.W.2d 48 (1995). Here, however, the circumstances are different from *Oglesby*. In *Oglesby*, the trial court failed to address a separate battery claim in any form or fashion, and the plaintiff/appellant asked this court to remand that claim for a decision by the trial court. We refused because that party had not brought the battery claim to the trial court's attention. In the case before us, the trial court did grant summary judgment as to the negligent patient-care claim. Here the scope of the cause of action pled was misconstrued by the trial court, which is different from a trial court's failure to consider a claim for relief altogether. Admittedly, part of the confusion resulted from the fact that Regions also couched its cause of action in terms of negligent supervision. We do not consider the *Oglesby* decision to be controlling. We now consider all three causes of action and whether a material question of fact exists.

Negligent Patient Care

Elder was a helpless, semi-comatose quadriplegic. Stone County Skilled Nursing Facility assumed responsibility for her care and required payment therefor. They were therefore under a duty of ordinary care to provide such attention as her condition reasonably required. *Dollins v. Hartford Acc. & Ind. Co.*, 252 Ark. 13, 477 S.W.2d 179 (1972). Given Elder's total inability to take care of herself, Stone County Skilled Nursing Facility was responsible for every aspect of her well being. *Niece v. Elmview Group Home*, 131 Wash.2d 39, 929 P2d 420 (1997). This duty should not be confused with that of negligent supervision of employees. The Supreme Court of the State of Washington has done an admirable job discussing and distinguishing these two causes of action in *Niece*. The Washington Supreme Court there explained:

> This argument is based on an incorrect understanding of the duty that gives rise to a cause of action for negligent supervision of employees. The theory of liability for negligent supervision is based upon the special relationship between employer and employee, not

> the relationship between group home and resident. [Footnote omitted]. Cases like *Thompson* [*v. Everett Clinic*, 71 Wash. App. 548, 860 P.2d 1054 (1993),] and *Peck* [*v. Siau*, 65 Wash. App. 285, 827 P.2d 1108 (1992)], which define the scope of an employer's duty to control its employees for the protection of third parties, do not inform the scope of the duty of care owed by Elmview to Niece by virtue of Elmview's special relationship to her. While an employer generally does not have a duty to guard against the possibility that one of its employees may be an undiscovered sexual predator, a group home for developmentally disabled persons has a duty to protect residents from such predators regardless of whether those predators are strangers, visitors, other residents, or employees.

Niece, 131 Wash.2d at 49, 929 P.2d at 426. The court continued:

> Elmview's duty to protect Niece from all foreseeable harms, including the harm of sexual assault by staff, is much broader than its duty as an employer to control its employees. The same evidence that would establish Elmview's negligence under a broad theory of negligent supervision will also establish its negligence in failing to protect Niece from all foreseeable harms. Niece's cause of action for negligent supervision thus collapses into her negligence claim based on Elmview's breach of its special relationship duty of care. We therefore find it unnecessary to determine whether Niece has presented a factually sufficient claim for negligent supervision.

Niece, 131 Wash. 2d at 52, 929 P.2d at 428.

We hold that Stone County Skilled Nursing Facility bore a duty of ordinary care to furnish Elder the care and attention reasonably required by her condition. *See Bailey v. Rose Care Center,* 307 Ark. 14, 817 S.W.2d 412 (1991), (involving an alleged failure to provide the care and attention reasonably required by the condition of an eighty-nine-year-old resident of a nursing home who left the home unnoticed in his wheel chair and was subsequently struck by a pick-up truck and killed instantly). Such a duty has been established in earlier cases. In *Dollins, supra,* the issue was whether there was neglect that resulted in injury from a fall where the patient was known to be "confused" and was found on the floor at the foot of the bed. This court stated that it was "the duty of the hospital to see that the patient had such attention as her condition apparently made necessary." *Dollins*, 252 Ark. at 18. The care required was "that proportionate to the danger apprehended, judged by the condition of affairs before the accident occurred." *Dollins,* 252 Ark. at 18. In *Durfee v. Dorr*, 123 Ark. 542, 186 S.W. 62 (1916), this court stated

that Durfee, as a patient of a hospital, was owed a duty of reasonable care and attention given the necessities of his case. Mr. Durfee was left alone in the room by himself while in "a feverish, nervous, delirious, or unconscious condition." While in that condition he walked out an upstairs door and fell over a bannister. He died of the injuries. In short, a hospital or, in this case, a nursing home, is required to consider the patient's capacity to care for himself or herself and to protect the patient from dangers created by his or her weakened condition. Providing a safe environment for patients is within the scope of the professional services of a hospital or nursing home. *Sexton v. St. Paul Fire & Marine Ins. Co.* 275 Ark. 361, 631 S.W.2d 270 (1982).

Elder could not speak or call out if in need. She was wholly at the mercy of those who saw after her at Stone County Skilled Nursing Facility. If anyone entered her room, there was nothing she could do. As events of recent years have sadly shown, nursing-home residents and hospital patients have been the victims of assault not only by employees but also by others, even persons wandering in off the street. The natural and probable consequence of failing to provide a reasonably safe nursing home or hospital is injury or assault. There is a question of fact on whether the duty of care was breached and an issue of foreseeability to be considered by the trier of fact. Proximate cause is usually a question for the jury. When the evidence is such that reasonable minds cannot differ, the issue becomes a question of law to be determined by the trial court. *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998); *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993).

The alleged breach of duty in this case was discussed by Regions' expert Pamela Taylor Smith, who opined in an affidavit attached to the opposition to the motion for summary judgment. Smith stated:

> It is my opinion that the Stone County Nursing Center was negligent in the care it provided to Ms. Vicki Elder by a policy which permitted unaccompanied access to helpless female patients, such as herself, by male aides with little or no previous health care experience. This policy was not in keeping with accepted nursing practice. Further, and also contrary to accepted nursing practice, the facility failed to supervise its aides, particularly those such as Mr. McConnaughey, who had not been on the job long enough to establish a record of patient care and dependability.

Smith opined that Stone County Skilled Nursing Facility failed to provide Elder the appropriate protection given her condition. Other facts developed in this case show that access to Elder may not have been appropriately controlled and that this posed a danger to her safety. There is evidence that might support a claim that Stone County Skilled Nursing Facility failed to furnish Elder the care and attention reasonably required by her mental and physical condition. In short, in considering the pleadings and evidence, there is a genuine question of material fact as to whether there was a breach of the duty to use ordinary care in furnishing Elder the care and attention reasonably required by her condition. *Bailey, supra. See also, Sexton, supra; Dollins, supra; Durfee, supra; Niece, supra.* In the case before us, the trial judge failed to appreciate Region's claim for negligent patient care. The grant of summary judgment is reversed as to this cause of action.

Respondeat superior

The assault was a criminal act undertaken for McConnaughey's own personal interest. The act itself is evidence it was undertaken for sexual gratification. *Farmer v. State*, 341 Ark. 220, 15 S.W.3d 674 (2000). The act likely gave rise to liability for rape under Ark. Code Ann. § 5-14-103 (Repl. 1997). *Dabney v. State*, 326 Ark. 382, 930 S.W.2d 360 (1996). That the assault was undertaken for his own purposes is also made clear by the acts committed by McConnaughey just prior to the assault, which were wholly unrelated to his duties to clean and care for Elder. He and Foster had already cleaned, turned, and placed Elder on her right side. She was positioned in the manner in which they intended to leave her. The only thing left for McConnaughey to do was to pull down Elder's gown and pick up the dirty linen. When Foster returned, however, she found Elder moved and repositioned on her back, her legs spread, so as to facilitate the sexual assault. This criminal assault did not occur incident to McConnaughey's employment duties. His act of moving her and assaulting her might have been undertaken by anyone, even a visitor to the home, a delivery person, or a stranger off the street.

In *Porter v. Harshfield,* 329 Ark. 130, 948 S.W.2d 83 (1997), this court discussed respondeat superior in the context of a sexual assault of a conscious patient during the course of a gallbladder ultrasound. The court found that in such a case we would adhere to the theory of master-servant liability that we have followed since 1910, that an act of an employee, in order to render the

employer liable, must pertain to something that is incident to the employee's duties and which it is his duty to perform or for the benefit of the employer, citing *Sweeden v. Atkinson Imp. Co.*, 93 Ark. 397, 125 S.W. 439 (1910). The court also cited *Gordon v. Planters & Merchants Bankshares*, 326 Ark. 1046, 935 S.W.2d 544 (1996) and *Life & Cas. Ins. Co. of Tenn. v. Padgett,* 241 Ark. 353, 407 S.W.2d 728 (1966), wherein we stated:

> We think the law as it stands today is fairly summarized in the Restatement of Torts, where it is said that the master is subject to liability for his servant's intentional tort "if the act was not unexpectable in view of the duties of the servant." Restatement, Torts (2d), 245 (1958).

Whether the employee's action is within the scope of the employment depends on whether the individual is carrying out the "object and purpose of the enterprise," as opposed to acting exclusively in his own interest. *Gordon, supra.*

Applying these principles to the facts before us, we agree with the trial court that McConnaughey's sexual assault of Elder was unexpectable. As in *Porter,* McConnaughey was not, by any stretch of the imagination, acting within the scope of his duties as a CNA when he assaulted Elder. Rather, McConnaughey's actions were purely personal. Because McConnaughey's actions were not expectable in view of his duties as a CNA, Stone County Skilled Nursing Facility may not be held liable for the sexual assault and was thus entitled to summary judgment as a matter of law. *Porter, supra. See also, Padgett, supra.*

Negligent Supervision

Regions argues that the trial court was in error in granting the motion for summary judgment as to negligent supervision in allowing newly hired male aides unaccompanied access to immobile, semi-comatose female patients.

Negligent supervision of employees has been discussed in Arkansas. Foreseeability of the act committed is an element of the tort in this state. In *American Automobile Auction, Inc. v. Titsworth,* 292 Ark. 452, 730 S.W.2d 499 (1987), this court stated that an employer who hires two ex-convicts, one of whom is normally drinking, and entrusts to them the job of forcibly ejecting patrons, has a duty to exercise reasonable care to avoid harm to those patrons

by exercising supervisory care when the employer knows, or by the exercising of reasonable diligence ought to know, that such employees are about to forcibly eject a patron. Thus, there is a duty of reasonable care in supervision of employees. A foreseeable consequence of using inebriated ex-convict bouncers is that they might use too much force in carrying out their duties in ejecting patrons from a bar. *See also, Life & Cas. Ins. Co. of Tenn. v. Padgett, supra* (wherein a dispute was not unexpectable where there was an employment duty to collect money).

Decisions from other jurisdictions are helpful in understanding negligent supervision of employees. Negligent supervision of employees creates a limited duty to control an employee for the protection of third parties even where the employee is acting outside the scope of employment. *Niece v. Elmview Group Home, supra. See also, Trahan-Laroche v. Lockheed Sanders, Inc.*, 139 N.H. 483, 657 A.2d 417 (1995). However, an employer is not liable for negligently supervising an employee whose conduct is outside the scope of the employment unless the employer knew or, in the exercise of reasonable care, should have known that the employee presented a risk of danger to others. *Thompson v. The Everett Clinic,* 71 Wash. App. 548, 860 P.2d 1054 (1993). The Georgia Court of Appeals stated that to create an issue of fact on a claim of negligent supervision, the plaintiff must come forward with evidence that the employer knew or should have known of the employee's violent or criminal propensities. *Heard v. Mitchell's Formal Wear, Inc.*, 2001 WL 468776 (Ga. App. 2001). Our own court of appeals has also found that to recover under a theory of negligent supervision, a plaintiff must show that an employer knew or, through the exercise of ordinary care, should have known that its employee's conduct would subject third parties to an unreasonable risk of harm. *Sparks Reg. Med. Ctr. v. Smith*, 63 Ark. App. 131, 976 S.W.2d 396 (1998). This is required because foreseeability must be established. *Tistworth, supra; Padgett, supra; N.X. v. Cabrini Medical Center*, 719 N.Y.S.2d 60 (2001). The court in *N.X.* stated that "the failure to establish this element renders the tortious conduct unforeseeable as a matter of law." *N.X.*, 719 N.Y.S.2d at 66. Foreseeability is required. In Arkansas, negligence is the proximate cause of an injury only if the injury is the natural and probable consequence of the negligent act and ought to have been foreseen in the light of attending circumstances. *Lindle Shows v. Shibley*, 249 Ark. 671, 460 S.W.2d 779 (1970). Foreseeability is an element of a negligence cause of action in Arkansas. *Benson v. Shuler Drilling Co.*, 316 Ark. 101, 871 S.W.2d 552 (1994).

To find a cause of action under negligent supervision of an employee, one must find that the natural and probable consequence of negligent supervision in allowing a newly hired and untried nurse's aide to care for an immobile, semi-comatose female patient is sexual abuse by that nurse's aide. As discussed, absent some form of notice that the employee posed a danger, such an act is not foreseeable. Here, there was no indication of a prior criminal record or patient abuse. There was nothing to put Stone County Skilled Nursing Facility on notice that McConnaughey might do such a thing as sexually assault a patient. The fact that McConnaughey was an inexperienced CNA does not give rise to a reasonable probability that he would commit criminal sexual assault. On this basis, it was not foreseeable that McConnaughey would commit criminal sexual assault.

In coming to the conclusion that there is no liability under the claim for negligent supervision of an employee, it should be noted that the cause of action is not as broad as one under the duty to protect Elder from foreseeable harm. *Niece, supra.* Stone County Skilled Nursing Facility was under a duty to protect Elder from foreseeable harm, including the harm of sexual assault. Thereunder, an assault might give rise to liability whether the assault was committed by an employee, a visitor, or by someone coming in off the street. Niece, supra.

We find on the issue of negligent supervision of McConnaughey as an employee that because there was no notice in this case, the trial court's decision on this issue is affirmed.

Affirmed in part, and reversed and remanded in part.

Gyronne BUCKLEY *v.* STATE of Arkansas

CR 01-644 48 S.W.3d 534

Supreme Court of Arkansas
Opinion delivered July 9, 2001

Jack Lassiter, for appellant.

Appellant, pro se.

No response.

PER CURIAM. Appellant, Gyronne Buckley, was convicted of two counts of delivery of a controlled substance in Clark County Circuit Court on May 26, 1999. Appellant received two life sentences in that trial. His sentences were reversed by this court in *Buckley v. State*, 341 Ark. 864, 20 S.W.3d 331 (2000), and we

remanded the case for resentencing. Upon remand, appellant was resentenced by a jury to twenty-eight years on each count to run consecutively. On April 16, 2001, the trial court filed its order, and a notice of appeal was timely filed on April 20, 2001.

On June 7, 2001, appellant's counsel filed a motion to withdraw as attorney of record and lodged a partial record. In his motion, appellant's counsel states that he seeks permission to be relieved as attorney of record in this case, as appellant and his counsel have reached irreconcilable differences concerning the sentencing stage of his trial. On June 19, 2001, and on June 21, 2001, appellant filed *pro se* responses to his counsel's motion to withdraw as attorney of record. On June 29, 2001, appellant's counsel filed a supplement to his motion.

Rule 16 of the Rules of Appellate Procedure—Criminal provides in pertinent part that trial counsel, whether retained or court-appointed, shall continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. Counsel filed a notice of appeal from the April 16, 2001, order and was thus obligated to represent appellate until such time as he was permitted by the appellate court to withdraw, pursuant to Ark. Sup. Ct. R. 4-3(j)(1). Under Rule 4-3(j)(1), counsel for a defendant who wishes to withdraw from an appeal must abstract and brief all of the rulings that were adverse to his client.

If appellant's counsel intended to withdraw, he should have filed a brief and a motion to be relieved as counsel, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and our Rule 4-3(j)(1), stating there is no merit to the appeal. In turn, we would have informed appellant in accordance with Rule 4-3(j) that he was entitled to file within thirty days a *pro se* brief advancing any points for reversal that he wished to raise on appeal.

Because appellant's counsel has failed to follow the foregoing rules, the disposition of appellant's appeal has been unduly delayed. *Johnson v. State*, 345 Ark. 357, 45 S.W.3d 844 (2001). We direct counsel to either file a motion to withdraw with an accompanying brief, pursuant to Rule 4-3(j)(1), or rebrief the issues in this appeal and argue the merits. Counsel has thirty days from this decision to file the appropriate documents.

Rebriefing ordered.

ARNOLD, C.J., not participating.

[redacted]

Timothy HOUFF *v.* STATE of Arkansas

CR 01-595 47 S.W.3d 888

Supreme Court of Arkansas
Opinion delivered July 9, 2001

[redacted]

Sullivan Law Firm, P.L.L.C., by: *Kelly J. Adkins*, for appellant.

No response.

PER CURIAM. Appellant, Timothy Houff, by and through his attorney, has filed a motion for a rule on the clerk. His attorney, Kelly J. Adkins, admits in her motion that the record was tendered late due to a mistake on her part.

[redacted] We find that such an error, admittedly made by an attorney for a criminal defendant, is good cause to grant the motion. *See In re Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*).

The motion is therefore granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Mark LATTA *v.* STATE of Arkansas

CR 01-679 48 S.W.3d 532

Supreme Court of Arkansas
Opinion delivered July 9, 2001

McCullough Law Firm, by: *R.S. McCullough*, for appellant.

No response.

PER CURIAM. Appellant, Mark Latta, by his attorney, R.S. McCullough, has filed a motion for rule on the clerk. Following a jury verdict finding Latta guilty of manufacturing a controlled substance, the Saline County Circuit Court sentenced appellant to life imprisonment in the Arkansas Department of Correction. The judgment and commitment order was entered on June 30, 2000. Appellant timely filed a notice of appeal on July 14, 2000, and ultimately tendered the appellate record on February 5, 2001. However, due to a miscalculation in due dates and admitted "inadvertence," the record was lodged outside the applicable time limits.

Mr. McCullough admits in the instant motion that the record was tendered late due to a mistake on his part. We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (per curiam). Accordingly, we grant the motion for rule on the clerk. A copy of this opinion will be forwarded to the Committee on Professional Conduct. *Id.*

Raymond Leshay MITCHELL *v.* STATE of Arkansas

CR 01-600 47 S.W.3d 888

Supreme Court of Arkansas
Opinion delivered July 9, 2001

John H. Bradley, Public Defender, for appellant.

No response.

PER CURIAM. John H. Bradley, a state-salaried, full-time public defender for the Second Judicial District, was appointed by the trial court to represent appellant Raymond Leshay Mitchell, an indigent defendant, in these criminal cases. Following a revocation hearing on February 28, 2001, the circuit court revoked (1) a sentence of supervised probation on a charge of delivery of a controlled substance, cocaine, and (2) a suspended imposition of sentence on a charge of felon in possession of a firearm. The court sentenced Mr. Mitchell to concurrent three-year terms of imprisonment in the Arkansas Department of Correction on each revocation, followed by concurrent three-year periods of suspended imposition of sentence. A notice of appeal from the judgments of conviction has been timely filed. Pursuant to our *per curiam* order entered on June 21, 2001, the attorneys of record have certified to the clerk by affidavit that the transcript is true, accurate, and complete. Accordingly, the record has been lodged with our clerk.

Mr. Bradley now asks this court to relieve him as counsel for Mr. Mitchell in this criminal appeal. As a state-salaried, full-time public defender for the Second Judicial District, Mr. Bradley is ineligible for compensation by this court for work performed in the appeal of this matter pursuant to our opinion in *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000). In *Tester v. State*, 341 Ark. 281,

16 S.W.3d 227 (2000), we relieved appellant's court-appointed public defender and appointed new counsel on appeal under similar circumstances. *See also, Craft v. State*, 342 Ark. 57, 26 S.W.3d 584 (2000); *McFerrin v. State*, 342 Ark. 61, 26 S.W.3d 429 (2000); *Bolton v. State*, 342 Ark. 55, 26 S.W.3d 783 (2000). We grant Mr. Bradley's motion to be relieved for good cause shown. Frank Newell will be substituted as attorney for appellant Raymond Leshay Mitchell.

Dominic SIMPSON *v.* STATE of Arkansas

CR 01-684 48 S.W.3d 533

Supreme Court of Arkansas
Opinion delivered July 9, 2001

Mark S. Frasier, for appellant.

No response.

PER CURIAM. Petitioner, Dominic Simpson, by his attorney Mark S. Fraiser, Chief Public Defender, Garland County Public Defender's Office, 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*, 265 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.

Dominic SIMPSON *v.* STATE of Arkansas

CR 01-684 48 S.W.3d 533

Supreme Court of Arkansas
Opinion delivered July 9, 2001

Ann C. Hill and *Mark S. Frasier,* for appellant.

No response.

PER CURIAM. Anne C. Hill and Mark S. Fraiser, state-salaried public defenders, move to withdraw as appointed counsel for appellant Dominic Simpson. The Office of the Public Defender for the Eighteenth Judicial District East, was appointed by the trial court to represent appellant Dominic Simpson, an indigent defendant, on a charge of first-degree murder. Steve Oliver, Deputy Public Defender, represented Simpson throughout all proceedings below, including trial. On December 6, 2000, Simpson was convicted of the charge and sentenced to 480 months in the Arkansas Department of Corrections. Her appointed counsel, Oliver, was subsequently sworn in as prosecuting attorney for Garland County.

A notice of appeal was timely filed on January 3, 2001. Counsel for Simpson then made an untimely tender of the record on April 4, 2001. Our clerk directed appointed counsel to file a motion for Rule on the clerk in order to be granted a belated

appeal. On June 20, 2001, contemporaneously with this motion to withdraw, appointed counsel filed a motion for Rule on the Clerk. That motion is granted by *per curiam* today. Accordingly, the record has been lodged with the clerk.

Attorney Hill notes that Dominic's original appointed counsel, Steve Oliver, can no longer represent her. Ms. Hill also notes that the public defender can no longer represent Simpson because that office also represented Dominic's two co-defendants. Ms. Hill asks this court to relieve the Office of the Public Defender for the Eighteenth Judicial District East as appointed counsel for Simpson in her criminal appeal. As state-salaried, public defenders for the Eighteenth Judicial District East, none of these attorneys are eligible for compensation by this court for work performed in the appeal of this matter pursuant to our opinion in *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000). In *Tester v. State*, 341 Ark. 281, 16 S.W.3d 227 (2000), we relieved appellant's court-appointed public defender and appointed new counsel on appeal under similar circumstances. *See also Craft v. State*, 342 Ark. 57, 26 S.W.3d 584 (2000); *McFerrin v. State*, 342 Ark. 61, 26 S.W.3d 429 (2000); *Bolton v. State*, 342 Ark. 55, 26 S.W.3d 783 (2000). We grant the motion to be relieved for good cause shown. Kent McLemore will be substituted as attorney for appellant Dominic Simpson.

WAYNE ALEXANDER TRUST, Wayne Alexander, Trustee *v.* CITY of BENTONVILLE

01-633 47 S.W.3d 262

Supreme Court of Arkansas
Opinion delivered June 7, 2001[1]

[1] Reporter's note: This opinion was not made available to the office of the

Jay Carol Miner, Timothy Monroe Weaver, and *Charles M. Kester,* for appellant.

Camille Steadman Thompson, for appellee.

PER CURIAM. Appellant, Wayne Alexander Trust, Wayne Alexander, Trustee, appeals from a Benton County Circuit Court order approving Bentonville Municipal ordinance 94-63 ordering the condemnation of seven structures in Bentonville. Appellant requested that the circuit court stay execution of its order until he had an opportunity to file an appeal with our court. The circuit court denied appellant's request. Appellant now files a motion in our court requesting an emergency motion for a stay of the Benton County order until we have considered the matter on appeal. Because the City of Bentonville has started the process of destroying the structures that were in issue in Bentonville Municipal ordinance 94-63, appellant also requests that we give expedited consideration to his motion to stay.

Appellant requests that we stay the Benton County order pursuant to Rule 8 of the Arkansas Rules of Appellate Procedure—Civil. That rule in relevant part states:

> (a) *Supersedeas defined; necessity.* A supersedeas is a written order commanding appellee to stay proceedings on the judgment, decree or order being appealed from and is necessary to stay such proceedings.
>
> (b) *Supersedeas; by whom issued.* A supersedeas shall be issued by the clerk of the court which rendered the judgment, decree or order being appealed from unless the record has been lodged with the appellate court in which event the supersedeas shall be issued by the clerk of the appellate court.
>
> (c) *Supersedeas bond.* Whenever an appellant entitled thereto desires a stay on appeal, *he shall present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires.* The bond shall be to the effect that appellant shall pay to appellee all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall

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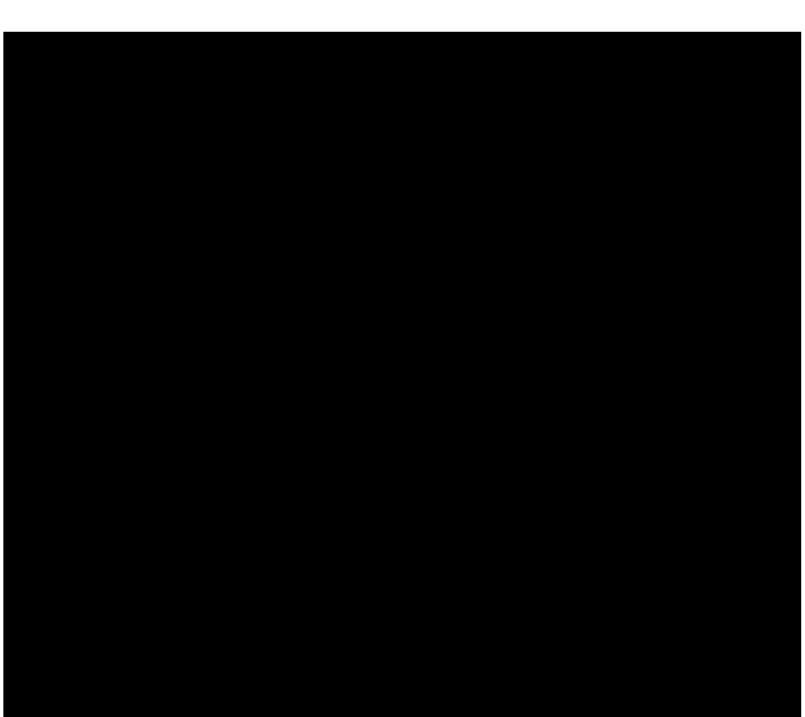
Reporter of Decisions until September 4, 2001.

> satisfy and perform the judgment, decree or order of the trial court.

Id. (emphasis added).

Appellant has filed a partial record with our court. However, we note that appellant has failed to file a supersedeas bond. Accordingly, without reaching the merits of appellant's request, we must deny his motion to stay the circuit court's order.

Motion to stay denied.



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