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Terry DOUGLAS, Evelyn Douglas,
and Hydco, Inc. *v.* CITY of CABOT,
City of Cabot Planning Commission,
and Summit/Sun Terrace Property
Owners' Association

01-426 59 S.W.3d 430

Supreme Court of Arkansas
Opinion delivered November 15, 2001

Denise Reid Hoggard, for appellants.

Clinton D. McGue and *Keith G. Rhodes*, for appellees.

W.H. "DUB" ARNOLD, Chief Justice. Appellants, Terry Douglas, Evelyn Douglas, and Hydco, Inc., bring the instant appeal challenging an order of the Lonoke County Circuit Court denying their petition for a writ of mandamus and granting appellees', City of Cabot, City of Cabot Planning Commission, and Summit/Sun Terrace Property Owners' Association, motion for dismissal. Along with the appeal, we consider appellees' pending motion to dismiss on the grounds that appellants failed to properly perfect the circuit-court appeal in compliance with applicable rules of procedure. We find merit in appellees' arguments, and we dismiss the appeal with prejudice.

Background

On September 30, 1999, appellant Hydco, Inc., applied for a building permit to construct a detached-garage structure on the Douglases' property. The parties agree that the permit application was deficient in at least one respect, namely that the required plot plan was not submitted in triplicate. The final plot plan was submitted on October 27, 1999, almost one month following the application. Moreover, Hydco's permit application described a metal garage structure with 30 feet by 60 feet dimensions. However, according to witness testimony and architectural drawings, the structure's actual dimensions were 42 feet by 60 feet. Despite the irregularities, the City issued Hydco a permit on October 6, 1999.

Hydco then began construction on the Douglases' property, including clearing trees and brush, and hauling in fill dirt. Electricity was also run to the site. Offsite, Hydco constructed and fabricated the metal garage facility. According to the Douglases, they spent over $32,000 toward construction prior to November 2, 1999. Then, in response to neighbors' complaints, the city building inspector issued a stop-work order prohibiting any further preparatory work on the building site.

Subsequently, the City of Cabot Planning Commission considered the matter at its regularly scheduled November meeting. The Planning Commission determined that the Board of Zoning Adjustment was the appropriate forum to resolve the dispute, and the matter was placed on the Board's December agenda. Interested parties were granted the opportunity to be heard. Ultimately, the Board upheld the city building inspector's decision to issue the stop-work order.

Before the administrative process concluded, the Douglases filed a petition for writ of mandamus in the circuit court on November 12, 1999. The City filed an answer and a motion to dismiss on December 2, 1999. Following a January 7, 2000 hearing, the trial court denied the motion to dismiss and ordered the Douglases to join Hydco as a necessary party. Appellants then filed an amended complaint on January 20, 2000, to which the appellees timely responded. Appellee Summit/Sun Terrace Property Owners' Association also intervened in the action.

On March 15, 2000, appellants filed a second amended complaint. Appellees then filed another motion to dismiss, a motion to

strike, and a motion for more definite statement. The trial court held a hearing on May 26, 2000, to consider the pending motions. After reviewing the parties' pleadings and arguments, witness testimony, and exhibits, the circuit court denied appellants' petition for a writ of mandamus and granted the motion to dismiss. From that order, comes the instant appeal.

Motion to dismiss appeal

As an initial matter, we consider appellees' jurisdictional challenge. Specifically, appellees claim that the appeal must be dismissed because it is untimely and fails to comply with the procedural requirements for perfecting an appeal. In response, appellants argue that the motion to dismiss should be denied because it is untimely and was not argued below. Appellants' posture is meritless. Subject-matter jurisdiction is a defense that cannot be waived by the parties at any time nor can it be conferred by the parties' consent. *See Moore v. Richardson*, 332 Ark. 255, 964 S.W.2d 377 (1998).

Here, appellants should have pursued their remedies before the Board and, failing a satisfactory ruling, appealed that decision to the circuit court. However, the Douglases and Hydco concede that they never filed an appeal from the Board's decision but elected to file an original mandamus petition in the circuit court. In so doing, they failed to exhaust their administrative remedies, and this court has long held that the failure to exhaust administrative remedies is grounds for dismissal. *See City of Dover v. Barton*, 337 Ark. 186, 987 S.W.2d 705 (1999).

The applicable rules of procedure prescribed the proper appeal route. For example, Ark. Code Ann. section 14-56-416 (Repl. 1998) permits the Board to hear appeals from the decisions of administrative officers regarding the enforcement or application of zoning ordinances, including denials of building permits. Ark. Code Ann. § 14-56-416(b)(2)(A), (c) (Repl. 1998). The statute also provides that the Board's decisions shall be subject to appeal only in a court of record having jurisdiction. Ark. Code Ann. § 14-56-416(b)(2)(B)(ii).

Arkansas Code Annotated section 14-56-425 (Repl. 1998) elaborates on the appeal process and explains that an appeal from the Board of Adjustment's administrative decision may be taken to the circuit court of the appropriate county and tried *de novo* under

the same procedure applicable to civil appeals from inferior-court decisions. *See City of Paragould v. Leath*, 266 Ark. 390, 583 S.W.2d 76 (1979) (permitting appeal from board of adjustment's administrative decision to the circuit court). Significantly, this court has interpreted the requirements of section 14-56-425 to include compliance with Inferior Ct. R. 9. *Board of Zoning Adjust. v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1997); *Night Clubs, Inc. v. Forth Smith Plann. Comm'n*, 336 Ark. 130, 984 S.W.2d 418 (1999).

Rule 9 specifies that an appeal from an inferior court to the circuit court must be taken by filing (1) a record of the inferior-court proceedings, or (2) an affidavit showing that the appellant requested the record from the inferior-court clerk, but the clerk neglected to prepare and certify the record for appeal. Thus, the absence of either the record or the affidavit is fatal to any subsequent appeal. In other words, the requirements of Rule 9 are mandatory and jurisdictional. *Cheek*, 328 Ark. at 22, 942 S.W.2d at 823.

In the instant case, appellants acknowledge that they have neither filed the record of the City's administrative proceedings with the circuit court nor filed the required affidavit, certifying that they have attempted to obtain the record. Rather, they prematurely circumvented the appellate process by filing a writ of mandamus prior to the Board's reaching a final decision on the matter. In sum, appellants simply failed to perfect their appeal in the time and manner provided by law. Accordingly, the trial court never acquired jurisdiction of the appeal, nor did it acquire jurisdiction by appellants' filing of a mandamus action. *See Cheek*, 328 Ark. at 21, 942 S.W.2d at 823. In light of appellants' failure to exhaust their administrative remedies and to properly perfect an appeal, we grant appellees' motion and dismiss the appeal.

STATE of Arkansas OFFICE of CHILD SUPPORT ENFORCEMENT *v.* Christopher WILLIS

01-238 59 S.W.3d 438

Supreme Court of Arkansas
Opinion delivered November 15, 2001

[redacted]

Greg L. Mitchell, for appellant.

Gilbert Law Firm, by: *Melinda R. Gilbert* and *Robert T. James*, for appellee.

ROBERT L. BROWN, Justice. This appeal involves paternity. The sole question presented is whether the chancery court erred in dismissing the paternity complaint of the appellant, which is the State of Arkansas Office of Child Support Enforcement (OCSE). We believe that the chancery court did err in dismissing that complaint, and we reverse the dismissal order and remand the case for further proceedings associated with the paternity complaint.

On February 13, 1982, John and Merigayle Triplett married. On November 23, 1988, Merigayle had a daughter, Megan. On February 26, 1992, the Tripletts divorced. In the resulting divorce decree entered by the chancery court (1992 decree), the court approved the parties' agreement regarding custody of Megan. Specifically, the decree stated:

> The parties hereby have one (1) child, Megan Elizabeth Triplett, born November 23, 1988, and the Plaintiff [Merigayle Triplett] shall have sole custody of said child with Defendant [John Triplett] having reasonable and seasonable visitation rights.
>
> The Defendant shall pay child support for the said child of $60.00 per week.
>
> The Defendant shall be responsible for all ordinary doctor, hospital, dental and prescription drug bills for the child.

On February 14, 1993, John and Merigayle married for a second time. At some point during the late summer of 1997, Merigayle told John that he might not be Megan's father, and Merigayle named appellee Christopher Willis as Megan's putative father. In September of 1997, John called Willis and confronted him about the 1988 affair. Two days later, Merigayle called Willis and told him that he was Megan's father.

When Willis first knew of his biological relationship to Megan is a matter of factual dispute in this case. According to Willis's affidavit, Willis and Merigayle had a romantic relationship which lasted from January of 1988 to March of 1988. Although Willis saw Merigayle at various social engagements and restaurants after March 1988, he asserts that the two did not speak again until September of 1997. Willis claims that it was not until September of 1997 that he first knew of a possible biological link with Megan.

Merigayle disputes this in her affidavit. She avers that she told Willis that she thought the child was his as early as May of 1989, six months after Megan was born. She asserts that at that time, Willis called her to discuss personal matters, and he heard a child crying in the background. He asked about the baby, and Merigayle told him that the timing of her pregnancy indicated that the child was his. According to Merigayle, Willis was shocked to hear this and hurriedly got off the telephone. Merigayle adds that she and Willis again discussed the situation in the winter months of 1992. According to Merigayle, the next time she spoke with Willis concerning his being Megan's biological father was in September of 1997.

On March 14, 1997, Merigayle filed her complaint for divorce from John. In his answer to Merigayle's petition for divorce, John asserted that he was not Megan's biological father, and he requested DNA testing to establish his biological relationship to Megan. Merigayle did not object to this testing. The chancery court granted his request, and the testing excluded John as Megan's biological father. Following this testing, in a divorce decree entered on January 20, 1998 (1998 decree), the chancery court found that John was not Megan's biological father. The 1998 decree did not order John to pay child support for Megan. No reference was made in the 1998 decree to the 1992 decree. Merigayle did not appeal the 1998 decree. After the 1998 decree, OCSE paid support to Merigayle.

On June 4, 1998, Merigayle averred in an affidavit to OCSE that Willis was Megan's biological father. On June 22, 1998, OCSE ordered Willis, Megan, and Merigayle to submit to genetic testing to determine paternity. Willis did not challenge this testing. On July 22, 1998, the test results were returned, which showed that there was a 99.98% probability that Willis was Megan's biological father.

On August 12, 1998, after learning of the test results, OCSE filed a paternity complaint against Willis pursuant to its statutory authority. *See* Ark. Code Ann. § 9-10-104(a)(4) (Repl. 1998); Ark. Code Ann. § 9-12-210(d)(2) (Repl. 1998). In Willis's amended answer to OCSE's petition, he denied that he was Megan's father and raised affirmative defenses to the petition, including *res judicata* and collateral estoppel. Both affirmative defenses were based on the 1992 decree. Willis also named John as a defendant to the paternity complaint and cross-claimed against Merigayle and John for fraud and the tort of outrage. He sought injunctive relief and money damages against Merigayle and John. Willis concluded with multiple prayers for relief, including a prayer that the paternity complaint against him be dismissed.

On April 21, 1999, the chancery court dismissed OCSE's paternity petition against Willis. OCSE appealed the dismissal, and this court dismissed the appeal pursuant to Ark. R. Civ. P. 54(b), because the chancery court's order did not dispose of Willis's tort claims against Merigayle and John. *See Office of Child Support Enforcement v. Willis,* 341 Ark. 378, 17 S.W.3d 85 (2000).

After dismissal of the first appeal, Willis agreed to voluntarily nonsuit the cross-claims against John and Merigayle pursuant to Ark. R. Civ. P. 41(a).[1] On November 11, 2000, the chancery court entered an order reflecting this nonsuit and found as follows:

> That based upon the entry of a 1992 Divorce Decree establishing John Triplett as the legal father of the child, Megan Elizabeth Triplett, born November 23, 1998, [sic] the Court hereby finds that paternity of the child was established in 1992. Thus, the pending action for paternity, is improper.[2]

The chancery court dismissed OCSE's paternity complaint.

OCSE's sole point on appeal is that the chancery court erred in dismissing OCSE's paternity complaint as improper on grounds that paternity had been established under the 1992 decree. Initially, we refer to the precepts that govern our review. We review chancery cases *de novo* on the record, but we do not reverse a finding of fact by the chancery court unless it is clearly erroneous. *Moon v. Marquez,* 338 Ark. 636, 999 S.W.2d 678 (1999); *Office of Child Support Enforcement v. Eagle,* 336 Ark. 51, 983 S.W.2d 429 (1999). A finding of fact by the chancery court is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Huffman v. Fisher,* 337 Ark. 58,

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[1] This court has held that a plaintiff cannot nonsuit certain claims against a defendant in order to circumvent Rule 54(b). *See Haile v. Arkansas Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995); *Ratzlaff v. Franz Foods,* 255 Ark. 373, 500 S.W.2d 379 (1973). The underlying reason is that the principle of *res judicata* requires all claims against a defendant arising out of common facts to be brought, and nonsuiting certain claims would lead to piecemeal appeals and splitting a cause of action. We have also held that nonsuiting claims against separate defendants to avoid a Rule 54(b) dismissal is permissible, because joining separate defendants is not mandatory under the principle of *res judicata. See Driggers v. Locke,* 323 Ark. 63, 913 S.W.2d 269 (1996). Here, Willis's nonsuited claims are cross-claims, and it is not mandated that they be brought. *See* Ark. R. Civ. P. 13(f). Accordingly, Rule 54(b) is not circumvented.

[2] The date of Megan's birth was misstated in the November 11, 2000 order. Her date of birth was November 23, 1988.

987 S.W.2d 269 (1999); *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). It is this court's duty to reverse if its own review of the record is in marked disagreement with the chancery court's findings. *Dopp v. Sugarloaf Mining Co.*, 288 Ark. 18, 702 S.W.2d 393 (1986) (citing *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); *Walt Bennett Ford v. Pulaski County Special Sch. Dist.*, 274 Ark. 208, 624 S.W.2d 426 (1981)).

In support of its argument for reversal, OCSE emphasizes that the 1992 decree did not address the issue of paternity. Nor, it contends, was paternity an issue in that divorce. Moreover, OCSE claims that when the parties remarried in 1993, this had the effect of annulling the 1992 decree as it related to Megan. OCSE cites *Oliphant v. Oliphant*, 177 Ark. 613, 7 S.W.2d 783 (1928), in support of this proposition. Furthermore, OCSE maintains, when John requested blood testing in 1997 to determine whether he was Megan's father, Merigayle did not object to that or raise *res judicata* as a bar to the testing. It was not until the paternity complaint was filed in 1998 against Willis that he raised the affirmative defenses of *res judicata* and collateral estoppel. Because of this, OCSE contends that *res judicata* based on the 1992 decree does not bar the paternity action. The agency further contends that because Merigayle did not raise this affirmative defense as part of the paternity testing of John which led to the 1998 decree, she waived that defense and collateral estoppel as well. This, according to OCSE, resulted in the 1998 decree, which was inconsistent with the 1992 decree on the issues of John's paternity and his obligation to support Megan. Only the later divorce decree should control, OCSE urges, and only that later decree should be given *res judicata* effect. OCSE concludes that it is the 1998 decree that left Megan with no legal father and no support, which opened the door to a paternity action.

Willis responds that the chancery court really relied on the principle of collateral estoppel and not *res judicata* in dismissing OCSE's paternity complaint and that collateral estoppel applies in this case. Collateral estoppel governs this case, he argues, and supports reliance on the 1992 decree rather than OCSE's theory of inconsistent decrees. He maintains that *Oliphant v. Oliphant, supra*, does not control this case, because that case dealt with a change of circumstances caused by a second marriage and the effect on child custody. Finally, he urges that the 1992 decree, as it related to paternity, could not be modified after three years under Ark. Code Ann. § 9-10-115(f) (Repl. 1998).

We agree with Willis that the *Oliphant* case does not control this paternity issue. In *Oliphant,* even though two marriages and two divorces were also involved, the issue was whether a redetermination of child custody was necessary. The father urged that a review was unnecessary. This court held, however, that the second marriage constituted a change of circumstances which warranted redetermination of the custody issue. The principle of changed circumstances, however, is not a relevant factor in paternity matters.

It is not clear from the chancery court's order whether the court relied on the doctrine of *res judicata* or collateral estoppel in deciding that the 1992 decree rendered the paternity action "improper." Accordingly, we will discuss both doctrines in our analysis, even though Willis relies on collateral estoppel in his brief on appeal. We turn first to the question of whether *res judicata* prevents OCSE's paternity action. *Res judicata* bars relitigation of a subsequent suit when: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. *Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999) (citing *Miller County v. Opportunities, Inc.*, 334 Ark. 88, 971 S.W.2d 781 (1998); *Hamilton v. Arkansas Pollution Control & Ecology Comm'n*, 333 Ark. 370, 969 S.W.2d 653 (1998)). *Res judicata* bars not only the relitigation of claims that were actually litigated in the first suit but also those that could have been litigated. *Williams, supra; Wells v. Arkansas Pub. Serv. Comm'n,* 272 Ark. 481, 616 S.W.2d 718 (1981). Where a case is based on the same events as the subject matter of a previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Williams, supra*; *Swofford v. Stafford*, 295 Ark. 433, 748 S.W.2d 660 (1988). The policy of the doctrine is to prevent parties' relitigating issues on which they have already been given a fair trial. *McCormac v. McCormac*, 304 Ark. 89, 799 S.W.2d 806 (1990).

We conclude that the principle of *res judicata* based on the 1992 decree could not govern the outcome of this case for one simple reason: the 1992 divorce action and the 1998 paternity action do not involve the same parties or their privies. While OCSE, arguably, might be in privity with Merigayle due to support payments, Willis was not in privity with either John or Merigayle. Certainly, the interests of Willis and John were not aligned in the 1992 divorce proceeding. Indeed, John was unaware that he was not the biological father. Nor can Willis successfully claim that his

interests and Merigayle's were the same in the 1992 divorce. Willis was not a party to that litigation and did not participate in any way. Under similar circumstances, our court of appeals has held that there was no substantial identification between the mother and an alleged biological father who did not participate in the divorce litigation. *See Scallion v. Whiteaker*, 44 Ark. App. 124, 868 S.W.2d 89 (1993).

We are aware, of course, that this court has applied the principle of *res judicata* for purposes of deciding paternity based on a previous divorce decree in two fairly recent cases. *See Office of Child Support Enforcement v. Williams, supra*; *McCormac v. McCormac, supra*. In *Williams*, we held that a former husband's agreement to a divorce decree which stated that children were born of the marriage and his signing an agreed order on child support foreclosed a later action to establish that he was not the biological father for purposes of abating child support. In *McCormac*, we held that the mother of a child was barred from contesting her former husband's paternity in a subsequent dispute over visitation when the mother had previously agreed in the property settlement agreement that one child had been born of the marriage. Thus, it is clear that *res judicata* does bar relitigation of the paternity issue between the former husband and wife when the parties have agreed in the divorce action that a child was born of the marriage. We note in this regard that Merigayle did not argue the *res judicata* effect of the 1992 decree in the 1998 divorce proceedings and, indeed, did not object to John's request for blood testing to establish Megan's paternity. Nor did she appeal the 1998 decree. As a result, the 1998 decree leaves Megan without a biological father.

In the instant case, Willis was not a party to the divorce decree and was not in privity with a party to the divorce decree. We hold that the 1992 decree does not bar a subsequent paternity action between OCSE and Willis under the principle of *res judicata*.

The next question is whether OCSE is collaterally estopped from bringing the paternity complaint against Willis. Willis relies heavily on this doctrine of issue preclusion and vigorously contends that the question of paternity was resolved in the 1992 decree and cannot be raised a second time. OCSE's retort is that the paternity question was never actually litigated in 1992, and, thus, collateral estoppel does not pertain.

Collateral estoppel, or issue preclusion, requires four elements before a determination is conclusive in a subsequent proceeding: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *Palmer v. Arkansas Council on Economic Educ.*, 344 Ark. 461, 40 S.W.3d 784 (2001); *Fisher v. Jones*, 311 Ark. 450, 844 S.W.2d 954 (1993); *East Texas Motor Freight Lines, Inc. v. Freeman*, 289 Ark. 539, 713 S.W.2d 456 (1986).

Collateral estoppel may be asserted by a stranger to the first judgment or decree, but the party against whom it is asserted must have been a party to the earlier action and must have had a full and fair opportunity to litigate the issue in that first proceeding. 47 AM. JUR. 2d *Judgments* §§ 645, 650 (citing *Arkansas Dep't of Human Servs. v. Dearman*, 40 Ark. App. 63, 842 S.W.2d 449 (1992)). It is apparent that our court of appeals has adopted this rule, though this Court has not. In *Coleman's Serv. Ctr., Inc. v. FDIC*, 55 Ark. App. 275, 935 S.W.2d 289 (1996), the appellate court said:

> Collateral estoppel is based upon the policy of limiting litigation to one fair trial on an issue and is applicable only when the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question.

Coleman's, 55 Ark. App. at 291, 935 S.W.2d at 299 (citing *Arkansas Dep't of Human Servs. v. Dearman, supra*). We agree with this statement by our court of appeals, as do a majority of jurisdictions, and hereby adopt this principle of collateral estoppel.

There are two reasons why collateral estoppel does not apply to the case at bar. First, this case does not satisfy the *Dearman* rule in that John did not have the opportunity to fully and fairly litigate the issue of his paternity in the 1992 divorce proceeding. At that time, by all factual accounts, John had no inkling that Megan was not his child. Merigayle, according to her affidavit, had discussed this with Willis but not with John. Thus, John had no reason to contest the presumption that Megan was his.

Secondly, the fourth element of collateral estoppel, that of "actual litigation," is not met in this case. Unlike *res judicata*, which acts to bar issues that merely could have been litigated in the first action, collateral estoppel requires actual litigation in the first instance. *Huffman v. Alderson*, 335 Ark. 411, 983 S.W.2d 899 (1999);

Crockett & Brown, P.A. v. Wilson, 314 Ark. 578, 864 S.W.2d 244 (1993). *See also Swadley v. Krugler*, 67 Ark. App. 297, 999 S.W.2d 209 (1999). Further, this court cursorily applied this element in *Miller County v. Opportunities, Inc.*, 334 Ark. 88, 971 S.W.2d 781 (1998), and held that no issue was "actually litigated" before the court when on appeal, we could not determine that the lower court's order was based on any actual proceedings.

To discern what "actually litigated" means, we turn to *Black's Law Dictionary*. That dictionary defines "litigation" as "The process of carrying on a lawsuit; a lawsuit itself." *Black's Law Dictionary* 944 (7th ed. 1999). We emphasize the necessity for trying the issue sought to be estopped by stating that the matter must be *actually* litigated. In the 1992 divorce proceeding, neither John nor Merigayle put Megan's paternity in issue; hence no adversary presentations of evidence on this point were made. The chancery court's finding of paternity in the 1992 decree was not the result of litigation. At that time, only Merigayle had doubts that Megan was John's child, and she had not imparted those doubts to John.

We hold that the failure of John and Merigayle to actually litigate the issue of his paternity in the 1992 divorce proceedings prevents Willis's application of collateral estoppel to the later paternity action.

Finally, there is Willis's argument that OCSE is foreclosed from modifying the determination of paternity in the 1992 decree because the modification did not occur within three years of the decree as required by Ark. Code Ann. § 9-10-115(f) (Repl. 1998). We give this argument little credence because we do not view what occurred in the 1992 divorce as either an adjudication of paternity or voluntary acknowledgment of paternity as required under the Paternity Code. *See* Ark. Code Ann. §§ 9-10-101 through 202 (Repl. 1998). *See also Office of Child Support Enforcement v. Williams, supra* (provisions of the Paternity Code do not apply to paternity determinations arising as a matter of presumption under a divorce decree). It stands to reason that without a prior adjudication of paternity or an acknowledgment of the same, there can be no modification of paternity. What occurred in 1998 with the paternity complaint by OCSE, accordingly, was not an action to modify but an original action to establish paternity. *See Bean v. Office of Child Support Enforcement*, 340 Ark. 286, 9 S.W.3d 520 (2000).

Because we conclude that no adjudication of who Megan's biological father is has transpired, we hold that § 9-10-115(f) is inapposite to the instant case.[3] All that has occurred is that John was eliminated as the biological father by the 1998 decree. Megan, as a result, is without a father, and no support is currently being paid. Because we hold that a modification of paternity has not occurred in this matter, we need not address Willlis's argument that OCSE's action is time-barred.

Reversed and remanded.

THORNTON and HANNAH, JJ. concur.

JIM HANNAH, Justice, concurring. While I am compelled to concur in the result in this case, it must be noted that this case turns on a unique set of facts, and reliance on this opinion should take those facts into account. We have before us a couple who married and divorced twice. In this case, we are also faced with a chancellor in the second divorce of the parties who, despite a prior divorce decree setting out that Megan was born of the marriage, allowed DNA testing to disprove that prior finding and then declared John Triplett was not the father of Megan. There was no appeal from this divorce decree and, therefore, this issue was not brought to this court. Thus, when faced with its statutory obligation of locating the proper party to secure repayment of benefits, the Office of Child Support Enforcement was faced with a court order that declared that the presumed and previously declared father was not the father. Therefore, OCSE found no paternity had been established as to Megan and filed an action under Ark. Code Ann. § 9-10-104(4) (Repl. 1998) to establish paternity after the chancery court bastardized Megan.

It is not my view that this decision opens the door to dispute paternity in the typical divorce decree setting out that children born of the marriage are the children of the husband and wife. *See Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999). I am concerned that the analysis of the majority under res judicata and collateral estoppel may create the impression that divorce decrees are not the binding court orders they have been previously found to be.

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[3] The modification section of the Paternity Code has been amended three times in the past six years to establish differing time periods in which paternity determinations can be modified. *See* Act 1091 of 1995 (five years); Act 1296 of 1997 (three years); Act 1736 of 2001 (no time limit).

It is important as well to keep in mind that absent the chancery decree bastardizing Megan, there would have been no need to establish paternity. Paternity had been set out in the 1992 decree. Therefore, in such a case, any action by OCSE would be by way of assignment of rights by Merigayle to OCSE. OCSE would not be allowed to challenge Megan's paternity because OCSE would stand in Merigayle's shoes as the contractual assignee of her entitlement to support. *Office of Child Sup. Enforcem't v. Ragland*, 330 Ark. 280, 954 S.W.2d 218 (1997). By the 1992 decree of divorce, Merigayle acknowledged Megan was born of the marriage. Further, by an affidavit dated June 17, 1993, Merigayle swore under oath that Megan was born of the marriage. Nothing in the statutes creating the paternity action purports to do away with the presumption of legitimacy of a child born during marriage. *Hall v. Freeman*, 327 Ark. 148, 936 S.W.2d 761 (1997). Further, nothing has altered the bar to parties to a divorce decree challenging the finding of paternity stated therein. *Williams, supra*. It should also be noted that there is not only the above noted false affidavit, but yet another affidavit stating the truth. There is an affidavit dated May 15, 1998, wherein Merigayle declares Willis is the father of Megan. Merigayle has lied in an affidavit in 1993. It is difficult to imagine this court would countenance Merigayle going into court after affirming under oath that Megan was the child of John Triplett to assert she was not. This would be so simply on grounds of public policy. The integrity of the court would be impugned thereby. *Grable v. Grable*, 307 Ark. 410, 821 S.W.2d 21 (1991). Because Merigayle could not do so, OCSE under Merigayle's assignment of rights could not do so. As this court stated in *Guaranty Nat'l Ins. v. Denver Roller, Inc.*, 313 Ark. 128, 854 S.W.2d 312 (1993), (citing *Pacific Nat'l Bank v. Hernreich*, 240 Ark. 114, 398 S.W.2d 221 (1966)). "It is well settled that 'assignees can receive no better right than their assignors had.' "

Thus, while I must concur in the outcome on this unique set of facts, I must express my concern that this decision not be read too broadly.

THORNTON, J., joins in this concurrence.

Kathleen BOURNE, *Guardian*, and Ralph Howell,
A Minor v. BOARD of TRUSTEES of the
Little Rock POLICEMAN'S RELIEF PENSION FUND

01-444 59 S.W.3d 432

Supreme Court of Arkansas
Opinion delivered November 15, 2001

Robert A. Newcomb, for appellant.

Edward G. Adcock, for appellee.

JIM HANNAH, Justice. This is an appeal from the trial court's dismissal of a deceased retired police officer's surviving son's suit for benefits under his father's pension where his father had no spouse at the time of his death. The applicable statute at the time of the retired police officer's death in 1997, Ark. Code Ann. § 24-11-425 (Supp. 1997), provided that a monthly pension would be paid to a qualified survivor "during the surviving spouse's life." This language requiring a living spouse as a condition for payment of a survivor's pension first appeared in the statute in 1987 when the code was reenacted. No act of the Arkansas Legislature made this change. The last act amending section 24-11-425 prior to the 1987 code revision was Act 1027 of 1985. That Act, in referring to the

qualified survivor, stated "during his/her life," rather than "during the surviving spouse's life," which inexplicably appears in the 1987 volume. The language "during his/her life" first appeared in Act 582 of 1981 and remained in the statute until the 1987 code revision. In fact "during his/her life" also appeared in Act 618 of 1987 which amended section 24-11-425 as it appeared in the 1987 supplement rather than the 1987 volume. Yet somehow in the 1987 Supplement we find again "during the surviving spouse's life." Thus, while the statute as it appeared in the 1987 volume required a surviving spouse, no act of the legislature ever amended the section 24-11-425 to use this language. Therefore, there was a modification or change in the statute in revision in a manner not authorized by the laws or constitutions of Arkansas. Ark. Code Ann. § 1-2-103(a) (Repl. 1996) provides that in such case the prior language applies. Thus, Ark. Stat. Ann. § 19-1808 (Supp. 1985) applies to this case and provides that where there is a surviving spouse, child, or children under the age of eighteen, then the Board of Trustees shall direct a monthly pension to a surviving spouse for life or to a surviving minor child to age eighteen. The applicable statute does not make payment of a monthly pension to a qualified dependent on the existence of a surviving spouse. On this basis, the trial court entered a dismissal in error, and this case is reversed and remanded.

Facts

Matthew Howell was born in 1983 while his father Ralph Howell was a member of the Little Rock Police Department. Ralph retired in 1989 and began receiving retirement benefits. On his application for benefits, he listed his son Matthew as a qualified survivor in the event of his death. Ralph and Matthew's mother, Kathleen Bourne, were divorced. Thus, on March 24, 1997, Ralph died without a surviving spouse. After Ralph's death, Matthew applied for and was denied death benefits under Ark. Code Ann. § 24-11-425 because there was no surviving spouse. In 1999, the statute setting out pension benefits was modified to provide benefits for surviving children in the absence of a surviving spouse. Matthew again applied, and was again denied, this time based upon Ralph's death being in 1997 and the court finding the 1999 act was not retroactive.

Statutory Interpretation

This case requires interpretation of the Arkansas statutes. In *Western Carroll Cty. Amb. Dist. v. Johnson*, 345 Ark. 95, 44 S.W.3d 284 (2001), this court stated:

> 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).

Western Carroll Cty. Amb. Dist., 345 Ark. at 99-100.

In applying these principles to the interpretation of Ark. Code Ann. § 24-11-425, we first note that the phrase in contention provides benefits for children of deceased police officers if there is a surviving spouse, but does not if there is no surviving spouse. It would be surprising if the legislature intended to provide for children of deceased officers who had surviving spouses but did not intend to provide for an officer's orphaned child. This might be argued to be an absurd consequence contrary to legislative intent. However, we note more significantly that we are unable to find any act of the legislature that amended the subject sentence to include this language making payment of benefits dependent upon the existence of a surviving spouse. It appears this language was added

and the statute was changed in error in the reenactment of the code in 1987. On that basis, Ark. Code Ann. § 1-2-103 applies to correct the error. *Cox v. City of Caddo Valley*, 305 Ark. 155, 806 S.W.2d 6 (1991). We first, however, consider the legislative and statutory history of the Policeman's Pension and Relief Fund.

The Policeman's Pension and Relief Fund

We have before us something more than merely a retirement plan for police officers. Act 250 of 1937 established a "policeman's pension and relief fund." Section one of Act 250 provides a tax on property to provide a fund for pensioned and superannuated members of the police department as well as for "widows and orphans or dependent mothers of deceased members of the police department. . . ." This purpose set out in the original act has been adhered to consistently throughout the years until the erroneous amendment of section 24-11-425 in the 1987 code reenactment. The statute has indeed been amended by the Legislature a number of times, but up until 1987, it always retained the same purpose, to benefit police officers through retirement, disability, and provide pension benefits for spouses and children in the event of death of the police officer. Only by the unintended modification to the statute in the 1987 reenactment was this purpose altered to require a surviving spouse before any monthly pension could be paid to survivors.

Section 8, as originally drafted in 1937, provided that the benefits were to be paid to police officers as well as "to such widow" and "for such child." Also, section 8 in its last sentence stated, "Provided that any member of the police department retired and pensioned under the provision of the Act shall die while so retired and pensioned, leaving a widow or children or widowed mother surviving, shall be entitled to a pension under this act." Section 13 of the Act makes provision for a widow or child or widowed mother to make application to the board of trustees. Finally, section 19 requires every member of the department to file the names of beneficiaries. Thus, it is apparent that the pension and relief fund was not intended simply as a retirement fund for police officers. This Act was codified in Pope's Digest, sections 9863, 9868, and 9874. Act 86 of 1953 modified funding and modified pension amounts. Again, the benefits were to be paid "to such widow" and "for such child." Section 8 was again modified in 1965 and in 1967; however, the cited language remained the same. In 1981, by Act 582, Section 8 was amended to provide, "[S]hall leave

a widow or child or children under the age of eighteen (18) year surviving, the said board of trustees shall direct a monthly pension during his/her life. . . ." This same act added a provision that stated, "In addition to the above monthly pension such Board of Trustees shall order and direct payment of the sum of one hundred twenty five dollars ($125.00) per month to each child under eighteen (18) years of age" under certain conditions there set out. This was a benefit to provide added assistance to children furthering their education.

Our current problem arose during codification and reenactment of the Arkansas laws in 1987. There is a fundamental change in the statute as printed in 1987 that can't be accounted for in the acts. Act 1027 of 1985 was the last act prior to the 1987 code revision, and is referenced in the notes at the end of the statute in the 1987 volume. This Act made some changes to the statute. However, the relevant language read:

> If any active police officer shall die or if any retired member dies from any cause, leaving a surviving spouse or child or children under the age of eighteen (18) years, *then the Board of Trustees shall direct a monthly pension during his/her life in an amount. . . .* (Emphasis added.)

Thus, as stated, the language "during his/her life" remained from 1981 until the Code reenactment. Somehow this language was altered in transcription into the 1987 Code to read:

> If any active police officer shall die or if any retired member dies from any cause, leaving a surviving spouse or child under the age of eighteen (18) years, *then the Board of Trustees shall direct a monthly pension during the surviving spouse's life in an amount. . . .* (Emphasis added.)

The change from "during his/her life" to "during the surviving spouse's life" fundamentally alters who may draw a pension. Under the language printed in the 1987 Code, a child may not be paid a monthly pension unless there is a surviving spouse. Apparently no one caught this error because from 1987 until 1999 the language "during the surviving spouse's life" remained in the printed code. It should also be noted that Act 618 of 1987, which amended the section and appeared in the 1987 supplement, also provides "during his/her life." Inexplicably this language was not used in the 1987 supplement. Again, the language printed in the code is "during the

surviving spouse's life." It was only in Act 978 of 1999 that the error was apparently caught and corrected.

This type of error was envisioned when the new code was adopted in 1987. Act 267 of 1987 codified at Ark. Code Ann. § 1-2-103(a)(3) provides:

> (a) All acts, codes, and statutes, and all parts of them and all amendments to them of a general and permanent nature in effect on December 31, 1987, are repealed unless:
>
> . . .
>
> (3) Omitted, changed, or modified by the Arkansas Code Revision Commission, or its predecessors, in a manner not authorized by the laws or the constitutions of Arkansas in effect at the time of the omission, change, or modification.

Here we have a change or modification that was not authorized by the laws in effect at the time of the change or modification. The prior statute, Ark. Stat. Ann. § 19-1808 (Supp. 1985), provided that the Board of Trustees shall direct a monthly pension "during his/her life."

■ ■ Nothing in Act 1027 of 1985 permitted substituting "during a surviving spouse's life" for "during his/her life," which is the proper language of the Act. Somehow a clerical error was made in codification in the new code in 1987. A similar situation was discussed in *Cox, supra*. There, the Arkansas Code Revision Committee used "or" where the act had stated "and/or." Therein the court stated:

> While it is stated that all acts and statutes in effect on December 31, 1987, were repealed by the codification and reenactment of the Arkansas laws, exceptions are provided, and when applicable, the law as it existed on December 31, 1987, shall continue to be controlling. Ark. Code Ann. 1-2-103 (1987). One such exception occurs if the act or statute is omitted, changed, or modified by the Arkansas Code Revision Commission in a manner not authorized by the laws or the constitutions of Arkansas in effect at the time of the omission, change, or modification. Ark. Code Ann. 1-2-103(a)(3).

Cox, 305 Ark. at 157-158.

Here, there is no act that substituted "during the surviving spouse's life" for "during his/her life." The change or modification of section 24-11-425 was done by the Arkansas Code Revision Commission in a manner not authorized by the laws or the Constitution of Arkansas in effect at the time of the omission, change, or modification. Ark. Code Ann. § 1-2-103(a)(3).

However, it should be noted that Act 1197 of 1993 and Act 1241 of 1997 used the same language as contained in section 24-11-425(a) except the minimum amount of payment. Act 1197 of 1993 and Act 1241 of 1997 did not amend section 24-11-425(a) in any way other than to increase the minimum amount of payment. Thus, it appears the legislature looked to the code as printed in drafting the 1993 and 1997 acts and inadvertently picked up the erroneous wording. This problem was addressed in *Citizens to Establish a Reform Party v. Priest*, 325 Ark. 257, 926 S.W.2d 432 (1996), wherein this court noted a provision was included in a statute by mistake beginning with the 1987 reenactment and in a subsequent act the legislature clearly looked to the erroneous language in the code. The court there stated:

> In drafting Acts 946 and 963 of 1995, the legislature obviously looked to the Code provisions. The language used in those Acts does not reflect the original language contained in Act 123 of 1987. It mirrors the modified version of the exception which erroneously appeared in the Arkansas Code. We are reluctant to interpret a statute in a manner contrary to its express language, but we cannot allow a drafting error or codification error to circumvent legislative intent. *Rosario v. State*, 319 Ark. 764, 894 S.W.2d 888 (1995); *Cox v. City of Caddo Valley*, 305 Ark. 155, 806 S.W.2d 6 (1991).

Citizens to Establish a Reform Party, 325 Ark. at 264.

Thus, while the legislature used the erroneous language substituted in the 1987 reenactment, it was a codification error which circumvents the legislative intent, and resort to the wording of the statute prior to the error is required. Ark. Code Ann. § 24-11-425 was previously Ark. Stat. Ann. § 19-1808. The last printing of the statute prior to the error was in the 1985 Supplement. It reads as follows:

> If any active police officer shall die or if any retired member dies from any cause, leaving a surviving spouse or child or children under the age of eighteen (18) years, then the Board of Trustees

> shall direct a monthly pension during his/her life in an amount equal to the rank of the deceased police officer. . . .

The term "during his/her life" means that if an active or retired police officer dies with a surviving spouse or a surviving child or children, a monthly pension shall be paid to such spouse for life, if there is one, or to the minor child or children until the age of eighteen. Thus, payment of a pension under the statute is not dependent upon a spouse surviving the death of the active or retired police officer. We also note that paragraph (a) of Ark Code Ann. § 24-11-245 was substantially amended by Act 978 of 1999, now discussing the benefits paid to the surviving spouse in paragraph (a) and discussing benefits paid to children in paragraph (b). Arguably, this corrects the error just discussed because payment of benefits to children is not tied to the existence of a surviving spouse. This change casts light on legislative intent in this case. While the amendment of an act does not control the interpretation, we can look to changes in statutes made by subsequent amendments to determine legislative intent. *Pledger v. Mid-State Constr. & Materials, Inc.*, 325 Ark. 388, 925 S.W.2d 412 (1996). The 1999 Act brought the statute back into conformity with the statute as it existed prior to the 1987 reenactment and tends to show there was an error.

As to cases arising under section 24-11-425 between the 1987 reenactment and the 1999 amendment on the issue of who may be qualified to receive a monthly pension under the statute, Ark. Stat. Ann. § 19-1808 (Supp. 1985) applies.

Reversed and remanded.

Gail PARKERSON *v.* Charles J. LINCOLN, II

01-478 61 S.W.3d 146

Supreme Court of Arkansas
Opinion delivered November 29, 2001
[Petition for rehearing denied January 10, 2002.]

T.B. Patterson, Jr., P.A., for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Robert L. Henry, III*, and *Richard A. Smith*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. This is an appeal of a summary judgment granted to appellee in an action for legal malpractice and breach of contract. The following facts are undisputed. Appellant, Gail Parkerson, filed her *pro se* complaint against American States Insurance Company ("American States") in Garland County Circuit Court on August 28, 1995. Appellee, Charles Lincoln, II, filed his entry of appearance on October 11, 1995. The losses claimed by appellant against American States occurred on August 27, 1990; she filed her complaint on August 28, 1995 — one day outside of the five-year statute of limitations.

Hearings were held on September 9, 1996, and October 7, 1996, on American States' motion for summary judgment based on the assertion that the claim was barred by the applicable statute of limitations. On October 7, 1996, Judge Walter Wright granted American States' motion for summary judgment, finding that the statute of limitations did, indeed, bar the claims.

On October 8, 1996, appellant spoke with appellee via telephone and was informed that the motion for summary judgment was granted. On October 9, 1996, appellant called appellee and suggested that he file a motion for reconsideration based on the fact that the date the statute would have run would have fallen on the weekend, and August 28th was the first day after the weekend that the complaint could have been filed; therefore, the complaint should have been considered timely filed. Appellee told appellant not to bother him again and instructed her to find another attorney. Appellant and appellee agree that this was the last conversation between the two of them.

On October 11, 1996, appellant resumed representing herself *pro se* and filed a motion for reconsideration, which was granted;

Judge Wright set aside his previous ruling granting American States' motion for summary judgment. On October 17, 1996, appellant wrote a letter to appellee outlining what she believed to be the various mistakes and acts of negligence on his part. All of the acts she alleged to be negligent occurred prior to October 9, 1996. She made specific mention of his alleged negligence and three references to a potential malpractice suit against him. Also on October 17, 1996, appellant filed with the court a notice of change of attorney, notifying the court that appellee was no longer her attorney.

On October 18, 1999, appellant filed in Pulaski County Circuit Court her complaint against appellee for legal malpractice and breach of contract. Appellee moved for summary judgment, contending that the statute of limitations for a breach of contract action had run prior to the date appellant filed her complaint against him. On December 4, 2000, the trial judge heard the appellee's motion for summary judgment and granted same in an order dated January 4, 2001. It is from this order that appellant brings the instant appeal. For her only point on appeal, appellant asserts that the trial court erred in granting summary judgment to appellee, whether on the basis of the statute of limitations or the lack of proximately caused damages, and in dismissing the legal malpractice action of appellant. We affirm.

I. Standard of Review

We have ceased referring to summary judgment as a "drastic" remedy. We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we only approve the granting of the motion when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court, *i.e.*, when there is not any genuine remaining issue of material fact and the moving party is entitled to judgment as a matter of law. *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998). The burden of proving that there is no genuine issue of material fact is upon the movant, and all proof submitted must be viewed favorably to the party resisting the motion. *Ford v. St. Paul Fire & Marine Ins. Co.*, 339 Ark. 434, 5 S.W.3d 460 (1999). On appellate review, we determine if summary judgment was proper based on whether the evidence presented by the movant left a material question of fact unanswered. *City of Dover v. A. G. Barton*, 342 Ark. 521, 29 S.W.3d 698 (2000).

II. Statute of Limitations

The applicable statute of limitations for actions on contract and legal malpractice is three years, pursuant to Ark. Code Ann. § 16-56-105 (Supp. 1999). We have held that the limitations period in these types of cases begins to run when there is a complete and present cause of action, and, in the absence of concealment of the wrong, when the injury occurs, *not* when it is *discovered*. *See Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996); *Chapman v. Alexander*, 307 Ark. 87, 817 S.W.2d 425 (1991). Appellant does not plead concealment on any level. Appellant and appellee agree that the last conversation between the two of them occurred on October 9, 1996. Further, although appellee was still appellant's attorney of record until October 17, 1996, at which time appellant filed notice with the court that appellee was no longer her attorney, all of the allegations of negligence asserted by appellant occurred prior to October 9, 1996. Appellant did not file her complaint against appellee until October 18, 1999. The statute of limitations ran on October 9, 1999. Therefore, appellant's claim against appellee was barred, and the trial court was correct in granting summary judgment in appellee's favor.

Appellant asserts that because appellee had not turned over her file until he made it available to her sometime in November of 1999, then the statute was tolled until she obtained the file. We disagree. Because appellant, in her letter to appellee dated October 17, 1996, outlined to appellee all of the actions that she believed were negligent on his part — all of which occurred *prior* to October 9, 1996, and because we have held that the limitations period begins to run when the injury occurs and not when it is discovered, we hold that the statute had run and appellant's claims against appellee are barred.

Affirmed.

Katherine THOMAS, Individually and As Parent
and Next Friend of Tamarius Thomas, A Minor
v. Ray STEWART and Charter Enterprises

01-259 60 S.W.3d 415

Supreme Court of Arkansas
Opinion delivered November 29, 2001

[redacted]

Gary Eubanks and Associates, by: *Russell D. Marlin*, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Julia L. Busfield* and *John E. Moore*, for appellee.

TOM GLAZE, Justice. Katherine Thomas brings this appeal from the trial court's order granting summary judgment in favor of defendant Ray Stewart. In addition, she asks us to overrule the doctrine of caveat lessee in Arkansas.

Appellant Thomas and her son, Tamarius Thomas, were tenants in an apartment building that was at some point owned by appellee Ray Stewart.[1] Thomas's sister, Anita Benton, was also a

[1] Ray Stewart, d/b/a Charter Enterprises, Inc., was the named defendant in this suit. However, as will be discussed *infra*, Stewart apparently sold the apartment building to Gordon Reese in 1996. For unknown reasons, Reese is most often referred to as Stewart's employee

tenant in that same apartment building. In January of 1998, as Tamarius was leaning on a second-floor balcony railing between the apartments of Thomas and Benton, the railing gave way. Tamarius fell to the ground and suffered numerous injuries. Thomas filed suit against Stewart on December 28, 1999, alleging that Stewart or his employees were responsible for the railing that collapsed, that Stewart failed to inspect his premises in such a manner as to keep them in a reasonably safe condition, and that he failed to maintain the premises in such a way as to assure that they were in a reasonably safe condition.

Stewart answered, asserting that he was under no legal obligation to the Thomases for Tamarius's injuries, sustained in a common area of the apartment complex, absent a statute or an agreement. Shortly thereafter, Stewart moved for summary judgment, asserting that neither Thomas nor Benton had a written lease with him. Further, he argued that under Arkansas law, a landlord is under no legal obligation to a tenant or a tenant's guest for injuries absent a statute or express agreement. While he conceded that he provided some maintenance to the property, Stewart stated he did not expressly agree to assume the duty to inspect the property, remove hazards, or insure the safety of the tenants or their guests. Further, he averred that he had never made any repairs or alterations to the balcony railing at issue prior to the accident.

Thomas responded to Stewart's motion for summary judgment by arguing that the balcony railing had a latent defect that made it dangerous. Thomas contended that Arkansas should recognize a rule, as other jurisdictions have, by which a latent defect renders a landowner liable when injuries proximately result from such a defect. Further, Thomas suggested that Arkansas should adopt a rule that once a landlord has assumed a duty by conducting maintenance or by warning that he would continue to do so, he is liable when injuries proximately result from his failure to do so. Thomas attached deposition excerpts in which she had stated that Gordon Reese, the maintenance man for the apartment complex, had come to her apartment to fix things, like the plumbing or the air conditioner. Thomas's deposition also reflected that Anita Benton, her sister, had told her that the railing was loose and that she (Benton) had informed Reese about that problem before the accident. Both Thomas and her son said that, prior to the accident, they had no idea the railing was loose. Thomas also attached deposition excerpts

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and Stewart is referred to as the owner or landlord.

from Benton; Benton stated that, long before Tamarius's fall in January of 1998, she had complained to Gordon Reese about the balcony being loose, and that Reese told her that he would check the railing or get someone to check and fix it. This deposition testimony, Thomas asserted, presented a genuine issue of material fact as to the landlord's knowledge of the problem, thus rendering summary judgment inappropriate.

After a hearing, the trial court entered an order granting Stewart summary judgment. In that order, the court found the following: 1) there was no written lease between Thomas and Stewart or between Benton and Stewart; 2) there was no express agreement between Stewart and Thomas or Benton relating to repairs, inspection, or maintenance of the property; 3) there is no statute in Arkansas imposing a duty on a landlord to inspect or maintain the leased premises in a safe manner; 4) Thomas failed to prove that Stewart assumed the duty to inspect the leased property, remove hazards, or insure the safety of the tenants or their guests; 5) Thomas failed to establish that any defects in the railing were latent defects, or unknown to the tenant; 6) Benton had full knowledge of the alleged defects, and Tamarius was her guest; 7) Arkansas has adopted the doctrine of caveat lessee, and has done so for over 100 years; and 8) Stewart had not negligently performed any repairs. Therefore, the court granted Stewart's motion for summary judgment.

On appeal, Thomas continues her argument that there are issues of fact that render summary judgment inappropriate. We have, of course, ceased referring to summary judgment as a "drastic" remedy. *See Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998) (supp. opinion on denial of reh'g in *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998)). We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we only approve the granting of the motion when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court, *i.e.*, when there is not any genuine remaining issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried. *BPS, Inc. v. Parker*, 345 Ark. 381, 47 S.W.3d 858 (2001). However, when there is no material dispute as to the facts, the court will determine whether "reasonable minds" could draw "reasonable" inconsistent hypotheses to render summary judgment inappropriate. In other words, when the facts are not at issue but

possible inferences therefrom are, the court will consider whether those inferences can be reasonably drawn from the undisputed facts and whether reasonable minds might differ on those hypotheses. *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000).

In support of her argument that summary judgment was inappropriate, Thomas cites *Hurst v. Feild*, 281 Ark. 106, 661 S.W.2d 393 (1983). In that case, a gas station was leased to Texaco, Inc.; under the terms of the lease to Texaco, the owner agreed to make major repairs over $50.00. Texaco, in turn, subleased the station to Leon Hurst, who was the proprietor of the station during a time when a stone facade was constructed on the building. In November of 1978, Texaco subleased the station to Troy Coleman, who subsequently entered into an oral sublease with Hurst, who remained on as proprietor. The subleases executed by Texaco to Hurst and to Coleman contained an agreement that the lessee would maintain the station in good repair and in a safe condition, but the terms of the oral sublease to Hurst were in question.

In January of 1980, a portion of the stone facade collapsed, injuring Hurst. Hurst, as sublessee, sued for personal injuries against the owners, lessor (Texaco), and sublessor (Coleman). The trial court found that the duty to repair rested on Hurst, and granted summary judgment in favor of the defendants. On appeal, this court reversed as to sublessor Coleman, noting as follows:

> At common law the lessor owed no duty of repair of the premises to the lessee. Arkansas law follows this rule. Unless a landlord agrees with his tenant to repair the leased premises, he cannot, in the absence of statute, be held liable for repairs. *Terry v. Cities of Helena & W. Helena*, 256 Ark. 226, 506 S.W.2d 573 (1974); *Collison v. Curtner*, 141 Ark. 122, 216 S.W. 1059 (1919).
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> In the instant case, the lease agreements made between the owners and Texaco, Inc. and between Texaco, Inc. and Coleman are not applicable to the lease between Coleman and Hurst because of a lack of privity. Therefore, the only question is whether the terms of the oral sublease from Coleman to Hurst imposed upon Coleman a duty to repair. *Appellant Hurst's affidavit was that Coleman agreed to make repairs and that Coleman told Hurst to call him if any repairs were needed. This is sufficient to raise a question of fact.* (Emphasis added.)

Id. at 108; *see also Majewski v. Cantrell*, 293 Ark. 360, 737 S.W.2d 649 (1987) (court held there was an agreement to repair where lessor admitted having sent a worker out to repair roof on numerous occasions).

Here, Thomas asserts that a similar situation exists. She points to Anita Benton's deposition testimony, wherein Benton stated she informed Gordon Reese about the balcony railing being loose prior to Tamarius's fall, and that Reese, as an employee of Stewart, told her he would either fix it or call someone to fix it. Thomas also points to her own deposition testimony where she averred that it was Reese with whom she entered into the oral lease for the apartment, and that Reese was the one responsible for making repairs to the apartments. Reese admitted that he was responsible for the maintenance of the buildings and their railings. Thomas contends that these statements were sufficient to raise a question of fact about whether or not Reese, as an employee of Stewart, entered into an oral agreement to make repairs to the premises.

We agree that there are questions of fact, if for no other reason than because we believe there is a question as to the role and authority of Gordon Reese. Simply put, there are disputed facts surrounding Reese's responsibility and authority concerning the apartment building. Stewart's motion for summary judgment refers to Reese as the "owner of the apartments," and Reese's deposition testimony, attached to that motion, reflects that he purchased the apartments in 1996, long before this incident occurred in January of 1998. In that same deposition, Reese also acknowledges that he was responsible for the maintenance of the buildings and the railings outside them. Further, Thomas attached her own deposition testimony to her response to the initial summary judgment motion; after noting that she never had to sign a written lease, she averred that it was Reese who informed her she could have the apartment and that she had always believed Reese to be the owner of the apartments.

Notwithstanding these foregoing statements, however, counsel for Thomas asserted that Reese was only an "agent, servant, or employee" of the named defendant, Ray Stewart. Further, Thomas's attorney argued that "the defendant, through its agent, servant, or employee Gordon Reese," assumed the duty of maintaining the buildings. Defense counsel never cleared up the issue of Reese's capacity or role, and the trial court, in ruling on the motion, also referred to Reese as "the agent." The court also

phrased the issue as being whether there was an assumption of duty, and asked, "where did this person, Reese, get that authority from?"

Thus, it is apparent that there is a great deal of confusion surrounding Reese's status and his authority in this case. Indeed, at oral arguments before this court, counsel for appellee Stewart acknowledged that she did not focus on Reese's role because she "[did] not want to say there is a fact issue," and she conceded that if Reese's authority mattered, "then we would lose." Nevertheless, Stewart's counsel asserted that even if Reese did have authority, the contentions raised by Thomas were not allegations of an agreement by Reese to fix the railing, but were merely allegations that Benton had complained about the railing.

In support of this argument, Stewart argues that the situation is not akin to that presented in *Hurst*, but instead approximates more closely the facts in *Stalter v. Akers*, 303 Ark. 603, 798 S.W.2d 428 (1990). There, a third party, Mrs. Akers, was injured on the property of Jason and Laura Howard, who rented their house from Patsi Stalter. As Akers left the Howard's house, she tripped and broke her leg on a concrete block that had been placed as a temporary substitute for a broken step. Akers knew that the bottom step had been broken, and she testified that she had overheard a conversation in which Stalter, the lessor, had told Laura Howard that she (Stalter) would repair the broken step. Although the jury found in Akers's favor, this court reversed. Noting that there was evidence that Akers overheard a conversation between Stalter and Howard about fixing the defective step, this court nevertheless held that "a gratuitous promise to repair, unsupported by consideration, is not sufficient to impose upon the landlord a duty to carry out the promise." *Stalter*, 303 Ark. at 607.

The *Stalter* court further noted that, although the Restatement (Second) of Torts § 357 provided that a lessor is subject to liability for physical harm caused to his lessee by a condition of disrepair if the lessor has contracted by a covenant in the lease or otherwise to keep the land in repair, the comment to that section also stated that "th[is] rule has no application where there is no contractual obligation, but merely a gratuitous promise to repair, made after the lessee has entered into possession." *Id.* Thus, holding that an injured third party must establish a landlord's contractual duty to repair a defect in the premises before he may recover for an injury suffered upon leased property over which the landlord has relinquished possession and control to a tenant, this court reversed the jury's verdict. *Id.*

Relying on *Stalter*, the appellee argues that the statement by Reese that he would fix the railing outside Benton's apartment amounted to nothing more than a gratuitous promise to repair, unsupported by consideration. We disagree. We first point out that the *Stalter* case, citing the *Hurst* and *Majewski* decisions, consistently recognized the rule that where it was shown that a sublessor (or lessor) agreed to make repairs, such was sufficient to raise a question of fact regarding duty. However, the trial court in *Stalter* was reversed because it gave an inappropriate jury instruction that failed to reflect that a gratuitous promise to repair, without consideration, is not sufficient to impose upon the landlord a duty to carry out the promise. The present case is a summary judgment one, and the issue, among others, to be developed is whether Stewart's agreement involved a gratuitous promise. Thomas says it did not, arguing that Stewart's (or Reese's) agreement to repair involved consideration because the agreement was made during the parties' month-to-month oral lease. In any event, this issue is yet another issue to be tried, addressed, and decided on remand, in addition to the factual question of Reese's role and authority to make a promise in the first instance.

Thomas also argues that this court should take this opportunity to reexamine the doctrine of caveat lessee, which has been the rule in this state for over one hundred years. *See Haizlip v. Rosenberg*, 63 Ark. 430, 30 S.W. 60 (1897). While we do not foreclose the possibility of considering this issue in the future, we decline to address the question further here for several reasons. First, we point out that, although Thomas urges the court to overrule a long line of cases, including *Propst v. McNeill*, 326 Ark. 623, 932 S.W.2d 766 (1996), her brief fails to provide the court with any authority on the issue of caveat lessee beyond a New Hampshire case, *Sargent v. Ross*, 308 A.2d 528 (N.H. 1973), which was addressed and rejected in *Propst*. Further, Thomas has not apprised the court of any developments since this court decided *Propst* that would cause us to decide the case any differently. In *Propst*, we noted that the question of landlord liability was more properly a question for the General Assembly, stating that, "because of the policy considerations and possible impact that would ensue in enlarging a landlord's liability, there is merit in the argument that such matters might be dealt with better in the legislative arena." *Propst*, 326 Ark. at 626. Thomas has not provided the court with any indication that the General Assembly has taken any action on this issue, and in the absence of any such research or authority, we are hesitant to address the matter here.

Finally, Thomas also argues that the doctrine of caveat lessee can be analogized to that of caveat emptor, which this court addressed and modified in the context of the sale of new houses in the case of *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970). Thomas contends that because the court swept away an "old world caveat related to real property" in *Wawak*, we should take the opportunity to do so here with respect to caveat lessee. We decline to adopt this reasoning. Although Thomas asserts that we should simply adopt a more modern rule, as the court did in *Wawak*, we point out that this court, in that case, had the benefit of *amicus curiae* briefs from interested organizations; such briefs had been invited after the case was submitted in order to ensure that the court would have before it all possible persuasive arguments before overturning long-standing precedent. Without the benefit of such research and argument in this case, we simply do not believe we are in the best-informed position to make relatively sweeping changes to our common law.[2]

Because the trial court improperly concluded that there were no genuine issues of material fact, we reverse the order granting summary judgment against Thomas and remand the case for further proceedings.

IMBER, J., not participating.

BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. Like the majority, I am reluctant to consider such a sweeping change in our common law as completely abandoning the doctrine of caveat lessee for landlords without fully developed facts and briefing accompanied by appropriate *amicus curiae* briefs. I am also reluctant to consider adopting exceptions to the doctrine such as the retention-of-control and latent defect exceptions without comparable briefing.

Yet, it has been almost thirty years since the Uniform Residential Landlord and Tenant Act was first proposed in 1972. The uniform act provided that states should require residential landlords to comply with applicable building and housing codes which affect health and safety, make repairs and keep the premises in a fit and

[2] For similar reasons, and also because Thomas has prevailed in this appeal, we decline Thomas's invitation to adopt exceptions to the caveat lessee doctrine.

habitable condition, maintain common areas, and make available basic plumbing, water, sanitation, and utility services. *See Case Note. Propst v. McNeill: Arkansas Landlord-Tenant Law, A Time for Change*, 51 Ark. L. Rev. 575 (1998). Undoubtedly, this uniform act or some variation of it has been proposed to the General Assembly on several occasions over the past three decades, but no action has been taken by that body. This is so even though this court said in *Propst v. McNeill*, 326 Ark. 623, 626, 932 S.W.2d 766, 768 (1996), that because of the policy considerations inherent in the issue of landlord liability, "there is merit in the argument that such matters might be dealt with better in the legislative arena." Three legislative sessions have occurred since the *Propst* decision, but, again, no action has been taken.

Because the General Assembly has not seen fit to act on this issue, it is appropriate that this court revisit the issue of landlord liability at the next appropriate opportunity. On two occasions in the last decade, justices of this court have shown a willingness to limit the rule of caveat lessee or adopt one of the exceptions to it. *See Eoff v. Warden*, 330 Ark. 244, 953 S.W.2d 880 (1997) (Newbern and Corbin, JJ., dissenting on basis that retention-of-control exception should be considered); *Bartley v. Sweetser*, 319 Ark. 117, 890 S.W.2d 250 (1994) (Newbern, J., concurring on basis that landlord-tenant relationship is a special relationship giving rise to a duty of care).

In the past when the General Assembly has refused to act, this court has made a significant change in its common law. *See, e.g., Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968). In *Parish*, the issue was tort immunity for political subdivisions. Because the General Assembly had refrained from addressing the issue, though called upon to do so by this court in *Kirksey v. City of Fort Smith*, 227 Ark. 630, 300 S.W.2d 257 (1957), we abolished tort immunity for political subdivisions in the *Parish* decision. We acted similarly in *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997) (alcohol vendor's liability for selling alcohol to minors may be submitted to jury on issue of whether sale was proximate cause of resulting injury); *Jackson v. Cadillac Cowboy, Inc.*, 337 Ark. 24, 986 S.W.2d 410 (1999) (alcohol vendors owe duty of care to intoxicated persons, knowing they will drive a motor vehicle). In both cases, we had previously urged the General Assembly to meet the issue of dramshop liability head-on, and no action was taken. It was only after those two decisions were handed down that legislation was enacted. *See* Act 1596 of 1999, now codified at Ark. Code Ann. § 16-126-101 to 106 (Supp. 2001).

The issue of landlord liability for negligence to guests and tenants deserves attention either by the General Assembly or, failing that, by this court.

Kevin Warzell BROWN and Justin Scott Thornhill *v.* STATE of Arkansas

CR 00-1227 60 S.W.3d 422

Supreme Court of Arkansas
Opinion delivered November 29, 2001
[Petition for rehearing denied January 10, 2002.*]

* GLAZE and HANNAH, JJ., would grant.

John Joplin, Deputy Public Defender, for appellants.

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

DONALD L. CORBIN, Justice. Appellants Kevin Warzell Brown and Justin Scott Thornhill appeal from the judgment of the Sebastian County Circuit Court convicting them of aggravated robbery. The robbery occurred on July 6, 1999, at the Convenience Corner store in Fort Smith. The robber was described as a white male, approximately five feet, five inches to five feet, seven inches tall and 120-150 pounds. He wore a ski mask and carried a gun in one hand and a blue, plastic Wal-Mart shopping bag in the other. The State alleged that Thornhill was the one who actually robbed the store while Brown waited outside in the car. Both men were sentenced as habitual offenders. Brown received life imprisonment while Thornhill received thirty years' imprisonment. Appellants raise a total of eight points for reversal. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We reverse and remand for a new trial.

For their first point for reversal, Appellants argue that the trial court erred in denying their motion for a directed verdict on the sole charge of aggravated robbery. They assert that there was insufficient evidence showing that they committed the robbery with a deadly weapon. They rely on (1) the victim's testimony that she thought the gun was fake, and (2) the fact that the only gun recovered from Appellants' apartment was a BB gun. Appellants argue that, at a minimum, the victim's testimony provided a rational basis to instruct the jury on the lesser-included offense of robbery. We agree with the latter argument.

No right has been more zealously protected by this court than the right of an accused to have the jury instructed on lesser-included offenses. *Rainey v. State*, 310 Ark. 419, 837 S.W.2d 453 (1992); *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980). It is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by even the slightest evidence. *See Ellis v. State*, 345 Ark. 415, 47 S.W.3d 259 (2001); *Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001). Thus, we will affirm the trial court's decision to exclude an instruction on a lesser-included offense only if there is no rational basis for giving the instruction. *Id. See also* Ark. Code Ann. § 5-1-110(c) (Repl. 1997).

Here, the evidence shows that Dottie Harrison was working at the Convenience Corner on July 6, 1999. Around 1:30 a.m., a man walked into the store wearing a ski mask and carrying a gun in one hand and a blue, plastic Wal-Mart bag in the other. The robber told Harrison to give him the money. He repeated his demand three times. Harrison thought that it was a friend playing a joke on her until the third time that the man demanded the money. According to Harrison, the robber had the gun in his hand the whole time, holding it kind of sideways and pointing it at her. When asked to describe the gun, Harrison stated: "I don't know a whole lot about guns, but it didn't look right, and that's what I told the detectives that night. It was strange." She testified on cross-examination that the gun looked fake, but she was not sure about it. She admitted telling the police, on the morning of the robbery, that "[t]he gun appeared to be black in color and it looked fake to me." She also admitted stating that her grandchildren played with toy guns and that the gun used in the robbery "just looked plastic to me." On redirect, Harrison stated that if she had known that the gun was not real, she would not have given the robber any money.

At the close of all the evidence, Appellants sought instructions on the lesser offenses of robbery and theft by threat. The trial court refused both instructions. We agree with the trial court's ruling on the offense of theft by threat, as this court has consistently held that theft of property, whether by threat or otherwise, is not a lesser-included offense of aggravated robbery. *See Robinson v. State*, 303 Ark. 351, 797 S.W.2d 425 (1990); *Rolark v. State*, 299 Ark. 299, 772 S.W.2d 588 (1989). We disagree, however, with the trial court's refusal to instruct on robbery.

Robbery is a lesser-included offense of aggravated robbery. *See Tarkington v. State*, 313 Ark. 399, 855 S.W.2d 306 (1993);

Henson v. State, 296 Ark. 472, 757 S.W.2d 560 (1988). "A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another." Ark. Code Ann. § 5-12-102(a) (Repl. 1997). It becomes aggravated robbery if the person is armed with a deadly weapon or represents, by word or conduct, that he is so armed. *See* Ark. Code Ann. § 5-12-103(a)(1) (Repl. 1997). "Generally a robbery instruction is required when the charge is aggravated robbery." *Henson*, 296 Ark. at 474, 757 S.W.2d at 561. The exception to that general rule is when the evidence is so conclusive as to show that only aggravated robbery could have been committed. *Id.* Appellants contend that the victim's testimony that the gun looked fake provided a rational basis for the jury to acquit on the charge of aggravated robbery and convicted on the lesser charge of robbery. We agree.

In *Fairchild v. State*, 269 Ark. 273, 600 S.W.2d 16 (1980), this court held that the victim's perception about a weapon was the key in determining whether there was sufficient proof of aggravated robbery. There, the appellant committed a robbery while holding his hand under his shirt in an attempt to convey to the victim that he was armed with a gun. The jury convicted him of aggravated robbery, but this court reduced the conviction to robbery. This court relied on the fact that the victim "did not attach any special significance to this conduct and certainly did not perceive it to be in any way threatening." *Id.* at 275, 600 S.W.2d at 17. Accordingly, this court held: "Since the appellant's subjective intent does not control what is objectively conveyed to another, a hand under a shirt has no meaning in the context of the aggravated robbery statute *unless the victim at least perceives it to be menacing*." *Id.* (emphasis added).

In *Clemmons v. State*, 303 Ark. 354, 796 S.W.2d 583 (1990), this court affirmed the appellant's aggravated-robbery conviction on the ground that there was no doubt that the appellant had represented, by both words and conduct, that he was armed with a deadly weapon. There, as in *Fairchild*, the victim did not observe a gun. Rather, she indicated that the robber had what she assumed was his finger inside his pocket. However, unlike Fairchild, Clemmons made a verbal representation that he did have a gun. Specifically, Clemmons told the victim that he had a gun and he would shoot her if she did not give him her purse. This court held that where a defendant verbally represents that he is armed with a deadly weapon, it is sufficient to convict for aggravated robbery, regardless of whether he actually had such a weapon. On the other hand,

"[w]here no verbal representation is made and only conduct is in evidence, *the focus is on what the victim perceived concerning a deadly weapon.*" *Id.* at 357, 796 S.W.2d at 585 (emphasis added).

The obvious difference between the facts in this case and those in *Fairchild* and *Clemmons* is that the victim here actually saw a weapon in the robber's hand. We do not believe, however, that this difference renders those holdings inapplicable to the present appeal. The issue is still the same, *i.e.*, whether the victim perceived that the robber possessed a *deadly* weapon.

Here, unlike the robber in *Clemmons*, there is no evidence that the robber, Appellant Thornhill, made any verbal representations as to whether the gun was real or fake. Thus, the focus should be on what the victim perceived about the nature of the weapon. The victim testified that she initially thought the robbery was a joke and that the gun looked fake or strange or plastic. Her testimony constitutes at least slight evidence that the jury could have considered in determining whether Appellants were guilty of aggravated robbery or merely robbery. Moreover, the jury could have concluded, based on the fact that only a BB gun was recovered from Appellants' apartment, that the robbery was not committed by use of a deadly weapon. It is for the jury, not the court, to weigh the evidence and credit that which it believes to be the most cogent. *Robinson*, 269 Ark. 90, 598 S.W.2d 421. The trial court's refusal to give the instruction deprived the jury of the opportunity to weigh the evidence. Accordingly, the trial court erred in refusing to give the instruction. We thus reverse and remand for a new trial.

Additionally, in the event the State seeks to present Brown's confession as evidence in the new trial, we direct the trial court to hold another *Denno* hearing for the purpose of allowing all material witnesses to testify. The record reflects that Brown's interview took place at the Washington County Jail and was conducted by Fort Smith Detectives Clay Thomas and Rusty Walker. Although Walker conducted the bulk of the interview, he was not called to testify at the suppression hearing. This was error because it is the State's burden to present evidence from all material witnesses once the accused asserts that his custodial confession was involuntary.

An accused's statement made while in custody is presumed involuntary, and the burden is on the State to prove by a preponderance of the evidence that it was given voluntarily and was knowingly and intelligently made. *Barcenas v. State*, 343 Ark. 181, 33 S.W.3d 136 (2000); *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427

(1998). "[W]henever the accused offers testimony that his confession was induced by violence, threats, coercion, or offers of reward then the burden is upon the state to produce all material witnesses who were connected with the controverted confession or give adequate explanation for their absence." *Smith v. State*, 254 Ark. 538, 542, 494 S.W.2d 489, 491 (1973). *See also Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997); *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995); *Remeta v. State*, 300 Ark. 92, 777 S.W.2d 833 (1989); *Williams v. State*, 278 Ark. 9, 642 S.W.2d 887 (1982); *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981); *Bushong v. State*, 267 Ark. 113, 589 S.W.2d 559 (1979), *cert. denied*, 446 U.S. 938 (1980); *Gammel v. State*, 259 Ark. 96, 531 S.W.2d 474 (1976); *Russey v. State*, 257 Ark. 570, 519 S.W.2d 751 (1975); *Northern v. State*, 257 Ark. 549, 518 S.W.2d 482 (1975); *Smith v. State*, 256 Ark. 67, 505 S.W.2d 504 (1974). The State's burden to produce all material witnesses exists regardless of whether the defendant specifically raises the issue, in the trial court or on appeal. *See Smith*, 256 Ark. 67, 505 S.W.2d 504. As this court has explained:

> [W]e held in the earlier *Smith* case that, whenever the accused introduced evidence of coercion, the burden of the state could only be met by calling all material witnesses or giving adequate explanation for the absence of any who did not testify. *Nowhere in* Smith *does it appear that, in making an objection based upon a contention the state has failed to show a statement is involuntary, a defendant must point out, in precise words, that a material witness was not called.*

Id. at 70, 505 S.W.2d at 507-08 (emphasis added).

Here, Brown contended that he asked for an attorney during the interview and that his request was not honored. He also contended that the officers threatened him and made false promises of leniency to him. The transcript reflects that when Walker asked Brown to tell him what happened, Brown made the following statement: "I tell you (inaudible) talk to a lawyer (inaudible)." Walker's response was: "(Inaudible) they going to help (inaudible) what will that help in any way?" After a few more questions were asked, Brown stated: "Wait till I talk to a lawyer man." Because the State did not present Walker's testimony at the suppression hearing, Brown's testimony on this issue stands uncontradicted. Accordingly, should the State desire to use Brown's confession in the new trial, it must produce Walker at another suppression hearing so that the trial court may consider his testimony to determine whether Brown's confession was obtained in violation of his right to counsel. Likewise, Walker's testimony is required on Brown's claims that the

officers made false promises of leniency to him and that they threatened him during the course of the interview while the tape recorder was not running.

Reversed and remanded.

ARNOLD, C.J., GLAZE and HANNAH, JJ., concur in part and dissent in part.

TOM GLAZE, Justice, concurring in part; dissenting in part. I concur in the majority's decision to reverse for a limited remand for the trial court to conduct another suppression hearing. However, I disagree with the majority's holding that the trial court erred in refusing to give the lesser-included instruction on robbery. As the majority opinion states, aggravated robbery occurs if the person represents, *by word or conduct*, that he is armed with a deadly weapon.

Here, appellant Thornhill entered the Fort Smith convenience store demanding that the store clerk give him money. Thornhill wore a ski mask and brandished some type of gun to threaten the clerk into complying with Thornhill's demand. Obviously, Thornhill intended his use of the ski mask and gun to cause the clerk to understand that she should comply or Thornhill would use the weapon. Although she initially thought Thornhill's weapon looked strange, the victim (clerk) clearly perceived Thornhill's message that her life was being threatened if she did not hand over money.

In my view of the facts, Thornhill's conduct and words unequivocally conveyed that he was perpetrating an armed robbery. The majority opinion is wrong to suggest that the jury could reasonably have found no aggravated robbery occurred because the police later found only a BB gun in Thornhill's apartment. Such a suggestion fails to focus on what the victim perceived at the time of the crime. The trial court was clearly correct in concluding from Thornhill's conduct and words that he was in the store to commit armed or aggravated robbery. Thus, I would affirm the court's ruling on this point.

ARNOLD, C.J., and HANNAH, J., join this opinion.

Timothy W. KEMP *v.* STATE of Arkansas

CR 00-482 60 S.W.3d 404

Supreme Court of Arkansas
Opinion delivered November 29, 2001

[redacted]

Sam T. Heuer, for appellant.

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

RAY THORNTON, Justice. This appeal arises from a trial court's denial of the Rule 37 petition. Appellant, Timothy Kemp, was arrested and charged with four counts of capital murder. He was convicted and sentenced to death by lethal injection on each count. In *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943, cert. denied 519 U.S. 982 (1996) ("*Kemp I*"), we affirmed the conviction and sentence pertaining to one victim, and affirmed the convictions only as to the remaining three counts. We reversed the death sentences as to the three remaining counts and remanded for resentencing, as there was insufficient evidence to support the trial court's instruction to the jury with respect to the statutory aggravating circumstance that the murders were committed for the purpose of avoiding arrest. *Id.*[1] Following resentencing, the trial court

[1] In its brief, the State argues that appellant's claims pertaining to the death sentence for one victim, Richard Falls, should be procedurally barred because the Rule 37 petition was untimely. However, the State overlooks our decision of *Kemp v. State*, 326 Ark. 910, 934

again imposed the death sentence as to each of the three counts. In *Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998), cert. denied 526 U.S. 1073 (1999) ("*Kemp II*"), we affirmed these convictions. Appellant filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37, alleging that his counsel, Jeff Rosenzweig, had provided ineffective assistance of counsel. After a hearing on the matter, the trial court denied appellant's Rule 37 petition in its entirety.

From that order, appellant brings his appeal and raises four allegations of error. On appeal, appellant asserts that Mr. Rosenzweig was ineffective for four reasons: (1) failing to investigate the ownership of a gun found at the crime scene; (2) failing to correctly cite a statute when proffering an instruction to the trial court; (3) failing to seek a severance of offenses, and (4) various other grounds. We reverse and remand to the trial court for an entry of a written order in compliance with Rule 37.5(i) and our case law.

I. Standard of review

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. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). 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. *Id.*

S.W.2d 526 (1996) (*per curiam*) ("*Kemp III*"), where we concluded:

> We recall the portion of the mandate affirming the conviction and death sentence and stay it until such time as a final disposition of the remaining counts is complete. As such, any petition under Ark. R. Crim. P. 37.2(c) must be filed within sixty days of a mandate following an appeal taken after re-sentencing on the remaining counts. If no appeal is taken after re-sentencing on these counts, the petition must be filed with the appropriate circuit court within ninety days of the entry of judgment.
>
> *Id.*

Here, appellant timely filed his Rule 37 petition. The mandate of our court was returned to the trial court on April 29, 1999, and on May 18, 1999, appellant appeared before the trial court, at which time the trial court appointed Mr. Heuer, counsel for appellant, who met the qualifications set forth in Rule 37.5(b)(2). On August 11, 1999, appellant filed his Rule 37 petition. Therefore, appellant's Rule 37 petition was not untimely with regard to the Falls's sentence.

The criteria for assessing the effectiveness of counsel were enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), which provides that when a convicted defendant complains of ineffective assistance of counsel he must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors the result of the trial would have been different. *Id.* We have adopted the rationale of *Strickland* and held that:

> To prevail on any claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. Secondly, the petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial.

Thomas v. State, 330 Ark. 442, 954 S.W.2d 255 (1997). With this standard of review in mind, we review the issues of ineffectiveness raised by appellant.

II. Ineffective-assistance claims

For his first allegation of error, appellant argues that Mr. Rosenzweig was ineffective for failing to investigate the ownership of a weapon found at the crime scene. Specifically, he argues that a further investigation into this matter would have had bearing on his "imperfect self-defense" claim.

This point is not raised in appellant's Rule 37 petition, but the petition was orally amended at the Rule 37 hearing, where the following colloquy occurred:

> MR. HEUER: I have a motion to add an additional [issue]. After consultation with my client, he wishes for me to pursue an ineffective assistance claim for failure to investigate and pursue leads. I've advised the prosecutor of it. I don't know where it's going. But I could make the motion at the conclusion and ask that the pleadings conform to the proof or I could orally amend at this point.
>
> THE COURT: Are you prepared to argue that today?

MR. HEUER: Yes.

At the hearing, Mr. Rosenzweig testified that the "imperfect self-defense" was the heart of appellant's defense in the mitigation phase of the trial. After hearing the testimony and arguments by counsel, the trial court orally ordered:

> I do not find that the representation by Mr. Rosenzweig was ineffective. . . . I also believe that the failure to investigate as to who specifically owned the weapon, the thirty-two, was not evidence of ineffective assistance of the counsel that would meet the definition of that pursuant to *Strickland versus Washington* since that issue of that weapon was in fact raised at trial and the jury had the opportunity to consider that as part of a self-defense defense.

However, in the trial court's written order, under the "Findings of Fact" section, the trial court merely states:

> 8. (A) That trial counsel for defendant was not ineffective as defined by *Strickland v. Washington*, 466 U.S. 668 (1984), in any aspect of the trial in this matter, including . . . the investigation of the additional gun found at the crime scene . . . [.]

Rule 37.5(i) provides in part that when a hearing is held on the petition, "the circuit court shall, within sixty (60) days of the conclusion of the hearing, *make specific written findings of fact with respect to each factual issue raised by the petition and specific written conclusions of law with respect to each legal issue raised by the petition.*" *Id.* (emphasis added). This provision was adopted from the "Arkansas Effective Death Penalty Act of 1997." *See* Ark. Code Ann. § 16-91-202(h)(1) (Supp. 1999) (requiring that "the judge shall make specific written findings of fact and shall expressly state the judge's conclusions of law relating to each issue raised in the petition for post-conviction relief").

In *Echols v. State*, 344 Ark. 513, 42 S.W.3d 467 (2001), we rejected the State's argument, based upon *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000) and *Matthews v. State*, 333 Ark. 701, 970 S.W.2d 289 (1998) (*per curiam*), that where the trial court makes specific written findings on some, but not all, of the issues raised in the petition, it is up to the defendant to obtain rulings on any omitted issues. We concluded that those cases were distinguishable because appellants had not been sentenced to death. *Id.*

In *Echols*, we remanded the case to the trial court for entry of a written order in compliance with Rule 37.5(i) and our holding in *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999) (holding that the trial court's order was insufficient under Rule 37.3(a)). *Echols*, *supra*. Rule 37.5 reinforces the responsibility of the trial court to make specific written findings of fact and conclusions of law on each issue raised in the petition. *McGehee v. State*, 344 Ark. 602, 43 S.W.3d 125 (2001).

Here, we note that the trial court allowed appellant to orally amend his Rule 37 petition to include the issue of the ownership of the gun, and ruled on the issue from the bench. In its written order, the trial court made a *general* finding of fact, but did not make a "specific finding of fact with respect to [the] factual issue[,]" nor did it make any "specific written conclusion[] of law" with respect to the legal issue. Ark. R. Crim. P. 37.5(i). This deficiency requires that we remand for the trial court to address this point as required by our rule.

For his second allegation of error, appellant argues that Mr. Rosenzweig was ineffective for failing to correctly cite Ark. Code Ann. § 5-2-614 (Repl. 1997), the statute regarding the "imperfect self-defense," in the proffered jury instruction. Specifically, he argues that omitting the phrase, "is necessary for any of the purposes justifying that the use of force under this subchapter," from the statute is grounds for an ineffective assistance of counsel claim.

At the conclusion of the guilt phase at trial, Mr. Rosenzweig offered two jury instructions based upon Ark. Code Ann. § 5-2-614, which established appellant's defense of "imperfect self-defense." The first instruction, set forth in his Rule 37 petition and now on appeal, reads as follows:

> When a person believes that the use of force is necessary in defense of himself but that person is reckless or negligent either in forming that belief or in employing an excessive degree of physical force, the defense of justification — use of deadly physical force in self-defense — is unavailable as a defense to any offense for which recklessness or negligence suffices to establish culpability.

Source: Ark. Code Ann. § 5-2-614.

While citing the statute in this proffered instruction, Mr. Rosenzweig omitted the aforementioned phrase from the statutory

language, and the trial court refused both proffered jury instructions. On direct appeal in *Kemp I, supra*, we held that the trial court did not err in refusing to allow the proffered jury instructions *Id.* We noted that neither proffered jury instruction was an AMCI instruction, and because appellant's proffered instruction did not correctly state the law, the trial court did not err in refusing to give it. *Id.* (citing *Pickett v. State*, 321 Ark. 224, 902 S.W.2d 208 (1995)).

In the trial court's order under review in this proceeding, the trial court states in paragraph 8(b) of the "Findings of Fact" section that "there was not a rational basis for the giving of the two jury instructions as set forth above, which were proffered by trial counsel on behalf of the defendant[.]" However, there are no specific conclusions of law presented on this point, other than paragraph 9, which states, "[t]hat the constitutional rights of the defendant were not violated through the course of the trials of this matter[.]" It appears that this point was addressed in the trial court's fact section, but the order contains no specific conclusions of law. This deficiency requires that we reverse and remand to the trial court for compliance with Rule 37.5(i).

For his third allegation of error, appellant argues that Mr. Rosenzweig was ineffective for failing to request a severance. Specifically, he argues that a failure in severing the trial prevented the jury from considering each sentence separately to insure that there was no spilling-over from the victim-impact testimony.

Appellant alleges in his Rule 37 petition that "trial counsel was ineffective by failing to request the separate counts of capital murder to be severed." In its order, the trial court made the following ruling:

> 8. (A) That trial counsel for the defendant was not ineffective as defined by *Strickland v. Washington*, 466 U.S. 668 (1984), in any aspect of the trial in this matter . . . for failing to move for a severance of the counts, or any other matters that were raised by the defendant in this petition[.]

Here, the trial court made a *general* finding of fact with no explanation, but did *not* include a separate, specific, written conclusion of law on the issue. To address this deficiency, we reverse and remand to the trial court for entry of a written order in compliance with Rule 37.5(i).

For his fourth allegation of error, appellant reargues four points that were raised in *Kemp I, supra,* and *Kemp II, supra.* These points include (1) whether the victim-impact statute is constitutional; (2) whether the cumulative effective of victim-impact testimony violated appellant's due process rights; (3) whether appellant's due process rights were violated when we affirmed the trial court's refusal to submit two proffered jury instructions in *Kemp I, supra*; and (4) whether appellant's constitutional rights were violated when we affirmed in *Kemp I, supra,* that venue in Pulaski County Circuit Court was proper.

In its order, the trial court states:

> 8. (D) That the issues pertaining to the jurisdiction of the court, the victim-impact evidence, and the refusal of this Court to give the instructions requested by defendant have been determined by the Arkansas Supreme Court in their reviews of the convictions in these cases, which have all been affirmed by the Arkansas Supreme Court[.]

However, there are no conclusions of law pertaining to these issues, other than paragraph 9, which states, "[T]he constitutional rights of the defendant were not violated . . . [,]" and paragraph 10, which states, "[T]his Court did not lack jurisdiction, and in fact was a court of proper jurisdiction over the person of the defendant and the subject matter presented[.]" The trial court did not make a specific written conclusion of law that these issues are not cognizable under Rule 37. We hold that the conclusions of law as written are not specific enough as required by our rule.

We hold that the trial court's order does not comply with our Rule 37.5(i) because the trial court failed to make *specific written* findings of fact *and* conclusions of law. In his order before us, the trial court's findings of fact are quite general, and the *two* conclusions of law are not sufficient under our rule. We reverse and remand to the trial court for a written order on all points in compliance with Rule 37.5(i) and our case law, including *McGehee, supra,* and *Echols, supra.*

Under the precedent established in *Echols, supra,* we limit the trial court's duties on remand to making factual findings and legal conclusions only as to the issues raised by appellant on appeal, as all other claims raised below but not argued are considered abandoned. *Id.* We should also note that no new issues may be raised by appellant. To avoid lengthy delay, the order is to be completed and

the record is to be filed with this court within sixty days of the date that the mandate in this proceeding is issued.

Reversed and remanded.

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

TOM GLAZE, Justice, dissenting. I dissent for the reasons set out in the dissenting opinion in *Echols v. State*, 344 Ark. 513, 520-523, 42 S.W.3d 467, 471-473 (2001). *See also McGehee v. State*, 344 Ark. 602, 606, 43 S.W.3d 125, 128 (2001) (GLAZE, J., dissenting).

ROBERT L. BROWN, Justice. I concur with the majority opinion in every respect save one. The appellant raised four issues in his Rule 37.5 petition: (1) the victim-impact statute is unconstitutional; (2) the cumulative effect of the victim-impact statements violated the appellant's due process rights; (3) the appellant's due process rights were violated when the trial court refused two proffered instructions; and (4) appellant's constitutional rights were violated by our affirmance of his death sentence.

All of these issues were resolved by this court in the direct appeal of the appellant's judgment of conviction. The trial court said as much in its order:

> 8. (D) That the issues pertaining to the jurisdiction of the court, the victim-impact evidence, and the refusal of this Court to give the instructions requested by defendant have been determined by the Arkansas Supreme Court in their reviews of the convictions in these cases, which have all been affirmed by the Arkansas Supreme Court[.]

I disagree with the majority's holding that the trial court's conclusion on this point was not sufficiently specific. The trial court said in effect that these issues are not cognizable in a Rule 37 proceeding because they were decided on direct appeal. Accordingly, I would not remand these issues for additional conclusions.

IMBER, J., joins.

STATE of Arkansas *v.* Timothy Wayne HARDIN

CR 01-371 60 S.W.3d 397

Supreme Court of Arkansas
Opinion delivered November 29, 2001
[Petition for rehearing denied January 10, 2002.*]

* ARNOLD, C.J., and GLAZE and IMBER, J.J., would grant.

Mark Pryor, Att'y Gen., by: *Lauren Elizabeth Heil*, Ass't Att'y Gen., for appellant.

James R. Wallace & Associates, by: *H.C. Jay Martin*, for appellee.

RAY THORNTON, Justice. The State appeals the January 11, 2001, judgment of the Pulaski County Circuit Court, granting appellee, Timothy Wayne Hardin, a new trial on grounds of ineffective assistance of counsel pursuant to Ark. R. Crim. P. 37.2. The State contends that the trial court erred in granting Mr. Hardin a new trial because it did not find that counsel's ineffective assistance was prejudicial to him. It appears that the trial court erroneously relied upon *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980), and found that ineffective assistance could be predicated upon a collective consideration of all the allegations. We disagree with the trial court's interpretation and application of *Neal, supra*, and reverse and remand the case to the trial court for further action consistent with this opinion.

On November 16, 1999, a jury convicted Mr. Hardin of one count of rape, one count of residential burglary, and one count of misdemeanor theft of property. Mr. Hardin's conviction was affirmed on direct appeal. *Hardin v. State*, CACR 99-604, 2000 WL 139258 (Ark. App. Feb. 2, 2000). Thereafter, Mr. Hardin filed a petition for postconviction relief pursuant to Rule 37, alleging that his attorney, Jeff Weber, had rendered ineffective assistance of counsel. In his petition, Mr. Hardin alleged that Mr. Weber was ineffective as counsel due to his (1) failure to investigate defenses, (2) failure to investigate defense witnesses, (3) failure to prepare Mr. Hardin to testify, and (4) failure to ask questions on cross-examination of the victim that Mr. Hardin requested him to ask.

The Rule 37 hearing began on November 3, 2000, and on January 11, 2001, the trial court entered an order granting Mr.

Hardin a new trial. It is from this order that the State now brings this appeal. While the underlying case is criminal in nature, which suggests that Ark. R. App. P.—Crim. 3 should apply, we have recognized that Rule 37 proceedings are "civil in nature" and have recently decided appeals by the State from grants of postconviction relief. *State v. Dillard*, 338 Ark. 571, 998 S.W.2d 750 (1999) (citing *State v. Clemmons*, 334 Ark. 440, 976 S.W.2d 923 (1998); *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998); *State v. Slocum*, 332 Ark. 207, 964 S.W.2d 388 (1998)). Having determined that this appeal is properly before us, we turn to the merits of the case.

I. Standard of Review

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. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001) (citing *Dillard, supra*). 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. *Davis, supra* (citing *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997)).

II. Ineffective Assistance of Counsel

We outlined the principles of law regarding postconviction challenges in *Davis, supra*, where we stated:

> 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 or 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).

Davis, supra.

We also outlined the *Strickland* standard for assessing the effectiveness of trial counsel in *Davis, supra*:

> [T]he 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 a 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.

Id. (quoting *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999)). In making a determination on a claim of ineffectiveness, the totality of the evidence before the factfinder must be considered. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000).

Upon examination of the trial court's order, we conclude that there is error in the order that requires us to remand the case. In its order granting Mr. Hardin a new trial, the trial court reasoned:

> In *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980) at 428, the Arkansas Supreme Court stated: "None of the specific allegations considered separately, if true, would justify vacation of the sentence . . . Still petitioner's allegations, considered collectively, warrant our granting permission to petitioner to apply to the trial court for relief under Rule 37 on the basis of the specific allegations of ineffective assistance of counsel enumerated above. . . ."
>
> This court is of the opinion that the seriousness of the Class Y felony charge required more investigation and research than what was done by counsel, thus, rendering his assistance ineffective pursuant to Rule 37.

The State argues that the trial court's reliance on *Neal, supra*, is misplaced. We agree.

While the express language that the trial court recited in *Neal, supra*, seems to support the trial court's finding that cumulative error can be used to support a finding of ineffective assistance of counsel, that conclusion is mistaken. First, we note that *Neal, supra*, was decided when the former Rule 37 was in effect, and the former Rule 37 required petitioners who had appealed their convictions to seek our permission to proceed in circuit court. *See* Ark. R. Crim. P. 37.2(a) (1990) (modified 1991) ("If the conviction in the original case was appealed to the Supreme Court or Court of Appeals, then no proceedings under this rule shall be entertained by the circuit court without prior permission of the Supreme Court."); *but see* Ark. R. Crim P. 37.2(a) ("If the conviction in the original case was appealed to the Supreme Court or Court of Appeals, then no proceedings under this rule shall be entertained by the circuit court while the appeal is pending."). Therefore, the pronouncement in *Neal, supra*, was merely a determination that the petitioner was entitled to proceed with a Rule 37 hearing, not a resolution of the ultimate issue of whether trial counsel was ineffective. Second, we note that while *Neal, supra*, seems to suggest a cumulative-error analysis in ineffective assistance of counsel challenges, we have squarely rejected the cumulative-error analysis on numerous occasions. *E.g., Noel, supra* (holding that we do not recognize cumulative error in allegations of ineffective assistance of counsel). We conclude that the trial court erred in resting its *Strickland* analysis upon a cumulation of allegations of ineffective assistance of counsel. The trial court's reliance on *Neal, supra*, is misplaced. Because the trial court erroneously relied on *Neal, supra*, what we do not know is whether the trial court would have found that one or more of the allegations of ineffective assistance of counsel, standing alone,

showed that Mr. Weber made errors so serious that he was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment, and that the deficient performance prejudiced the defense sufficiently to undermine confidence in the outcome of the trial. *See Davis, supra.*

The State contends that the trial court erred in granting Mr. Hardin a new trial because it did not find that counsel's ineffective assistance was prejudicial to him. The State argues that the trial court's finding that counsel rendered ineffective assistance under Rule 37 was not adequate to show prejudice and that the failure to interview witnesses and other alleged deficiencies should be excused as trial strategy. From the record before us, and in light of the United States Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000), as well as the trial court's mistaken reliance upon cumulative error, we cannot say that the trial court was clearly erroneous on this point. We conclude that the case must be remanded to analyze the matter without giving consideration to cumulative error. Only when such an analysis is made will we be able to determine whether both prongs of *Strickland* have been met. Therefore, we remand the case for the trial court to make that determination.

Reversed and remanded.

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

ANNABELLE CLINTON IMBER, Justice, dissenting. The majority ignores that under *Strickland v. Washington*, regardless of whether or not counsel's performance was deficient, there must still be a showing of prejudice: "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." 466 U.S. 668, 693 (1984). The United States Supreme Court made it clear in *Strickland* that the existence of prejudice is paramount to a finding of ineffective assistance of counsel:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 691-92. (Citation omitted.) It is not enough for the petitioner to show that the errors had some conceivable effect on the outcome of the proceeding; rather the petitioner must show there is a reasonable probability that, absent counsel's errors, the factfinder would have had a reasonable doubt as to guilt. *Id.* at 693-95.

Without determining whether any purported deficiencies in Mr. Weber's performance prejudiced Mr. Hardin, the majority remands this case and instructs the trial court "to analyze the matter without giving consideration to cumulative error." Remanding the case, however, is completely unnecessary. It is Mr. Hardin's failure to make the required showing of sufficient prejudice that defeats his ineffective-assistance-of-counsel claim, rather than the trial court's misplaced reliance on *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980). This court has recently reversed the trial court's grant of a new trial in several cases after reviewing the record and determining that there was no showing of prejudice.

In *State v. Herred*, the trial court found that Herred was denied effective assistance of counsel and granted him a new trial. 332 Ark. 241, 964 S.W.2d 391 (1998). We held that the trial court clearly erred in granting postconviction relief "because it failed to find that any of counsel's purported deficiencies prejudiced Herred." *Id.* at 253, 964 S.W.2d at 398. We pointed out the trial court's failure to make a finding that there existed a reasonable probability of a different outcome. *Id.* Furthermore, we concluded that the record suggested otherwise. *Id.* Similarly, in *State v. Clemmons*, the circuit court found that the defendant was denied effective assistance of counsel and granted him a new trial. 334 Ark. 440, 976 S.W.2d 923 (1998). In reversing the circuit court's grant of a new trial, we noted that the circuit court failed to state how a "purported deficiency prejudiced Clemmons," and we held that "the circuit court was clearly erroneous in granting Clemmons a new trial because no showing was made that . . . Clemmons was prejudiced by counsel's deficient representation." *Id.* at 444, 976 S.W.2d at 925. In *State v. Slocum*, the trial court granted Slocum a new trial based on alleged ineffective assistance of counsel. 332 Ark. 207, 964 S.W.2d 388 (1998). Slocum asserted that his counsel was ineffective for failing to request a specific jury instruction. We held that the trial court clearly erred in granting the new trial, adding that "it cannot be said that the result of the trial would have been different had the instruction been requested." *Id.* at 213, 964 S.W.2d at 391.

Likewise, in this case, the trial court's order sets forth no facts showing prejudice and no such facts are apparent from the record.

In making a determination on a claim of ineffectiveness, the totality of the evidence before the factfinder must be considered. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). Once again, the Supreme Court has fully explained what a court should keep in mind as it makes the prejudice determination:

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Strickland, supra, at 695-96. Based upon the evidence submitted at the postconviction hearing in this case, we know what the omitted testimony would have been. Considering the totality of the evidence, it is inconceivable that the testimony of the witnesses who were not called by defense counsel to testify at trial, or Mr. Hardin's own testimony, would have produced a reasonable doubt in the minds of the jury as to Mr. Hardin's guilt.

In addressing whether the trial court's finding that counsel rendered ineffective assistance was adequate to show prejudice, the majority makes the following holding: "From the record before us, and in light of the United States Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000), as well as the trial court's mistaken reliance upon cumulative error, we cannot say that the trial court was clearly erroneous on this point." I disagree. Not only is the trial court's mistaken reliance upon cumulative error irrelevant, but the majority's application of *Williams v. Taylor* is misplaced, and the record before us does not show that Mr. Hardin was prejudiced by counsel's purported deficient performance. As demonstrated by *Herred, Clemmons,* and *Slocum, supra,* this court can reverse the grant of a new trial where it is clear from the record that no showing of prejudice has been made. Thus, the trial court's mistaken reliance upon cumulative error is of no consequence.

In addition to being distracted by the irrelevant cumulative error issue, the majority mistakenly relies upon *Williams v. Taylor*, 529 U.S. 362 (2000). The Supreme Court held in *Williams* that an attorney's failure to investigate and present substantial mitigating

evidence on behalf of a defendant warranted a finding of ineffective assistance of counsel. *Id.* Clearly, the case before us is distinguishable from *Williams*. It cannot be said there is substantial mitigating evidence in favor of Mr. Hardin. If there had been a "voluminous amount" of favorable evidence, as there was in *Williams*, Mr. Hardin might have been able to show that presentation of the omitted evidence would have changed the outcome of his trial. *Id.* at 396. The totality of the evidence in this case, however, weighs heavily against Mr. Hardin.

The witnesses who were not called at trial would have been able to testify only to the fact that Mr. Hardin and the victim were seen together in the months prior to the rape and to the fact that Mr. Hardin was seen near the victim's apartment building prior to the rape. The evidence might have included testimony from James McNeely, the security guard at the victim's apartment complex. Mr. McNeely testified at the postconviction hearing that he saw Mr. Hardin visiting the victim's apartment building "in the evening time a couple of times and one time at night." Mr. McNeely could not confirm the dates on which he saw Mr. Hardin, and testified that he had never seen Mr. Hardin and the victim together. Another potential witness was Mr. Hardin's friend, Henry Ray Harper, who testified at the hearing that, sometime in the summer of 1997, he traveled with Mr. Hardin to pick up the victim in Hot Springs. The trio then traveled back together to his house in Little Rock, where Mr. Harper saw Mr. Hardin and the victim "acting like lovebirds . . . like they, you know, had made up and were getting back together." Another potential witness, a Little Rock police officer, took a report from Mr. Hardin twelve days before the rape. According to the report, Mr. Hardin's car had been vandalized while parked near the victim's apartment building one evening. Although the police report places Mr. Hardin near the victim's apartment, it also reflects that he gave the officer a North Little Rock address, and not the victim's address, as his home address. From this evidence, it would have been just as likely for the jury to infer that Mr. Hardin was stalking the victim rather than visiting her.

The victim admitted to having a relationship with Mr. Hardin in 1996, but denied having any contact with him after she moved back to Little Rock in October 1997. Thus, some of the proposed testimony by the witnesses who were not called to testify at the trial might suggest the victim and Mr. Hardin had been dating immediately prior to the rape, contrary to the assertions of the victim. However, even if the omitted evidence had been used to attack the victim's credibility at trial, it would not have been strong enough to

show a reasonable probability of a different outcome at trial. Regardless of any prior relationship between the victim and Mr. Hardin, the evidence indicates that the encounter in question was one involving violence and not consent. Other testimony came out at trial, as well as physical and medical evidence, indicating that a rape occurred.

The officer who responded to the victim's 911 call testified that "the door was kind of kicked in . . ., [t]here were several dents around the door knob . . ., the dead bolt was kind of dented in a little bit" and the safety chain was broken. He also testified that the victim appeared injured and he called an ambulance. The emergency physician who examined the victim after the rape testified that, although the rape kit detected no sperm in the victim's vagina, she had nicks, or tears, in her vagina and cervix that were consistent with "recent sexual intercourse or some type of other physical trauma to the genital area," as well as reddened areas on her lower neck and right elbow. He testified that her injuries implied vigorous sexual intercourse that could be consistent with someone who was raped by force. Katrena Polite, a friend of the victim's, testified that she saw the victim the night of the rape and she was "frantic," "upset," "crying," "uncontrollable," and "couldn't speak." She also testified that the victim had injuries or bruises on her neck, knee, legs, and arms. The victim stayed with Ms. Polite for three days after the incident until her father arrived. The victim's father testified that prior to the rape his daughter was in fear of Mr. Hardin and that two days after the rape, "she was a wreck . . . she couldn't hardly walk . . . she was crying and she was nervous . . . [s]he said that she had been ripped." Furthermore, the victim testified that Mr. Hardin called her at work on December sixteenth and promised he would move to Michigan and she "wouldn't have anything else to worry about" if she would drop the charges against him.

Also, as this court is required to consider the totality of the evidence, we must consider that, in allowing Mr. Hardin to testify, Mr. Weber would have potentially opened the door to a large volume of evidence of prior bad acts committed by Mr. Hardin against the victim. As previously stated, the victim's father testified that his daughter feared Mr. Hardin. At the postconviction hearing, the victim's father also recounted an incident in which Mr. Hardin broke into the victim's apartment, poured Purex all over her clothes, and stole her VCR. The evidence also could have shown that, in 1996, the victim filed a domestic abuse petition against Mr. Hardin and was granted an order of protection. She eventually left the State of Arkansas because Mr. Hardin had made threats against

her and her family. Mr. Harper acknowledged at the postconviction hearing that the first relationship between the victim and Mr. Hardin "didn't work out too well," and that they "kind of, you know, got into a big argument and a big fight and this and that." He even admitted telling Mr. Hardin, "man, I wouldn't be talking to this girl because, you know, y'all had bad terms." Finally, according to the victim's own testimony, Mr. Hardin saw and approached her at a local mall in November 1997, called and threatened her at work on November 26, and kicked in the door of her apartment and raped her on November 30. Mr. Swain, the manager of security for Baptist Health, corroborated the victim's testimony about the threatening phone call on November 26. He testified that the victim contacted him on that date to fill out a complaint regarding an individual who had called and threatened her life. The victim also expressed fear that the caller might come onto her employer's property. She gave a description of Mr. Hardin and asked security to be on the lookout; she also asked for escorts to and from her car. A police report dated November 26, 1997, reflects that the victim filed a complaint against Mr. Hardin in which she stated that he threatened to kill her and vandalize her home.

Based on the foregoing, it is evident that the conviction in this case is supported by an overwhelming record. In granting postconviction relief, the trial court clearly erred because it failed to find that any of counsel's purported deficiencies prejudiced Mr. Hardin. Indeed, such a finding cannot be made when considering the totality of the evidence. Given the overwhelming evidence against Mr. Hardin, there is no reasonable probability that the omitted evidence would have changed the outcome of the trial. In reversing and remanding this case to the trial court, the majority ignores both established law and the overwhelming record supporting the jury's verdict.

For these reasons, I conclude that Rule 37 relief is not warranted and the judgment of the trial court should be reversed.

ARNOLD, C.J., and GLAZE, J., join in this dissent.

Oscar STILLEY *v.* Margaret JAMES, Rick Grinnan, Linda Varado, Alban Varado *v.* John Speed

01-88 60 S.W.3d 410

Supreme Court of Arkansas
Opinion delivered November 29, 2001

[redacted]

Oscar Stilley, for appellant.

Cross, Gunter, Witherspoon, & Galchus, P.C., by: *Abraham W. Bogoslavsky*, for appellees.

RAY THORNTON, Justice. Appellant, Oscar Stilley, appeals the October 10, 2000, and October 31, 2000, orders of the Sebastian County Circuit Court, granting appellees, Margaret James, Rick Grinnan, Alban Varnado, and Linda Varnado ("appellees"), and separate appellee, John Speed ("separate appellee"), attorney's fees pursuant to Ark. Code Ann. § 16-22-308 (Repl. 1999). Appellant raises three points for reversal: (1) the trial court erred in granting judgment on the underlying claim because appellees were not properly prevailing parties, and, thus, the attorney's fees should be stricken; (2) the trial court erred in granting attorney's fees and costs without hearing, notice, or opportunity to defend, and before expiration of the time for response; and (3) the trial court erred in ruling that a purported third-party beneficiary to a claimed contract may recover attorney's fees under the statutory provision allowing attorney's fees in contract actions. We affirm.

On May 9, 2000, appellees specifically sought costs and attorney's fees in their complaint against appellant in the underlying indemnity-agreement case, and, on September 13, 2000, the circuit court ruled in favor of appellees on the merits. On October 5, 2000, appellees filed a motion for costs and attorney's fees as prevailing parties in the underlying case against appellant. On October 10, 2000, the circuit court granted appellees costs of $319.26, pursuant to the Arkansas Declaratory Judgment Act, which is codified at Ark. Code Ann. §§ 16-111-101—109 (1987), and attorney's fees in the amount of $5,182.00, pursuant to Ark. Code Ann. § 16-22-308. On October 11, 2000, after the circuit court had entered its order granting attorney's fees, appellant filed his response to the motion for costs and attorney's fees.

On June 7, 2000, separate appellee specifically sought costs and attorney's fees in his cross-complaint against appellant in the underlying indemnity-agreement case, and, on September 13, 2000, the circuit court ruled in favor of separate appellee on the merits. On October 31, 2000, separate appellee filed a motion for costs and attorneys fees as a prevailing party in the underlying case against appellant. On November 1, 2000, the circuit court granted costs of $322.80, pursuant to the Arkansas Declaratory Judgment Act, and attorney's fees in the amount of $3,357.00, pursuant to Ark. Code Ann. § 16-22-308.

On November 6, 2000, appellant filed an objection to the fees and to the process of granting fees. On November 27, 2000, the circuit court held a hearing to reconsider its order granting costs and attorney's fees to separate appellee and to consider appellant's objection to the fees. On November 30, 2000, the circuit court affirmed its order granting costs and attorney's fees. It is from these orders that appellant brings this appeal.

■ It is well established that due to the trial judge's intimate acquaintance with the record and the quality of service rendered, we usually recognize the superior perspective of the trial judge in determining whether to award attorney's fees. *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). Accordingly, an award of attorney's fees will not be set aside absent an abuse of discretion by the trial court. *Id.* (citing *State Farm Fire & Cas. Co. v. Stockton*, 295 Ark. 560, 750 S.W.2d 945 (1988)).

■ For his first point on appeal, appellant argues that if we were to decide the underlying indemnity-agreement appeal in his favor, appellees and separate appellee would no longer be prevailing parties, as required by Ark. Code Ann. § 16-22-308, and the fees granted by the circuit court should be stricken. We have held that one must prevail on the merits in order to be considered a prevailing party under Ark. Code Ann. § 16-22-308. *Burnette v. Perkins & Assoc.*, 343 Ark. 237, 33 S.W.3d 145 (2000).

■ We have decided the underlying appeal involving the indemnity-agreement issue in favor of appellees. *See Stilley v. James*, 345 Ark. 362, 48 S.W.3d 521 (2001). Because appellees prevailed on the merits, they were clearly prevailing parties under Ark. Code Ann. § 16-22-308. Accordingly, this argument is wholly without merit.

For his second point on appeal, appellant argues that the trial court erred in granting attorney's fees and costs to appellees and separate appellee without a hearing, notice, or opportunity to defend, and before expiration of the time for response, and, in so doing, failed to afford him due process.[1] Appellant further argues that by granting the motions for attorney's fees without providing him notice, a hearing, or an opportunity to defend, and before expiration of the time for response, the circuit court failed to conduct itself impartially. We disagree and affirm.

Our general rule relating to attorney's fees is well established. Attorney's fees are not allowed except when expressly provided for by statute. *Chrisco, supra* (citing *Damron v. University Estates, Phase II, Inc.*, 295 Ark. 533, 750 S.W.2d 402 (1988)). Ark. Code Ann. 16-22-308 addresses attorney's fees in certain civil actions and provides in pertinent part as follows:

> In any civil action to recover on . . . breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party *may* be allowed a reasonable attorney fee to be assessed by the court and collected as costs.

Id. (emphasis added). The word "may" is usually employed as implying permissive or discretional, rather than mandatory, action or conduct and is construed in a permissive sense unless necessary to give effect to an intent to which it is used. *Chrisco, supra* (citing *Dunn v. Dunn*, 222 Ark. 85, 257 S.W.2d 283 (1953)).

In the present case, we cannot say that the circuit court violated appellant's due process rights when it granted the motions for attorney's fees. We note that both appellees and separate appellee asked for attorney's fees in their respective pleadings in the

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[1] Appellant does not argue that Ark. R. Civ. P. 54(e) and Ark. R. Civ. P. 78(b) & (c) are applicable to the question whether a hearing, notice, or an opportunity to defend was required before the circuit court addressed appellees' and separate appellee's motions for costs and attorney's fees. With reference to that issue, we note that Ark. R. Civ. P. 54(e)(3) provides, in pertinent part:

> (3) *On request of a party* or class member, the court shall afford an opportunity for adverse submissions with respect to the motion in accordance with Rule 43(c) or Rule 78.

Id. (emphasis added).

Here, appellant failed to request an opportunity to file a response, or to request a hearing, but the trial court, by its own action, afforded appellant such an opportunity when it held a hearing on November 27, 2000. *See infra.*

underlying circuit court action. It appears from the statute that the trial court could have made a determination regarding attorney's fees at any time subsequent to its September 13, 2000, ruling on the indemnity agreement in favor of appellees and separate appellee. While the circuit court granted appellees' motions for attorney's fees five days after they filed their motion for attorney's fees and one day after separate appellee filed his motion for attorney's fees, and prior to any response by appellant, we note that under Ark. Code Ann. § 16-22-308, the circuit court may assess reasonable attorney's fees in a contract action to a prevailing party, which both appellees and separate appellee clearly were. Appellant has not cited any persuasive authority[2] that the trial court was required to permit appellant to respond to the motion prior to the court's decision to award attorney's fees. We have stated on many 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. *Maddox v. City of Fort Smith*, 346 Ark. 209, 56 S.W.3d 375 (2001) (citing *Ouachita Trek Dev. Co. 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)). Because appellant was aware that attorney's fees had been requested from the time of the commencement of the underlying indemnity-agreement action, we cannot say that appellant did not have notice or an opportunity to request time to file a response or to seek a hearing.

We further note that the circuit court, by its own action, scheduled a hearing, which was held on November 27, 2000, to

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[2] Appellant has failed to cite any persuasive authority to support his position. Appellant relies on Ark. R. Civ. P. 12(i) for the proposition that he was entitled to an opportunity to respond to the motion for attorney's fees. Rule 12(i) provides, in pertinent part:

> Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings.
>
> * * *
>
> (i) Responses to Motions. If a party opposes a motion made under this or any other rule, he shall file his responses, including a brief in support, within ten (10) days after service of the motion upon him.

Id. By reading this rule in context, it is clear that this section is applicable only with respect to motions for judgment on the pleadings — not motions for attorney's fees. In addition, appellant's reliance upon *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Washington v. Thompson*, 339 Ark. 417 (1999), for the principle that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner, is misplaced. Because appellant was aware that attorney's fees had been requested from the time of the commencement of the underlying indemnity-agreement action, he was clearly afforded the opportunity to be heard at a meaningful time and in a meaningful manner.

permit appellant to voice his objections to the award of costs and attorney's fees. The circuit court heard appellant's objections to the fee granting process, as well as his further argument that the circuit court erred in concluding that appellant was liable for damages on the underlying indemnity agreement, and affirmed its decision to grant the motions. Therefore, we conclude that the circuit court did not violate appellant's due process rights by granting the motions for attorney's fees without a response or a hearing. Appellant also argues that the circuit court was biased and abused its discretion. In light of the foregoing analysis, and based upon our standard of review, we cannot say that the circuit court failed to act impartially or abused its discretion in granting the motions for attorney's fees.

For his final argument on appeal, appellant argues that the trial court erred in ruling that appellees, as third-party beneficiaries to the indemnity agreement in the underlying case, may recover attorney's fees under Ark. Code Ann. § 16-22-308, which permits the trial court to grant attorney's fees to the prevailing party in contract actions. We disagree.

We have expressly held that third-party beneficiaries are entitled to recover attorney's fees under Ark. Code Ann. § 16-22-308. For example, in *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 902 S.W.2d 760 (1995), we stated:

> A party may recover for damages from breach of contract when that party is a third-party beneficiary of the contract. *Howell v. Worth James Constr. Co.*, 259 Ark. 627, 535 S.W.2d 826 (1976). It follows that a third-party beneficiary may recover attorney's fees under the statute that allows such fees for breach of contract.

Little Rock Wastewater, supra.

Similarly, in the present case, because appellees were third-party beneficiaries to the indemnity agreement,[3] they may

[3] *See Stilley, supra,* where we expressly held that appellees are third-party beneficiaries to the indemnity agreement because, pursuant to Ark. Code Ann. § 16-111-104 (1987), they are "interested parties" whose "rights, status, and other legal relations are affected by a contract." *Stilley, supra.* We further held that appellees are third-party beneficiaries to the indemnity agreement because Arkansas law is clear that "a contract made for the benefit of a third party is actionable by such third party," and the indemnity agreement was made for the benefit of appellees because it provided that appellant would pay money to appellees if they obtained a judgment against separate appellee. *See id.*

recover attorney's fees under Ark. Code Ann. § 16-22-308. Therefore, appellant's argument is meritless, and we affirm on this point as well.

Finding no reversible error, we affirm.

Diane CLARK *v.* FARMERS EXCHANGE, INC.

01-475 61 S.W.3d 140

Supreme Court of Arkansas
Opinion delivered November 29, 2001

Stephen Lee Wood, P.A., by: *Stephen Lee Wood*, for appellant/ cross-appellee.

Paul L. Davidson and *Boyer, Schrantz, Rhoads & Teague, PLC*, by: *Ronald L. Boyer* and Johnnie Emberton Rhoads, for appellee/ cross-appellant.

JIM HANNAH, Justice. This case concerns an action under the Arkansas Civil Rights Act. Appellant Diane Clark asserts the circuit court erred when it denied her postjudgment motion to transfer her action to chancery court for assessment of additional damages in equity.[1] Clark selected the circuit court as her forum and tried her case to a jury, which she asked to determine liability and damages. She made no attempt to transfer the case to chancery until after she had proceeded to final judgment in the case. If the courts had concurrent jurisdiction, Clark would have had the right to apply to either. When she made the choice of circuit court, as she clearly did by trying the case to completion there, she selected the forum, and a decision of the circuit court is binding on her and is *res judicata*. The denial of the postjudgment motion to transfer to chancery was not error.

Cross-Appellant Farmers Exchange, Inc. (the Exchange) alleges the jury verdict must fail because it is not supported by substantial evidence. Significant evidence was presented by both sides as to what occurred. The jury was left to decide who was telling the truth, and the jury awarded Clark $12,600. The evidence apparently believed by the jury proves the facts beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. The jury verdict is supported by substantial evidence. We affirm.

Facts

At the time of her termination, Clark was general manager of the Farmers Exchange. She had been employed by the Exchange for seventeen years, having held the position of general manager for

[1] Pursuant to the passage of Arkansas Amendment 80, which went into effect on July 1, 2001, our state courts are no longer separated into chancery and circuit courts. Rather law and equity has been merged and the courts have been merged and now carry only the designation of "circuit court." Because law and equity have been merged, the circuit courts can award not only legal remedies, but also traditional equitable remedies. In the future, individuals will not have to elect in which "court" to file their lawsuit.

about a year. Clark alleges that although she was diagnosed with multiple sclerosis in 1992, and the Exchange was aware of her condition from that time, her symptoms never affected her job performance. Further, she alleges that she was never told that her job performance was a concern.

Several weeks before her termination in February 1999, Clark was placed on a ninety-day medical leave by the Exchange. The Exchange told her the leave was to allow her to recuperate and return to work. Clark alleges she never asked for this leave and that her doctor never recommended such a leave. She additionally asserts that when she was told to take the medical leave, nothing was said about her job performance, and additionally, that even when she was terminated some weeks later, again, nothing was said about her job performance. Thus, Clark alleged her termination was based upon her physical disability and that she thereby suffered discrimination in employment.

The Exchange asserts Clark was a valued employee up to and including her promotion to the position of general manager, but that shortly thereafter in 1998, Clark began to experience serious physical problems, personnel problems with workers, and problems with the board of directors. Board members testified that they noticed Clark was becoming unable to see well enough to deal with facts and figures, and that she was becoming unable to speak with enough clarity to communicate in board meetings or effectively run the business. The members of the board became concerned about the quality of operation of the Exchange under Clark's management.

According to the Exchange, Clark was terminated because of incompetent management. They assert more specifically that she was unable or unwilling to perform her duties in an adequate fashion. Board member Mr. Glenn Featherston testified to problems with the advertising budget, which he stated the board asked Clark to reduce, and instead she increased. He also testified that she was instructed to pay down a bank note, but she did not. Featherston additionally testified that the board was concerned about an unusually high turn over in employees and in a failure to properly train and cross train employees. Featherston testified further that Clark was given specific instruction on declining further credit to certain accounts, and she failed to comply. The board believed that by November 1998, Clark simply was not functioning, and they had to do something. They decided to place Clark on a ninety-day sick

leave with pay and benefits to allow her to see if she could recuperate. Assistant Manager Jim Patterson was asked to serve temporarily as manager in Clark's absence and was compensated therefore. For this ninety days, the Exchange paid two general managers. Clark was to take the time off and see if she could recuperate. However, according to Featherston, Clark chose instead to come to the Exchange and interfere in management and employee supervision rather than take the time off as instructed. As a result, four of the nine employees told Patterson they would not continue in employment if Clark returned. Again, according to Featherston, Clark was told to allow Patterson to run the Exchange, and she would not do so. At a board meeting in February 1999, it was decided Clark should be terminated. Clark disputed these events in her testimony when she took the stand.

In 1992, Clark first experienced an inability to move her right hand, and then she suffered some form of light seizures. She was diagnosed with multiple sclerosis. The Exchange was aware of Clark's illness from the beginning. It appears that with medication, the symptoms were kept in abeyance until 1998. At this point Clark began to suffer substantial problems from the disease. It is clear her illness played a role in the problems that gave rise to her termination. As noted, board members testified that as they neared November 1998, Clark was unable to see well enough or communicate well enough to handle board meetings. Clark asserts she told the board she was about to start a new medication at the time she was placed on medical leave.

Clark filed suit in circuit court. Her complaint included a paragraph which asserted that "upon a finding of discrimination, this action should be transferred to the Chancery Court" for purposes of granting an injunction and to award "front pay." It thus appears Clark believed she was due damages in chancery in addition to those she was seeking in circuit court. Clark did not argue below that her civil trial should somehow be bifurcated. She did not move to transfer the case to chancery until after a final judgment was entered in circuit court. Clark filed her action in circuit court and then submitted her case to the jury. A verdict was returned in Clark's favor in the amount of $12,600 for lost wages and insurance benefits. She had sought back pay and lost-employment benefits, compensatory damages, and punitive damages as the affirmative relief listed in her complaint. A final judgment in Clark's case was entered by the trial court on August 3, 2000.

Clark brings her appeal arguing her postjudgment motion to transfer to chancery was denied in error. The Exchange cross-appeals asserting a lack of substantial evidence to support the jury's verdict.

Choice of Forum

This case was tried in circuit court in the summer of 2000 and judgment was entered on August 3, 2000. In the judgment, paragraph E stayed execution on the judgment until a final order was issued on a motion to transfer the cause to chancery. Thus, Clark maintained the right to some sort of postjudgment assessment of damages in chancery. However, a judgment is a final determination of the rights of the parties in an action. *Shappy v. Knight*, 251 Ark. 943, 475 S.W.2d 704 (1972); *Melton v. St. Louis I. M. & S. Ry. Co.*, 99 Ark. 433, 139 S.W. 289 (1911).

In the complaint, Clark stated that "upon a finding of discrimination" she intended to transfer the cause to chancery. Clark, however, made no attempt to transfer her cause to chancery until after she allowed the entire decision on liability and damages to be made in circuit court. She now asserts a right to some sort of postjudgment assessment of additional damages. This she may not do. Clark may not maintain an action in chancery after the action was decided in circuit court. As this court stated in *Hooper v. Ragar*, 289 Ark. 152, 711 S.W.2d 148 (1986), in such situations as this where the choice of forum has been made, the appellant has had her day in court and is not entitled to a second chance. This court in *Burns v. First Nat'l Bank*, 336 Ark. 406, 985 S.W.2d 747 (1999), cited *Moore v. Price*, 189 Ark. 117, 70 S.W.2d 563 (1934), wherein this court stated:

> Circuit courts and chancery courts are of equal dignity; and in cases where there is concurrent jurisdiction, the court that first acquires jurisdiction has the right and jurisdiction to conduct the matter to an end without interference of another court of equal dignity. *Wright v. LeCroy*, 184 Ark. 837, 44 S.W.2d 355 (1931).

Clark complains, however, that the Arkansas Civil Rights Act provides additional remedies that are undefined in the Act but which must be obtained in chancery. Although it is not clear from the briefs, we must assume that the reason the action was filed in circuit court was because the prayer for relief included punitive damages.

The Arkansas Civil Rights Act in Ark. Code Ann. § 16-123-107(c)(1)(A) (Supp. 2001) provides the court:

> [M]ay issue an order prohibiting the discriminatory practices and provide affirmative relief from the effects of the practices, and award back pay, interest on back pay, and, in the discretion of the court, the cost of litigation and a reasonable attorney's fee.

In paragraph (c)(2)(A), it provides that punitive damages are allowed to the extent of the amounts set out thereafter.

It is true that if Clark had filed this action in chancery, or if Clark had requested the matter be transferred to chancery for the chancery court to consider all the requested remedies including injunctive relief and front pay under the "clean-up doctrine," she might have been found to have waived any right to punitive damages. *Roach v. Concord Boat Corp.*, 317 Ark. 474, 880 S.W.2d 305 (1994); *Stoltz v. Franklin*, 258 Ark. 999, 531 S.W.2d 1 (1975). Equity cannot generally award punitive damages. Had this case been brought in chancery, or had it been transferred to chancery, the Exchange would have only needed to object to stop the award of punitive damages. At the same time, had there been no objection, the chancery court would not have been without authority to award damages normally awarded in circuit court. *Towell v. Shepherd*, 286 Ark. 143, 689 S.W.2d 564 (1985); *McNamara v. Bohn*, 69 Ark. App. 337, 13 S.W.3d 185 (2000).

We need not address this issue, however, because Clark made no attempt to seek relief in chancery until a final judgment was already entered in circuit court. Clark waived all equitable remedies she may have had by failing to move that the matter be transferred to chancery court. Had Clark desired the equitable remedies she now seeks, she should have moved to transfer the case to chancery court rather than let it go to the jury in circuit court. *Towell, supra.* Where there is a failure to object to jurisdiction, it will be considered consent to such jurisdiction. *Towell, supra.* As noted in the concurring opinion in *Union Nat'l Bank v. Hooper*, 295 Ark. 83, 746 S.W.2d 550 (1988), the rule is that failure to move to transfer to chancery acts as a waiver of the equitable remedies available there. This has long been the case. Even though chancery may have concurrent jurisdiction with a court of law of the subject matter at issue, a party who chooses to remain in circuit court will be held to such election. *Jamison v. May,* 13 Ark. 600 (1853). A party must suffer the consequences of the forum they choose. *Hesser v. Johns*, 288 Ark. 264, 704 S.W.2d 165 (1986).

The Act provides for "a civil action." Clark chose circuit court. If the courts had concurrent jurisdiction, Clark would have the right to apply to either. But, when she filed in circuit court, she selected the forum, and "a decision of that court would be binding on her — would be *res judicata*." *Caldwell v. Fitzhugh*, 175 Ark. 801, 300 S.W. 395 (1927). One of the main purposes of the doctrine of *res judicata* is to put an end to litigation by precluding a party who has had the opportunity for one fair trial from drawing the same controversy into issue before the same or a different court. *Taggart v. Moore*, 292 Ark. 168, 729 S.W.2d 7 (1987). Clark took the case to decision in circuit court. She had her day in court and is not entitled to a second chance. *Hooper, supra.* It has long been the rule that a plaintiff who deliberately selects the forum is bound by the outcome. *Taggart, supra*; *Robertson v. Evans,* 180 Ark. 420, 21 S.W.2d 619 (1929). The judgment acted as a final adjudication on the merits. *Greene v. Pack*, 343 Ark. 97, 32 S.W.3d 482 (2000). Thus, there is no merit to Clark's postjudgment motion to transfer to chancery.

Cross-Appeal

The Exchange argues the jury verdict is not supported by substantial evidence. When a jury verdict is challenged, the court will affirm the verdict and judgment of the trial court if the verdict is supported by any substantial evidence, with the evidence and all reasonable inferences therefrom examined in the light most favorable to the appellee. *John Cheeseman Trucking, Inc. v. Dougan*, 313 Ark. 229, 853 S.W.2d 278 (1993); *Schuster's Inc. v. Whitehead,* 291 Ark. 180, 722 S.W.2d 862 (1987). Further, a jury verdict will be disturbed only when fair-minded persons could not draw the conclusion reached by the jury. *Cheeseman, supra.; Pine View Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989).

The jury was presented with conflicting testimony. Clark took the stand and disputed the testimony given by the Exchange witnesses. She testified on the issue of her extension of credit that the Exchange alleged should not have been extended, and on a number of employee issues raised by the Exchange, as well on issues of accounts and use of funds. Clark denied the assertions of the Exchange witnesses, and the jury was left to decide who was telling the truth. As such, it was an issue of the credibility of a witness, which is an issue for the jury. *Sanders v. Mincey*, 317 Ark. 398, 879 S.W.2d 398 (1994); *Mays v. State*, 303 Ark. 505, 798 S.W.2d 75 (1990).

Substantial evidence is evidence that goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Madden v. Aldrich*, 346 Ark. 405, ___ S.W.3d ___ (2001); *Ethyl Corp. v. Johnson*, 345 Ark. 476, 49 S.W.3d 644 (2001). It appears the jury believed Clark and her witnesses over those of the Exchange. This may constitute substantial evidence. Therefore, viewing this matter in the light most favorable to Clark, it appears the verdict is supported by substantial evidence, and the cross-appeal is, therefore, denied.

Affirmed.

Robert WILLIAMSON and Cliff Haydell *v.*
SANOFI WINTHROP PHARMACEUTICALS, INC.

01-345 60 S.W.3d 428

Supreme Court of Arkansas
Opinion delivered November 29, 2001

Andrew L. Clark, for appellants.

Friday, Eldredge & Clark, LLP, by: *Kevin A. Crass*, for appellee.

JIM HANNAH, Justice. Appellant Robert Williamson[1] appeals the Pulaski County Circuit Court's decision denying class certification to a group of employees from Sanofi Winthrop Pharmaceuticals, Inc. (Sanofi), the appellee. The trial court found that Williamson could not meet the requirements of establishing commonality and superiority for class certification. We affirm.

This case centers around a bonus program for pharmaceutical sales people. During 1996, Sanofi held a sales promotion known as "Share in the Success." Under the program, sales representatives could earn $1,000, $2,000, or $4,000 bonuses if their sales region exceeded its performance from the previous year. Each of three regions had the opportunity to exceed a budgeted regional growth objective from the prior year in three business units: cardiovascular, injectable, and specialty products. Williamson worked in Central Region-2, which contained approximately sixty-three commissioned sales people.

As part of the program, Sanofi first published a booklet entitled "1996 Sales Incentive Program," which described the program as depending on increased sales as compared to a regional standard.

[1] Appellant Cliff Haydell withdrew from the lawsuit as a plaintiff and class representative prior to the hearing on the Motion for Class Certification. He is listed in the style of the case because his name appears on the record. However, we will only refer to Williamson as the appellant class representative in this opinion.

However, throughout the following year as the program was ongoing, Sanofi distributed monthly reports to each salesperson detailing each person's performance for the month, and updating how each region was doing in the program. Sanofi hired the outside firm Simulate, Inc., to prepare the monthly reports. Unfortunately, while the program was created to be based on a "regional" growth objective, Simulate's reports sent to each sales person were based on the national growth objective, which for some was an easier standard to meet. Every one of Williamson's reports indicated that his sales were above the national average and that he was on track to receive the year-end $4,000 bonus. The dispute in this case stems from this series of incorrect reports. While the "Share in the Success" program required a certain increase in regional sales over the year, the reports contained a comparison to the "national" performance for all three business units.

In early 1997, Sanofi notified Williamson and other employees that they would be receiving their incentive payouts on May 15, 1997. In fact, Williamson received a phone call on May 12, 1997, from a manager who told him that he and others would receive the payment. However, before payment was made, Sanofi realized the mistake in the reporting of the program and denied payment. Specifically, Sanofi found that each salesperson's monthly reports tracked his or her sales compared to the national average, but did not track each to the regional growth objective, which was higher than the previous year's national averages in each business group.

Williamson filed a complaint on March 30, 1998, alleging a breach-of-contract claim and asking that the court certify the commissioned sales representatives as a class. Sanofi answered on April 29, 1998, claiming that the class should not be certified, and that Williamson and the other sales people did not qualify for the incentive bonus because they did not meet the projected regional sales requirements. Sanofi also noted that the incorrect monthly reports were prepared by a third party.

On June 28, 2000, Williamson filed a specific motion to certify the class. Sanofi responded on August 16, 2000, arguing that each potential class member was not necessarily in the same position as another because it is unclear whether they each entered into a contract or believed that they entered into a contract merely by raising their sales numbers after the program was started. A hearing was held on this motion on August 21, 2000, at which no witnesses testified. After discussion of the elements to certify a class under Ark. R. Civ. P. 23, the trial court ruled from the bench that he did

not find that there was a common question among the potential class members because each member may have had a different understanding of the incentive program or may have known that the reported numbers were in error. The trial court filed its written order on August 24, 2000, and stated the same. The trial court also found that a class action was not the superior method for adjudicating the claims of the individual plaintiffs. Williamson filed his notice of appeal on September 22, 2000.

On appeal, Williamson lists the six Rule 23 requirements for certifying a class, and argues that the trial court erred in failing to certify the class due to a lack of commonality in claims by the potential class members. While he lists all six Rule 23 requirements to satisfy class-action status, he offers little if any argument for the other five elements. On the commonality issue, Williamson argues that the questions of law and fact are similar for each potential class member as they each qualified for the incentive program, they are all employees of Sanofi, and none of them received payment under the program. Williamson argues that merely by increasing sales, each potential class member accepted the "offer" proposed by Sanofi so that a contract was formed. Sanofi responds that this case does not lend itself to a class action because it requires each sales person to establish that he or she believed that the program had changed so that the national performance numbers replaced the regional performance numbers. Sanofi argues that the bar graphs in the graphic comparisons mailed to each employee demonstrated that the region did not meet the regional sales growth criteria, although the narrative above the graph indicated that the sales were compared to the national performance for each product. Because of this, Sanofi argues that each employee's understanding of the program and how and whether it applied to him or her is an individual question the court would have to ask each person to determine if each person thought a contract was formed. Therefore, the action is not proper as a class action.

The issue before this court is only one of class certification. In our review of a trial court's decision to grant class certification, we have said that trial courts are given broad discretion in matters of class certification, and we will reverse the trial court's ruling only when the appellant can demonstrate an abuse of that discretion. *BPS Inc. v. Richardson*, 341 Ark. 834, 20 S.W.3d 403 (2000); *Baker v. Wyeth-Ayerst Laboratories Division*, 338 Ark. 242, 992 S.W.2d 797 (1999); *Seeco, Inc. v. Hales*, 330 Ark. 402, 954 S.W.2d 234 (1997); *Mega Life & Health Ins. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997). Although we do not delve into the merits of the underlying

claims in a potential class-action case, we will review the trial court's order to determine whether the requirements of Rule 23 are satisfied. *BPS, Inc., supra.*

On the merits, Rule 23 of the Arkansas Rules of Civil Procedure details the requirements for a class-action suit. It states:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section may be conditional and it may be altered or amended before the decision on the merits.

This court has reviewed the provisions of Rule 23 on numerous occasions and has held that in order for a class-action suit to be certified six factors must be met. Specifically, the party seeking certification must establish: (1) numerosity; (2) commonality; (3) predominance; (4) typicality; (5) superiority; and (6) adequacy. *BPS Inc., supra.* When the court reviews a class-action certification, it will review the trial court's analysis of the factors upon which certification must be based. Specifically, the court has held that:

> [W]hether to certify a class "is not 'whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 . . . are met.' " As we observed, "it is totally immaterial whether the petition will succeed on the merits or even if it states a cause of action. . . ." *Id.* "[A]n order denying or granting class certification is separate from the merits of the case."

Direct Gen. Ins. Co. v. Lane, 328 Ark. 476, 944 S.W.2d 528 (1997) (citing *Farm Bureau Mutual Ins. Co. v. Farm Bureau Policy Holders*, 323 Ark. 706, 918 S.W.2d 129 (1996)).

Rule 23(a)(2) of the Arkansas Rules of Civil Procedure requires a determination by the trial court that "there are questions of law or fact common to the class." *See also, Mega Life, supra.* A review of our case law reveals that this requirement is case-specific. Professor Newberg's treatise on class actions explains that:

> [T]he common question prerequisite is interdependent with the notion of joinder impracticability under Rule 23(a)(1). Consideration of the common question issue requires an answer to the question: Common to whom?"
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> * * *
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> Rule 23(a)(2) does not require that all questions of law or fact raised in the litigation be common. The test or standard for meeting the rule 23(a)(2) prerequisite is . . . that is there need be only a single issue common to all members of the class. . . . When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.

Herbert B. Newberg, *Newberg on Class Actions*, § 3.10 (3d ed. 1993). The trial court must determine what elements in a cause of action are common questions for the purpose of certifying a class.

Several Arkansas cases have dealt specifically with the commonality issue in a class-action certification appeal. In *Cheqnet Systems, Inc. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995), this court found that the commonality requirement was satisfied where the class's main claim, which applied to every member of the class, was that Cheqnet violated the Fair Debt Collection Act by collecting $10 more than it was allowed to collect on returned checks. In *MegaLife, supra*, the court found that commonality was established through four common questions dealing with the applicability of insurance to the class members. The court found that "if these issues are resolved in favor of the class, the individual members will have suffered a common injury of paying premiums for a void insurance policy." *MegaLife*, 330 Ark. at 271. And, in *Farm Bureau Mutual Insurance, supra*, this court again found that the commonality

issue was satisfied where the class members alleged that a statutory violation occurred when they all had to pay "membership dues" to the Farm Bureau Federation before insurance policies would be issued. In each of these cases, this court found that the defendant's act, independent of any action by the class members, established a common question relating to the entire class to certify the matter as a class action. In this case, however, Sanofi's actions cannot give rise to a cause of action for breach of contract without the prerequisite of the creation of a contract, which necessarily requires each plaintiff to show that a contract was formed between Sanofi and himself. Therefore, before even reaching any common question about breach of contract, each potential class member would have to establish the existence of a contract between himself and Sanofi before ever reaching the issue of whether that contract was breached. This does not lend itself to a class action, and distinguishes this action from those grounded in fraud or misrepresentation.

The same holds true in *BNL Equity Corp. v. Pearson,* 340 Ark. 351, 10 S.W.3d 838 (2000), and *Seeco, Inc., supra,* in which this court certified the class after a finding that common issues predominated over individual issues. Again, in *BNL Equity,* this court affirmed the trial court's certification of the class in a case involving an alleged violation of the Arkansas Securities Act premised on material misrepresentations to stockholders in two public offerings. The court found that the claim of misrepresentation was the "common linchpin" of every class member's case, and that this claim predominated over possible individual issues of establishing each class member's knowledge and any affirmative defenses. In *Seeco, Inc.,* this court found that common issues existed in the class members's claims of fraud even though the elements of reliance and diligence would be issues to be decided on a person-by-person basis. In coming to this conclusion, the court stated, "The overarching issue which must be the starting point in the resolution of this matter relates to the existence of the alleged scheme" by Seeco, Inc., and others to perpetrate a fraud on royalty owners. *Seeco, Inc.,* 330 Ark. at 414. In these two cases, this court found that the allegations of fraud, being separate and apart from any other issues of personal reliance on those representations, were common questions applicable to every class member. Such is not the case here, however, where the potential class's claim is that of breach of contract rather than fraud or misrepresentation, a distinction which is the determining factor in this case.

Here, Williamson's theory, as the trial court noted, is that a contract was formed when Sanofi offered the incentive program and each salesperson increased his or her sales in response. While we will not consider the merits of the underlying lawsuit, *see Advance America v. Garrett*, 344 Ark. 75, 40 S.W.3d 239 (2001); *see also Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999) (holding that trial court may not consider whether plaintiff will ultimately prevail), consideration of the elements of the underlying claim is important to determine whether any questions are common to the class and whether those questions will resolve the issue. *See, e.g., Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65 (D.N.J. 1993). The potential class members allege that Sanofi breached a contract with them. The essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *Foundation Telecommunications v. Moe Studio*, 341 Ark. 231, 16 S.W.3d 531 (2000); *Gentry v. Hanover Ins. Co.*, 284 F. Supp. 626 (D.C. Ark. 1968) (cited in *Hunt v. McIlroy Bank & Trust*, 2 Ark. App. 87, 616 S.W.2d 759 (1981)). *See also, Southern Surety Co. v. Phillips*, 181 Ark. 14, 24 S.W.2d 870 (1930). We keep in mind two legal principles when deciding whether a valid contract was entered into: (1) a court cannot make a contract for the parties but can only construe and enforce the contract that they have made; and if there is no meeting of the minds, there is no contract; and (2) it is well settled that in order to make a contract there must be a meeting of the minds as to all terms, using objective indicators. *Crain Industries, Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991), *Hunt, supra* (citing *Hanna v. Johnson*, 233 Ark. 409, 344 S.W.2d 846 (1961); *Irvin v. Brown Paper Mills Co.*, 52 F. Supp. 43 (D.C. Ark. 1943), rev'd. on other grounds, 146 F.2d 232 (8th Cir. 1944)). These very requirements make a class action on a breach-of-contract claim difficult, indeed, as the element of a "meeting of the minds," for example, necessarily requires an individual inquiry into each party's understanding of the terms of the alleged contract, even using an objective standard. *See Crain Industries, Inc., supra.* This is different than a fraud or misrepresentation claim wherein a defendant's fraudulent activity, standing alone, may give rise to a cause of action without any overt act by the plaintiff. That is not to say that a contract claim can never be certified as proper for a class action — should the case arise where a contract or contracts exist, and it is the actual breach of the established contract or contracts that is before the court, perhaps the class certification could survive. However, that is not the case here where the initial inquiry in the

case turns on whether Sanofi created a contract with each salesperson, requiring inquiry into whether the elements of the creation of a contract with each salesperson are met.

As Sanofi argues and as the trial court pointed out, while there may be questions that apply to all the potential class members, the questions on which the case turns are not common to each class member. For example, Williamson supplied in his brief a list of ten questions that he argues are common to all the potential class members, and he is right. However, none of these questions contain the issues on which this case turns. For example, he notes that a common questions is "Did the appellee pay the incentive bonus?" Clearly, the answer for all potential class members is "No." But the case does not turn on that question. It would be the same if Williamson listed a common question as "Do all the plaintiffs speak English?" Again, the answer presumably would be "yes" for all class members, but the question would get us no further in determining the outcome of the case. Rather, the trial court pointed out that the appropriate common questions for this case would include inquiries such as "Did you, the employee, believe a contract was created under the initial incentive brochure or the monthly update reports?" and "Did you, the employee, meet the sales requirements to qualify under either the initial brochure or the monthly update reports?" These are the common questions. However, they cannot be asked *en masse* under these facts, but rather must be asked to each individual class member, thus making the case improper for class certification under the commonality or superiority prongs of the class-action inquiry.

Rule 23 of the Arkansas Rules of Civil Procedure is comparable to Rule 23 of the Federal Rules of Civil Procedure, and this court interprets our Rule 23 in the same manner as the federal courts interpret the federal counterpart. *Farm Bureau Mut. Ins. Co., supra.* As such, federal cases can offer guidance on this issue. In *R. W. Brooks, et al. v. Southern Bell Telephone & Telegraph Co.*, 133 F.R.D. 54 (S.D. Fla. 1990), the District Court found that a class should not be certified in a breach-of-contract case due to a lack of commonality in the issues. The court stated:

> Here, each prospective class member's proof of the existence and terms of his contract, and any modifications thereto, will necessarily rest on different sources. The uncommonality of fact among the putative class members on this issue is exemplified by the uncommonality of fact among the named representatives.

R.W. Brooks, 133 F.R.D. at 57. In that case, as here, not only were there written documents alleged to be written contractual terms, there were also instances of oral representations by Southern Bell's representatives regarding the alleged agreement between the company and its employees. Such is the case here where the potential class representatives were given varying documents detailing the terms of the incentive program, documents which contradicted one another, but there were also oral representations made to Williamson that may or may not have been made to other potential class members. As in the *R.W. Brooks* case, whether and what terms might have existed and on which terms and representations each class member relied is an individual fact question that is not common to each member of this potential class.

In another federal case, *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.,* 149 F.R.D. 65 (D.N.J. 1993), the District Court entertained a class-action certification appeal from Liberty Lincoln Mercury, a car dealership and proposed class representative for other dealerships subject to Ford's warranty reimbursement practices. The District Court denied class certification in a franchise practices lawsuit in part because the court did not find a commonality of issues. The court stated:

> When the resolution of a common legal issue is dependent upon factual determination that will be different for each purported class plaintiff (and in this instance for each part sold), courts have consistently refused to find commonality and declined to certify a class. (Citations omitted.)
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> * * *
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> In sum, given the individual proof necessary to establish Ford's liability with respect to each individual Dealer and for each individual sale and part, the commonality requirement of Rule 23(a)(s) is not met.

Liberty Lincoln Mercury, Inc., 149 F.R.D. at 76. Here, too, the court would be required to take proof from each class member to determine his or her understanding about the existence of a contract, whether the class member believed a contract existed between him or her and Sanofi, what the terms of that understanding were, whether each class member believed he or she had "accepted" an offer, assuming an offer was made, and whether any other oral representations had been made to him or her as they purportedly

had to Williamson. All of these questions render a class action impractical due to the lack of common questions among the potential class members.

Furthermore, because these questions cannot be asked *en masse*, it also renders a class action improper because it is not the superior manner in which to handle this case. Rule 23(b) of the Arkansas Rules of Civil Procedure requires that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. *See Seeco, Inc., supra.* We have held that the superiority requirement is satisfied if class certification is the more "efficient" way of handling the case, and it is fair to both sides. *Baker, supra.* Where a cohesive and manageable class exists, we have held that real efficiency can be had if common, predominating questions of law or fact are first decided, with cases then splintering for the trial of individual issues, if necessary. *Seeco, supra; see also Summons, supra.* We further note that when a trial court is determining whether class-action status is the superior method for adjudication of a matter, it may be necessary for the trial court to evaluate the manageability of the class. *See BNL, supra.* Under this requirement, because the trial court would have to hear each class member's testimony regarding his or her understanding about which incentive-program paperwork applied, the regional requirements or the national requirements, as well as consider all of the evidence from each plaintiff regarding whether he or she agreed to a contract by virtue or his or her sales performance, a class action could not be a superior method of handling this case.

Finally, we reiterate that this court reviews class-action certifications or denials under an abuse-of-discretion standard, and we will not reverse the trial court's decision unless the appellant can demonstrate that the court abused its discretion in reaching its decision. Here, we cannot say that the trial court abused its discretion in denying class certification to Williamson where Williamson's initial hurdle of proving that each sales person made a contract with Sanofi would require the trial court from the outset to splinter its inquiry among every potential class member. This necessarily defeats class certification for lack of a common question and because this is not a superior method to resolve this conflict.

Affirmed.

Glenda R. ROGERS *v.* Irene LAMB

01-563 60 S.W.3d 456

Supreme Court of Arkansas
Opinion delivered December 6, 2001

Christian & Byars, by: *Joe D. Byars, Jr.*, for appellant.

Gant & Gant, by: *R. Derek Barlow*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. Appellant, Glenda R. Rogers, brings the instant appeal from an order of the Crawford County Circuit Court (1) finding appellee Irene Lamb's right of title, as the surviving joint tenant of property held by Lamb and her deceased father, superior to Rogers's homestead claim, (2) issuing a writ of possession commanding the county sheriff to deliver the property to Lamb, (3) denying appellant's

counterclaim for equitable relief, (4) denying appellee recovery of any rental payments, and (5) denying Rogers's motion for further proceedings and alternative motion for findings and a new trial. The court of appeals certified this case for us to consider whether a widow's constitutional homestead rights, created by Ark. Const. art. 9, § 6, may be defeated by the survivorship interest of a joint tenant in property conveyed pursuant to Ark. Code Ann. section 18-12-106 (Supp. 2001). Our jurisdiction is authorized by Ark. Sup. Ct. R. 1-2(a)(1) and (d) (2001).

The instant dispute arose after the March 24, 2000 death of John D. Rogers, Lamb's father and appellant's purported husband. On July 28, 2000, Lamb filed a petition for ejectment against appellant based upon a warranty deed reflecting that Lamb and her father took title in 1986 to the subject property as joint tenants with rights of survivorship. According to Lamb, each paid one-half of the purchase price with the understanding that Rogers would occupy the property during his life. As a result of her father's death, Lamb averred that she held a fee-simple absolute interest in the property, free and clear of any claim by appellant.

In response, Rogers claimed a constitutional homestead interest in the property. Alternatively, she filed a counterclaim against Lamb asking the court to acknowledge her equitable interest in the property. In particular, appellant insisted that her financial contributions towards the home's maintenance, improvements, insurance, and taxes, entitled her to such relief. In light of the equitable counterclaim, Rogers also moved that the case be transferred to chancery court.

Following a December 6, 2000 preliminary hearing and after reviewing only the parties' briefs, the trial court entered an order on March 7, 2001, finding that jurisdiction was proper in the circuit court, resolving the merits of the case in Lamb's favor, and denying Rogers any equitable relief. Notably, neither party filed a motion to dismiss or a motion for summary judgment. In other words, the trial court entered its order settling the case *sua sponte*.

Rogers raises three points on appeal. First, she argues that the trial court erred by determining that her homestead right was inferior to Lamb's survivorship interest in the property. Second, she challenges the validity of the trial court's judgment in the absence of an appropriate motion filed by either party and in view of the court's refusal to hold a hearing or accept evidence in support of her equitable claim. Third, she challenges the trial court's decision

to retain jurisdiction and its implicit denial of her motion to transfer the cause to chancery court. We find merit in appellant's arguments, and we reverse and remand for further action consistent with this opinion. As an initial matter, we decline to address the merits of appellant's final point on appeal. Given the people's recent passage of Ark. Const. amend. 80, and the consequent abolition of courts of equity, the issue is moot.

Validity of March 7, 2001 order

At first glance, the instant case appears to turn upon our resolution of a substantive legal issue, namely, whether a joint tenant's survivorship interest trumps a widow's homestead rights. However, closer inspection of the record on appeal reveals that the case hinges on appellant's second point, a procedural challenge to the validity of the trial court's March 7, 2001 order. Prior to the court's ruling, neither party was afforded the opportunity to introduce evidence or witness testimony in support of their positions. Moreover, since Lamb neither filed a motion for summary judgment, a motion to dismiss, or a motion for judgment on the pleadings, there was no resulting burden on Rogers to "meet proof with proof," nor was there any impetus for the court to decide the case *sua sponte*. *See Dillard v. Resolution Trust Corp.*, 308 Ark. 357, 359, 824 S.W.2d 387, 388 (1992) (requiring opponent to meet proof with proof, by showing a material issue of fact, once moving party makes *prima facie* showing of entitlement to summary judgment).

Although appellee insists that summary judgment was warranted as a matter of law, she fails to offer any argument or authority in support of a court's granting summary judgment in the absence of a proper motion filed pursuant to Ark. R. Civ. P. 56. In any event, we are convinced that genuine issues of material fact remain in dispute. For example, the parties disagree about the relevant facts supporting a homestead right. Contrary to Rogers's assertion, Lamb suggests that appellant did not live in Mr. Rogers's home for a fourteen-year period but maintained another residence in Forth Smith, Arkansas. Lamb also implies, in her brief, that Rogers may not have been married to her father during the relevant period.

In the absence of evidence on these matters, the trial court's order was based upon speculation and conjecture. Indeed, the trial court could only assume the existence of material facts,

including whether appellant was married to the deceased, where she resided, and the nature and amount of any contributions she made to the property. The record is silent on these issues because there was no trial or pleadings to elicit the requisite proof.

On remand, the trial court must hold an evidentiary hearing before ruling on the merits of the existence or priority of the parties' property rights and the extent of any equitable counterclaims. The court must have proof that appellant was in fact *Mrs.* John D. Rogers, the deceased's widow, before it can even consider the applicability of an alleged homestead interest. Otherwise, the trial court puts the proverbial "cart before the horse" and entertains a purely academic question of law.

Reversed and remanded.

IMBER, J., not participating.

CITY of BARLING, Arkansas *v.* FORT CHAFFEE REDEVELOPMENT AUTHORITY, An Arkansas Public Trust, and Its Trustees; Linda Schmidt; Jerry R. Stewart, M.D.; Joe Edwards, Jr.; Ken Colley; Linda Hobbs; Becky Rhinehart; and Greg Smith, D.V.M.

01-531 60 S.W.3d 443

Supreme Court of Arkansas
Opinion delivered December 6, 2001

Hardin, Jesson & Terry, PLC, by: *Bradley D. Jesson*, *Rex M. Terry* and *J. Rodney Mills*; and *Pryor, Barry, Smith, Karber & Alford, PLC*, by: *Gregory T. Karber*, for appellant.

Smith, Maurras, Cohen, Redd & Horan, PLC, by: *Robert Y. Cohen, II* and *Matthew Horan*, for appellees.

TOM GLAZE, Justice. In this appeal, arising from a dispute between the City of Barling and the Fort Chaffee Redevelopment Authority, we are asked to resolve the question of who has the authority to designate the use of 7,390 acres that were formerly a part of Fort Chaffee, but which Barling annexed in a series of three elections in 1981, 1982, and 1991. Before proceeding to the legal issues presented by the appeal, a brief recitation of the facts of Fort Chaffee's history is necessary.

In 1941, the United States Department of the Army purchased over 76,000 acres in Sebastian County for the establishment of Camp Chaffee. During its history, Camp Chaffee became Fort Chaffee, and it has served a variety of functions during the past six decades. It was a training base during the Korean War, a relocation center for Vietnamese refugees at the close of the Vietnam War, a relocation center for Cuban refugees in the early 1980s, and a temporary location center for the Joint Readiness Training Center in the 1990s. In September of 1997, Fort Chaffee was closed by the United States government, and, pursuant to Ark. Code Ann. § 22-7-301 (Supp. 1999), the State of Arkansas accepted legislative jurisdiction over the Fort Chaffee property. The cities of Barling, Fort Smith, and Greenwood, as well as Sebastian County, formed the Fort Chaffee Redevelopment Authority (the "FCRA"), an Arkansas Public Trust, to conduct a comprehensive study of all issues related to the closure and redevelopment of the base. Authorized representatives of Barling, Fort Smith, Greenwood, and Sebastian County signed and agreed to be bound by the terms of the Trust Indenture. In 1997, the Arkansas General Assembly "acknowledged" and "endorsed" the Trust as the entity to prepare and implement a comprehensive plan for the optimal use of the property. Act 1201 of 1997, § 14, codified at Ark. Code Ann. § 12-63-103(a) & (b) (Repl. 1999).

In June of 1999, the United States Department of Defense recognized the Trust as the entity to implement the redevelopment plan at Fort Chaffee. In August of 1999, the Trust completed a Comprehensive Reuse Plan for a 7,390 acre portion of the Fort Chaffee. On June 30, 2000, the Trust entered into a Memorandum of Agreement with the Department of the Army whereby it was agreed that a 5,235 acre portion of the 7,390 acres would be conveyed to the Trust with the remainder being conveyed at a subsequent time. The City of Barling had annexed 13,720 acres of

the Fort Chaffee property in three annexations, which occurred in the years 1981, 1982, and 1991, and the 7,390 acres covered in the Comprehensive Reuse Plan are located in these annexed areas. In 2000, Barling passed numerous zoning ordinances that affected the Fort Chaffee property, and which the Trust alleged severely conflicted with the amended Comprehensive Reuse Plan. The conflicts were essentially instances where Barling had zoned park/open space or residential areas that FCRA had designated for public facilities or industrial use.

The Trust filed suit against Barling on September 5, 2000, alleging that the 1981, 1982 and 1991 annexations were void *ab initio* for numerous reasons. It further sought a declaratory judgment that Barling's land use ordinances were *ultra vires* and void to the extent that the ordinances regulated Fort Chaffee property. The Trust also sought to enjoin Barling from exercising legislative jurisdiction over the Fort Chaffee property; enforcing or threatening to enforce Barling city ordinances within the boundaries of that property; collecting taxes, fees, or assessments from the FCRA; and annexing any portion of the Fort Chaffee property without prior approval of the FCRA.

Barling initially filed a motion for summary judgment, submitting in part that FCRA's challenge to Barling's 1981, 1982, and 1991 annexation ordinances and elections was untimely under Ark. Code Ann. § 14-40-304 (Repl. 1998). That statute requires that challenges to annexations must be filed within 30 days of the election. The trial court agreed and granted Barling's motion for summary judgment on November 3, 2000. FCRA cross-appeals from that order.

FCRA then filed its own motion for summary judgment, and asked the trial court to hold as a matter of law that Barling had ceded its legislative authority to the Trust over the Fort Chaffee property, and had no legislative authority over that property. Barling responded by filing its second motion for summary judgment, wherein it urged the court to hold Barling had not ceded its legislative authority to the Trust; it further asked the trial court to hold Barling's ordinances and regulations applied equally to that part of Barling in the annexed areas within the Fort Chaffee property, as they do in all other parts of Barling "proper." FCRA's response asserted that the facts were undisputed and that Barling's imposition of its zoning ordinances would delay implementation of

the Trust's Comprehensive Reuse Plan, discourage potential developers, and endanger the ability of FCRA to complete its Reuse Plan.

The trial court entered an order on January 18, 2001, granting FCRA's motion for summary judgment and declaring that Barling's zoning plans conflicted irreconcilably with the Trust's Reuse Plan. The court further found that had Barling not annexed the Fort Chaffee property in 1981, 1982, and 1991, Barling "would be in the same position as the other municipal beneficiaries of the Trust (Fort Smith and Greenwood) and would be unable to assert any claim that it had legislative authority over the property." The court went on to note, however, that the State of Arkansas authorized a suspension of Barling's legislative authority over the annexed area during development of that area and during the life of the Trust, and that Barling agreed to the cessation of authority when its representative signed the Trust Indenture. In granting FCRA's motion for summary judgment, the court also enjoined Barling from exercising legislative jurisdiction over the annexed areas within the Fort Chaffee property. On direct appeal, Barling raises three arguments for reversal.

Our standard of review is that summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *City of Lowell v. City of Rogers*, 345 Ark. 33, 43 S.W.3d 742 (2001). The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried. *BPS, Inc. v. Parker*, 345 Ark. 381, 47 S.W.3d 858 (2001). We have ceased referring to summary judgment as a drastic remedy. We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we only approve the granting of the motion when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admission on file is such that the nonmoving party is not entitled to a day in court, *i.e.*, when there is not any genuine remaining issue of fact and the moving party is entitled to judgment as a matter of law. *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000). However, when there is no material dispute as to the facts, the court will determine whether "reasonable minds" could draw "reasonable" inconsistent hypotheses to render summary judgment inappropriate. In other words, when the facts are not at issue but possible inferences therefrom are, this court will consider whether those inferences can be reasonably drawn from the undisputed facts and whether reasonable minds might differ on those hypotheses. *Id.*

We now turn to Barling's numerous points and subpoints it advances for reversal.

For its first assignment of error, Barling argues that the trial court erred in ruling the statutory law, § 12-63-103, and the Fort Chaffee Trust Indenture signed by Barling, Fort Smith, Greenwood, and Sebastian County conveyed upon the FCRA the authority over zoning and land use issues. In response to the federal closure of Fort Chaffee, the General Assembly enacted Act 1201 of 1997, entitled an act "to provide for the management and operation of Fort Chaffee as a reserve component military training reservation . . . and for other purposes." Section 14 of Act 1201 became § 12-63-103(a) & (b), *supra*; this statute is captioned "Fort Chaffee Redevelopment Authority Public Trust," and it reads as follows:

> (a) The *State* of Arkansas *acknowledges and endorses the establishment of the Fort Chaffee Redevelopment Authority Public Trust*, created by Sebastian County, Arkansas, on February 19, 1997, as set forth in the Fort Chaffee Redevelopment Authority Indenture of Trust and pursuant to the provisions of the laws of the State of Arkansas, including specifically § 28-72-201 *et seq*.
>
> (b) The Fort Chaffee Redevelopment Authority Public Trust is hereby recognized by the State as the entity to: *prepare a comprehensive study of all issues related to the closure and redevelopment of Fort Chaffee Military Base surplus properties and to ensure proper planning and optimal use of the property* embodied therein; after conversion of such portions of the Base as the United States Department of Defense deems unnecessary to its overall military mission, *to manage, own and operate those portions so as to yield the maximum benefit to the residents of affected counties and communities in the State of Arkansas*; and for other purposes as enabled and set forth in the Fort Chaffee Redevelopment Authority Indenture of Trust are in the public interest and serve a public purpose and can best be accomplished by the creation of a public trust vested with the powers and duties specified in the Indenture of Trust. (Emphasis added.)

Barling contends that this statute cannot be read to afford the FCRA a kind of "super-legislative" authority over Fort Chaffee, and that while the FCRA is the entity charged with the development of Fort Chaffee, that charge does not amount to a usurpation of the control Barling exercises over the land — including the authority to impose zoning ordinances — due to its prior annexations of that land.

Barling argues first that the plain language of § 12-63-103(a) and (b) does not convey upon the FCRA authority to enact and enforce zoning ordinances and land use regulations. Instead, according to Barling, the FCRA is simply a local redevelopment authority, empowered only to work within already-existing local zoning structures. FCRA responds that Ark. Code Ann. § 28-72-201 (1987), cited in § 12-63-103(a), establishes the means by which governmental or municipal subdivisions may create and become parties to public trusts. Ark. Code Ann. § 28-72-202(d) (1987) specifically provides that when a municipality signs a trust indenture, that trust agreement becomes a binding contract between the state, the designated beneficiary, and the trustee of the trust, and that the trustee of the trust shall be the "regularly constituted authority of the beneficiary for the performance of the functions for which the trust shall have been created."

Here, the Trust Indenture, signed by Barling, Greenwood, Fort Smith, and Sebastian County as beneficiaries, provided that the closure and redevelopment of Fort Chaffee was a matter of great concern for the beneficiaries. These beneficiaries agreed that they could not meet the goals of the Trust by working alone. Accordingly, these affected communities (the beneficiaries) agreed to create a public trust that would have as its purpose the following:

> The public trust created by this Indenture shall prepare or cause to be prepared a comprehensive study of all issues related to the closure and redevelopment of the Base, shall prepare or cause to be prepared a comprehensive conversion and redevelopment plan for the Base, shall in conformity with such plan accept title from the United States of America to any and all real and personal property and improvements included in the Base, shall investigate and obtain all assistance available from the United States government and all other sources, and shall utilize such property and such assistance to replace and enhance the economic benefits generated by the Base with diversified activities, including, but not limited to, activities which will foster creation of new jobs, economic development, industry, commerce, aviation, and transportation within the affected communities.
>
> Such activities are in the public interest and serve a public purpose and can best be accomplished by the creation of a public trust vested with the powers and duties specified in this Indenture.

The "powers and duties specified" in the Indenture, found in Article IV, include the following:

> (b) *[The power to] [a]dopt, amend, and repeal rules and regulations, restrictive covenants, land use regulations and restrictions*, development and use of signage and advertising on the Property, and development and use regulations for the Property not inconsistent with this Indenture or the Act. (Emphasis added.)

Thus, upon reading the relevant statutes — §§ 12-63-103(a) and (b) and 28-72-201 and -202 — together with the plain language of the Trust Indenture, it is clear that the Trust is the entity endowed with the authority to manage, own, and operate the land to its maximum benefit. The Trust is empowered to accomplish these objectives by adopting rules, regulations, and restrictive covenants, including land use regulations and restrictions. By signing the Indenture, Barling agreed to be contractually bound by its language, including that which gave the FCRA the authority to take title to the land and manage it to the best economic advantage and to enact land-use regulations.

We note Barling's argument that the trial court confused Barling's zoning authority with FCRA's planning authority, and that zoning is a separate function by virtue of the State's "police power," as delegated to cities and towns. We first point out that the General Assembly has given zoning power to an authority other than a city. *See* Ark. Code Ann. §§ 3-3-301 to -312 (Repl. 1996 and Supp. 2001) (creating the Capitol Zoning Commission). Here, the General Assembly, as already discussed above, has given the FCRA power through land-use regulations (which necessarily include zoning laws) and by approving the parties' signed Trust Indenture. The trial court correctly held the FCRA had such zoning authority, and we affirm that ruling.

Barling also challenges the trial court's holding that the FCRA's "uncontroverted affidavits" by Jimmy Hicks, the Executive Vice President of RKG Associates,[1] Randy Coleman, Vice President of Mickle, Wagner, Coleman, Inc. (which participated in the preparation of the Comprehensive Reuse Plan), and Phillip Reeves, Executive Director of FCRA, established beyond any question that serious and irreconcilable differences exist between Barling and the Trust. Each of these affiants asserted that Barling's zoning plans conflicted in numerous ways with the Trust's Reuse Plan and with

[1] RKG Associates is the firm that developed the Comprehensive Reuse Plan for the Fort Chaffee property.

the goals set out in the Economic Development Conveyance (EDC) application.[2] The trial court concluded that Barling's ordinances conflicted with the Trust's needs to maintain a flexible development plan in order to accomplish its goals set out in the Reuse Plan, and that if the FCRA were forced to comply with Barling's zoning ordinances, it would not be able to accomplish its goal of job creation, which was a condition of the government's conveyance of the Fort Chaffee property back to the Trust.

Barling contends that the conflicts cited by the trial court are nothing more than zoning disputes between a real property developer (FCRA) and a municipality, and should in no way equate to the type of constitutional "conflict" prohibited between the state statute and a municipal ordinance. In short, Barling submits that the fact that the FCRA's development plan is not entirely consistent with Barling's zoning regulations does not confer upon the FCRA the authority to develop its own zoning and land use regulations and ignore those imposed by Barling.

In support of its argument, Barling cites *Bolden v. Watt*, 290 Ark. 343, 719 S.W.2d 428 (1986), wherein this court held that a city ordinance will not be held to conflict with a state statute when it is possible to read them in a harmonious manner. In *Bolden*, the appellant taxicab drivers were denied permits to operate taxicabs in Little Rock under a city ordinance prohibiting permits to persons convicted of driving under the influence of intoxicating liquors. Little Rock had authority to enact such an ordinance under a 1939 state statute. The appellant drivers contended the 1939 statute conflicted with a 1973 statute, which promoted the rehabilitation of criminal offenders by providing that criminal records and misdemeanor convictions could not be used to deny a person a license or permit. The *Bolden* court upheld Little Rock's denial of the drivers' permits. The court held that the two statutes and the Little Rock ordinance could be read in harmony, because they effectuated different purposes; it reasoned that the rehabilitation statute did not attempt to give a person a right to any particular job., but still benefitted those who had DWI convictions since they could get

[2] The Army donated the Fort Chaffee property under the EDC, and the FCRA would not have to pay for the land so long as it utilized the property to increase employment and economic development opportunities in the region. The EDC application submitted by the FCRA stated it had identified (1) over 1,820 acres for commercial and industrial uses, (2) 30 acres for development of outreach centers intended to benefit homeless persons, (3) 66 acres for governmental purposes, (4) 460 acres for construction of roadways, (5) 1,150 acres to be preserved as wetlands, and (6) 1,604 acres as appropriate for residential land use.

other jobs. This court explained that the public safety and welfare are sound reasons for holding taxi drivers to a higher degree of accountability than the ordinary driver. *Bolden*, 290 Ark. at 346-47. Barling asserts that its zoning ordinances and the State's recognition of the FCRA are subject to the same kind of harmonization, because the FCRA is simply a real estate developer, like any other developer, that must comport with the city's zoning laws.

FCRA responds that the General Assembly, by acknowledging the Trust in § 12-63-103, also acknowledged that the Trust became the "regularly constituted authority" for accomplishing trust purposes, and that the Trust and Barling had entered into a binding contract. *See* § 28-72-202(d). FCRA thus asserts that the General Assembly "was aware, in short, that the 'binding contract' that it 'endorsed' gave FCRA land-use regulatory powers over Fort Chaffee, and stated that its provisions should be 'liberally interpreted.' " Further, because Barling — as a signatory to the Trust Indenture — acknowledged that it could not develop and manage the land to its best use by itself, FCRA contends that the General Assembly clearly intended to give the FCRA the authority for planning the appropriate use of the land, instead of simply "relying on the general zoning laws of the State." We agree with FCRA.

FCRA's authority must be considered in light of the federal government's policy behind returning closed military bases to the states in which they are located. *See* 32 C.F.R. § 175.1 (the purpose of the "Revitalizing Base Closure Communities" program is to "assist the economic recovery of communities impacted by base closures and realignments"). Further, 32 C.F.R. § 175.4 states that it is Department of Defense policy to "help communities impacted by base closures and realignments [to] achieve rapid economic recovery through effective reuse of the assets of closing and realigning bases more quickly, more efficiently, and in ways based on local market conditions and locally developed reuse plans. This will be accomplished by quickly ensuring that communities and the Military Department communicate effectively and work together to accomplish mutual goals of quick property disposal and rapid job generation."

FCRA's proposed plans for the property are designed to promote "rapid job generation," as it has designed industrial areas that take advantage of the land's rail lines, has planned a $4.2 million "nature center" in conjunction with the Arkansas Game & Fish Commission that will create numerous jobs, and has described a conference hotel to be built in a light commercial/business park

zone, adjacent to an Olympic-sized swimming pool and other attractive amenities. Barling's zoning, however, encompasses large residential areas, even though much of the land so zoned has suffered "environmental degradation" from lead-based paint, asbestos, PCBs, and other harmful agents that would require massive remediation before the land could ever be offered for residential construction and would significantly depress property values.

Thus, FCRA has taken advantage of the authority granted to it by the Trust Indenture to swiftly move the Fort Chaffee property in the direction of job development and economic growth, in compliance with the Economic Development Conveyance it accepted from the federal government. Because the statutes at issue and the trust documents they reference recognize FCRA as "the entity" charged with managing this land, the trial court did not err in granting summary judgment to the FCRA on the question of that body's authority to control land-use issues on the property.

Barling's second point on appeal is that the trial court erred in finding that the city had ceded legislative authority over the land it annexed to the FCRA. The trial court's order found that Barling's claim to legislative authority over the Fort Chaffee property stemmed from its 1981, 1982, and 1991 annexations of tracts of land of the Fort, which are also contained in the Trust property. The court went on to note that, under § 28-72-202, "once the Trust is accepted by the beneficiaries (*e.g.* Barling), '[t]he trustee of the trust thereupon shall be the regularly constituted authority of the beneficiary for the performance of the functions for which the trust shall have been created.' " Thus, the court concluded that by signing the Trust Indenture, Barling ceded its legislative authority over the property encompassed within the FCRA.

Barling challenges this ruling, contending that a city's legislative power cannot be delegated to a committee or an administrative body, *Czech v. Baer*, 283 Ark. 457, 677 S.W.2d 833 (1984), nor can the city directors delegate or bargain away their legislative authority. *Id.* The trial court's finding that the City of Barling ceded all legislative authority over the land to the FCRA, the City argues, was not supported by the law or the evidence. Further, the City asserts it was not its intent to create an entity situated within its municipal boundaries yet not subject to its municipal laws. FCRA responds by noting that, because Barling's authority over zoning is entirely due to the grant of that authority by the State, the city should not be heard to complain when the State "proposes to share

power inter-locally with other cities via a binding trust, and the legislature endorses [the City's] binding contract to do so."

When Barling, the other cities, and Sebastian County signed the Trust Indenture, they agreed that they could not, by themselves, manage the conversion of the property from a former military base into an economically viable and prosperous community. Therefore, the Trust was created and given the authority to regulate the use of the land in order to achieve that goal. The Public Trust, created under the provisions of § 28-72-201 *et seq.*, was then endorsed by the Legislature in § 12-63-103, which acknowledged the authority of the FCRA to own, operate, and manage the property. Nevertheless, Barling asserts that the Trust Indenture was "nothing more than an indenture designed to permit the FCRA to go about its business of receiving the federal surplus property, and develop it according to law as with any other developer of a large parcel of property." This, however, ignores the fact already discussed above that when Barling signed the Trust Indenture, it granted the FCRA the authority to own, operate and manage the land, as well as the explicit power to "adopt, amend, and repeal . . . land use regulations." This authority to define land use regulations was specifically approved by the General Assembly in § 12-63-103, and thus we conclude that Barling unquestionably agreed to cede a portion of the authority granted to it by the State when it signed the indenture.

For its final point on appeal, Barling asserts that the trial court erred when it concluded that the affidavits of Jimmy Hicks, Randy Coleman, and Phillip Reeves, who participated in preparing the Reuse Plan, were "uncontroverted," and that these affidavits supported the conclusion that Barling's zoning ordinances irreconcilably conflicted with the Plan. Further, Barling asserts that the trial court failed to take into account the intent of the General Assembly, the FCRA, or the City of Barling as reflected in the affidavits of Richard Haberman and Jack Yates, Barling City Administrators, who both asserted that they had met with representatives of the FCRA and that those representatives offered assurances that they recognized Barling as the entity responsible for zoning.

In an order dated February 8, 2001, denying Barling's motion for reconsideration, the trial court noted that it considered the affidavits of Haberman and Yates, but it did not find them to raise a genuine issue of material fact. Further, the court noted that both

parties had declared that there were no factual issues to be considered, and that the questions presented to the court to resolve were legal in nature.

We are unable to reach the merits of Barling's argument, however, because the affidavits to which the city refers were not properly before the trial court. In this respect, the Haberman and Yates affidavits were attached as exhibits to Barling's brief in reply to FCRA's motion for summary judgment. These exhibits improperly raised new factual allegations and contentions for the first time. We do not consider such exhibits in our consideration of the propriety of summary judgment. *Eldridge v. Bd. of Corrections*, 298 Ark. 467, 768 S.W.2d 534 (1989).

We turn next to FCRA's cross-appeal, wherein the Trust argues that the trial court erred in ruling that FCRA's challenges to Barling's annexation ordinances were time-barred. As noted above, the trial court granted Barling's first motion for summary judgment, concluding FCRA's challenge to Barling's 1981, 1982, and 1991 annexation ordinances and elections were untimely filed, since § 14-40-304 requires that challenges to annexations must be filed within 30 days of the election.

FCRA asserts that it properly and timely challenged Barling's annexation elections because the ordinances calling for those elections were void *ab initio*. Particularly, FCRA argues that Barling did not have jurisdiction to acquire the federal military land, because only those laws in effect in 1941, when Arkansas ceded jurisdiction over the land to the federal government, could govern subsequent actions affecting that land. In support of its argument, FCRA cites *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929). There, in 1904, the United States acquired exclusive jurisdiction over Hot Springs Park, and in 1913, the General Assembly enacted a law relieving innkeepers from liability to guests for loss by fire unless it was due to negligence. The plaintiffs contended the Arkansas law had no force in Hot Springs Park, which included the Arlington Hotel where the plaintiffs sustained a fire loss. The Supreme Court agreed and held that when the United States bought or condemned state land for a "national purpose," without consent of the state, then "such jurisdiction would attach as was needed to enable the United States to use it for the purpose for which it had been purchased." However, when the state formally ceded jurisdiction to the federal government, "the state and the government of the United States could frame the cession and acceptance of governmental jurisdiction, so as to divide the jurisdiction between the two as the two

parties might determine, provided only they saved enough jurisdiction for the United States to enable it to carry out the purpose of the acquisition of jurisdiction." *Fant*, 278 U.S. at 451. FCRA submits that the *Fant* holding applies to the instant case, because when Arkansas ceded jurisdiction over Fort Chaffee to the federal government in 1942, there was no authority left for the state to grant to a municipal subdivision, such as Barling, for that subdivision to exercise or assume.[3]

The trial court here rejected FCRA's argument, finding instead that the present situation was controlled by *Howard v. Commissioners of Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953). We agree.[4] In that case, the City of Louisville, Kentucky, in 1947 and 1950, annexed a piece of land which the federal government had acquired in 1940, with the consent of the State of Kentucky, to construct a Naval Ordnance Plant. Louisville then began collecting a license tax on residents of that annexed area. Several employees of the ordnance plant filed suit, alleging that the plant was not within the city, since Louisville could not properly have annexed federal property, and as such, the city had no right to tax them. The Supreme Court noted as follows:

> The appellants first contend that the City could not annex this federal area because it had ceased to be a part of Kentucky when the United States assumed exclusive jurisdiction over it. With this

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[3] We note that, here, the state law at the time of the cession permitted municipal corporations to annex contiguous property. *See* Act 14 of 1887 (subsequently codified in part at Ark. Code Ann. § 14-40-203). Further, the incorporation of municipalities has been authorized by statutory law since at least 1875 (*see* Act 1 of 1875). Thus, it is irrelevant that the municipal corporation of Barling itself was not in existence at the time of the cession in 1941, since the statutory mechanism and the authority for a municipality to annex territory was extant as of that date, and Barling's annexations were never shown to be in conflict with the federal government's jurisdiction.

[4] However, we do not conclude, as the trial court did, that *Howard* overruled the Supreme Court's holding in *Fant* (*Fant II*). We believe the cases can be read together harmoniously. In particular, FCRA cites to our decision in *Arlington Hotel Co. v. Fant*, 176 Ark. 613, 4 S.W.2d 7 (1928) (*Fant I*), which was later affirmed by the Supreme Court in *Fant II*. In *Fant I*, this court said that the cessation of jurisdiction was necessarily one of political power, and it took away the authority of the State government to legislate over the territory ceded to the General Government. However, our court in *Fant* went on to state the following:

> It therefore seems settled . . . that the laws in existence in the State of Arkansas at the time of the cession are still in effect upon the reservation, as they are not inconsistent with the laws of the United States and have not been abrogated.

Fant, 176 Ark. at 616. This language is consistent with that later used in *Howard*.

> we do not agree. When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky. A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. *The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government.* The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

Howard, 344 U.S. at 626-27 (emphasis added).

Thus, a municipality, such as Barling, may annex property within a federal enclave so long as it does nothing that will interfere with the jurisdiction of the federal government. Despite the FCRA's argument that Barling's intention to provide fire and police protection to the Fort Chaffee land amounted to an interference with the federal government's authority to provide such services, we agree with the trial court's conclusion that "the mere recitation in the annexation ordinances that the services will be provided, even though Barling at the time of the annexation had no authority to provide such services if the federal government objected, does not make the ordinances void."

Because Barling had the ability to annex the federal land, we reject FCRA's argument that the annexations were void *ab initio*. We therefore conclude that FCRA's challenge to the elections, some nine, eighteen, and nineteen years after the annexations were accomplished, were time-barred under § 14-40-303. *See City of Springdale v. Incorporated Town of Bethel Heights*, 311 Ark. 497, 848 S.W.2d 1 (1993); *Duennenberg v. City of Barling*, 309 Ark. 541, 832 S.W.2d 237 (1992); *Williams v. Harmon*, 67 Ark. App. 281, 999

S.W.2d 206 (1999) (noting *Bethel Heights* and *Duennenberg* as holding that the thirty-day limitations period extends to challenges to procedures outlined in subchapter of Arkansas Code on annexations, including those procedures not enumerated in § 14-40-302). Thus, the trial court did not err in granting summary judgment on the question of FCRA's failure to bring its annexation challenge within thirty days.

FCRA argues also that Barling's annexation ordinances, as placed before its electors, constituted a constructive fraud upon the public, thus creating an issue capable of supporting a collateral attack. However, FCRA did not obtain a ruling on this issue from the trial court. It is well settled that to preserve arguments for appeal, even constitutional ones, the appellant must obtain a ruling below. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001) (citing *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998)). The same is true of FCRA's final argument, that Barling was bound to proceed with its annexation in a general election, rather than a special election such as that used in 1981 and 1991, because the law in existence at the time of the cession of jurisdiction in 1941. The trial court did not rule on these issues, and, although we believe there is no merit to FCRA's arguments, we decline to further address them here.

For the foregoing reasons, the trial court is affirmed on direct appeal and on cross-appeal.

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

ANNABELLE CLINTON IMBER, Justice, concurring in part; dissenting in part. I concur with the result reached by the majority because the City of Barling's attempted annexations of property in Fort Chaffee were void *ad initio*. FCRA raised the issue of whether Barling had the power to annex a large portion of Fort Chaffee while it was still a federal enclave. If it did not, then the annexations were void *ab initio*. The majority holds, as did the trial court below, that the federal government permits a city to annex a portion of a federal enclave. However, the court asked and answered the wrong question. The issue here is whether Arkansas law empowered Barling to annex a portion of a federal enclave, not whether the federal government permitted it. The majority's decision today, which upholds Barling's annexation of almost 14,000 acres in the Fort Chaffee federal enclave, opens the door for municipal land grabs of property ceded to the federal government.

Three United States Supreme Court cases frame the issue of the type of power that a state and its political subdivisions may exercise over a federal enclave. In *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929) (*Fant III*), the Supreme Court upheld our holding in *Arlington Hotel Co. v. Fant*, 176 Ark. 613, 4 S.W.2d 7 (1928) (*Fant II*), that when Arkansas cedes exclusive jurisdiction over to the federal government, it takes "away the authority of the State Government to legislate over the territory ceded to the General Government." *Id.* at 615 (quoting *Fant v. Arlington Hotel Co.*, 170 Ark. 440, 280 S.W.20 (1926) (*Fant I*)). This court also held that the state retained jurisdiction over transient matters (such as civil claims), but not over local matters (such as property), and that the federal enclave continued to be subject to laws in effect at the time the state ceded authority to the federal government. *Fant II, supra.* The next opinion by the Supreme Court on this issue came in 1953. In *Howard v. Commissioners of Sinking Fund of City of Louisville,* 344 U.S. 624 (1953), the Court held that a federal enclave was not a state within a state, and that the federal government was not concerned with where a city might draw its boundaries; rather the issue was whether a city's attempt to exercise authority over the property created friction between the city and the federal government. The third case on point is *Paul v. United States,* 371 U.S. 245 (1963). The *Paul* Court cites *Fant III* with favor for the proposition that "[a] State may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States. . . ." *Id.* at 268. The *Paul* Court did temper the *Fant III* view by concluding that regulatory changes that are consistent with state law, as it existed at the time of the cession, are applicable within a federal enclave. *Id.*

Reading the three cases harmoniously, it is clear that while the federal government does not object to a city annexing a portion of a federal enclave so long as it does not create friction, the power to annex the property is a question of state law, *i.e.* whether the State reserved that power to itself when it ceded jurisdiction to the federal government. The majority concludes that because the State and its municipal subdivisions had the power to annex property at the time the State ceded jurisdiction, cities continued to have that power. This court and the United States Supreme Court agree that laws in existence at the time of cession continue to be in effect on the federal enclave so long as they are not inconsistent with federal laws and purpose. *See Fant I, Fant II,* and *Fant III, supra.* This same proposition was affirmed by the Supreme Court in *Howard, supra.* Ten years later in *Paul,* the Supreme Court reaffirmed that laws in effect at the time of cession, and regulations consistent with those

laws, remain in effect over a federal enclave, but the State retains the power to legislate over the property only to the extent that the State specifically reserved that legislative power. *See Paul v. United States, supra.*

Arkansas ceded exclusive jurisdiction over the Fort Chaffee property to the federal government on December 21, 1942, and reserved to itself no legislative authority over the property. This court has previously held that when Arkansas cedes exclusive jurisdiction to the federal government, the state does not retain jurisdiction over local matters, such as property. *Fant II, supra.* The process of annexation has long been recognized as a municipal legislative function. *Gregg v. Hartwick*, 292 Ark. 528, 731 S.W.2d 766 (1987); *City of Little Rock v. Town of North Little Rock*, 79 S.W. 785 (1904). It is axiomatic that annexation asserts jurisdiction over property, a local matter. When Barling was incorporated in 1956, it had no powers beyond those granted to it by the General Assembly, the Constitution, or those incidental powers necessary to its statutory powers. *Brooks v. City of Benton*, 308 Ark. 571, 826 S.W.2d 259 (1992). Because Arkansas retained no legislative authority over the Fort Chaffee property at the time Barling was incorporated in 1956, Barling could not have been granted any power to annex that property. Therefore, Barling's attempted annexations were void *ab initio*. Where an annexation is void *ab initio*, no right can accrue under it. *Posey v. Paxton*, 201 Ark. 825, 147 S.W.2d 39 (1941).

For the above-stated reasons, I would hold that the trial court was clearly erroneous in concluding that Barling had the legislative authority to annex portions of Fort Chaffee. Thus, I would reverse the trial court on FCRA's cross-appeal.

J&M MOBILE HOMES, INC. *v.* William H. HAMPTON

01-594 60 S.W.3d 481

Supreme Court of Arkansas
Opinion delivered December 6, 2001

Eilbott Law Firm, by: *Andy L. Caldwell*, for petitioner.

Brockman, Norton & Taylor, by: *C. Mac Norton*, for respondent.

TOM GLAZE, Justice. Petitioner J&M Mobile Homes, Inc., d/b/a R.V. City ("J&M"), seeks a writ of prohibition to prevent the Jefferson County Circuit Court from hearing the appeal of a lawsuit originally filed against J&M in Pine Bluff Municipal Court. J&M argues that the municipal appeal was not properly perfected pursuant to Ark. Inferior Ct. R. 9, and that the circuit court therefore had no jurisdiction to hear the appeal.

On February 22, 2000, William Hampton sued J&M Mobile Homes in the Municipal Court of Pine Bluff, seeking to recover damages to a motor home that Hampton contended were caused by a faulty repair performed by J&M. The municipal court heard the case on August 29, 2000, and found in favor of J&M. The judgment was entered on September 5, 2000. On September 19, 2000, Hampton filed a notice of appeal, requesting that the Pine Bluff Municipal Court Clerk prepare and certify a record of the proceedings in the Pine Bluff Municipal Court, and noting that Hampton

was willing to pay any fees authorized by law for the appeal. However, although the entire record was apparently filed in the circuit court, the record had not been certified.

On November 3, 2000, J&M filed a motion in Jefferson County Circuit Court to dismiss Hampton's appeal, alleging that Hampton had failed to file a certified copy of the proceedings from the municipal court, as required by Inferior Court Rule 9. On December 12, 2000, the Pine Bluff Municipal Court Clerk filed a "Clerk's Certificate for Appeal," in which the clerk certified that on September 21, 2000, she had delivered the entire original Pine Bluff Municipal Court record in the case to the Jefferson County Circuit Clerk, along with a $100 filing fee. The circuit judge denied J&M's motion to dismiss on May 4, 2001, finding that Hampton had "substantially complied" with Inferior Court Rule 9.

J&M then filed its petition for writ of prohibition with our court on May 23, 2001, alleging that Hampton failed to perfect his appeal by filing a certified copy of the municipal court record with the circuit court within thirty days from the entry of the municipal court order; that Hampton failed to file an affidavit as required by Inferior Court Rule 9; and that the trial court, by proceeding with the case, had exceeded its authority. As such, J&M argues, a writ of prohibition is the proper remedy to prevent the "improper and unauthorized assumption of jurisdiction over this cause of action."

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.3d 686 (2000) (citing *Kelch v. Erwin*, 333 Ark. 567, 570, 970 S.W.2d 255 (1998); *West Memphis Sch. Dist. No. 4 v. Circuit Court of Crittendon County*, 316 Ark. 290, 871 S.W.2d 368 (1994)). It is a proper remedy when the jurisdiction of the trial court depends upon a legal rather than a factual question. *Ramirez v. White County Circuit Court*, 343 Ark. 372, 38 S.W.3d 298 (2001). The purpose of the writ is to prevent a court from exercising a power not authorized by law when there is no other adequate remedy by appeal or otherwise. It is never issued to prohibit an inferior court from erroneously exercising its jurisdiction, but only where the inferior tribunal is wholly without jurisdiction, or is proposing or threatening to act in excess of its jurisdiction. *Juvenile H. v. Crabtree*, 310 Ark. 208, 833 S.W.2d 766 (1992). When a party fails to perfect an appeal from an inferior tribunal to a circuit court in the time and manner provided by law, the circuit court never acquires jurisdiction of the appeal. *See Board of Zoning Adjustment v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1997).

Rule 9 of the Arkansas Inferior Court Rules governs appeals taken from inferior courts, such as the Pine Bluff Municipal Court, to circuit courts; that Rule provides, in pertinent part, as follows:

> (a) *Time for Taking Appeal.* All appeals in civil cases from inferior courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within thirty (30) days from the date of the entry of the judgment.
>
> (b) *How Taken.* An appeal from an inferior court to the circuit court shall be taken by filing a record of the proceedings had in the inferior court. It shall be the duty of the clerk to prepare and certify such record when requested by the appellant and upon payment of any fees authorized by law therefor. The appellant shall have the responsibility of filing such record in the office of the circuit clerk.

The provisions of Inferior Ct. R. 9 are mandatory and jurisdictional. *Board of Zoning Adjustment v. Cheek, supra*; *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994) (when the time for filing an appeal is fixed by a rule, the provision which limits the time is jurisdictional in nature). If an appellant does not comply with the rule's provisions, the circuit court is without authority to accept the appeal. *Hawkins v. City of Prairie Grove*, 316 Ark. 150, 871 S.W.2d 357 (1994); *Bocksnick v. City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992); *Edwards v. City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989).

J&M argues that, because Hampton failed to file either a certified copy of the municipal court transcript or an affidavit showing the transcript had been requested with the circuit court within thirty days, Hampton did not strictly comply with Rule 9, and the appeal was not properly perfected. As a result, J&M contends, the circuit court was entirely without jurisdiction to hear the appeal. We agree.

Our cases require strict compliance with Rule 9. In *Baldwin v. State*, 74 Ark. App. 69, 45 S.W.3d 412 (2001), the court of appeals specifically rejected a "substantial compliance" approach to appeals from inferior courts. There, the appellant, Howard Baldwin, had filed a notice of appeal and an appeal bond in circuit court; Baldwin argued that since the appeal bond contained the same information as the transcript, he had substantially complied with Rule 9. The court of appeals rejected that argument, stating that Rule 9 is clear that an appellant "must either actually lodge the

record in the circuit court, or file an affidavit with the circuit court clerk stating that he has requested the inferior court clerk to prepare the record and the clerk has neglected to prepare and certify that record for purposes of appeal. *Baldwin*, 74 Ark. App. at 72.

Likewise, in *Pace v. Castleberry*, 68 Ark. App. 342, 7 S.W.3d 347 (1999), the appellant, Keith Pace, had filed a notice of appeal to the circuit court within thirty days. Pace's counsel attached an affidavit to the notice of appeal stating that he had requested the municipal clerk to prepare and certify the records of the inferior court proceeding for appeal, but the clerk did not actually lodge the municipal court record until the thirty-first day from the entry of the municipal court order. The circuit court judge dismissed the appeal on the ground that the affidavit did not state the clerk negligently failed to complete the record as required by the rule. On appeal to the court of appeals, Pace argued that the notice of appeal and affidavit, filed on the twenty-ninth day, constituted substantial compliance with the rule. The court of appeals disagreed. The *Pace* court stated that it is the appellant's burden to file the record with the circuit clerk; it further held that the rule is clear that either the record itself, or an affidavit stating the municipal clerk failed to prepare the record, must be filed within thirty days. Because the affidavit submitted by Pace did not allege that the inferior court clerk neglected to file the record, the court of appeals rejected Pace's argument that he "substantially complied" with the rule; it held, instead, that failure to comply strictly with Rule 9 "precludes the circuit court from having jurisdiction over the appeal." *Pace*, 68 Ark. App. at 345.

In the instant case, we are again presented with a question of whether "substantial compliance" with Rule 9 is sufficient to perfect an appeal from an inferior court. There is no dispute that a certified record of the municipal court proceedings was not filed in the circuit court within thirty days.[1] Hampton nevertheless asserts that the entire record was timely lodged with the circuit court, and that the failure to timely certify the record is insignificant. However, we note again the language of Rule 9(b), which states that "[a]n appeal from an inferior court to the circuit court shall be taken *by filing a record of the proceedings* had in the inferior court. It shall be the duty of the clerk *to prepare and certify such record* when requested by the appellant and upon payment of any fees authorized

[1] Hampton concedes in his brief that, although the record was filed with the circuit court some sixteen days after the municipal court entered its order, the record "was not separately certified by the Municipal Clerk until a few months later."

by law therefor." Unless we are to consider the language in the second sentence as mere surplusage, we must conclude that the rule requires the filing of a certified copy of the transcript of the lower court proceedings within thirty days in order for the circuit court to acquire jurisdiction over the appeal.

We note Hampton's argument wherein he asserts that a writ of prohibition is not a substitute for a timely appeal, and that the writ should not be issued in order to prevent a circuit court from improperly exercising its jurisdiction. However, if an appeal is not properly perfected from the inferior court, the circuit court *never acquires jurisdiction. See Pike Avenue Development Co. v. Pulaski County*, 343 Ark. 338, 37 S.W.3d 177 (2001) (failure to either file the record with the clerk or file an affidavit showing that the record has been requested from the clerk within thirty days precludes the circuit court from having jurisdiction over the appeal). Prohibition is thus the appropriate remedy when, as here, the lower court is wholly without jurisdiction. *See Ramirez v. White County Circuit Court*, 343 Ark. 372, 38 S.W.3d 298 (2001). It would be a waste of time, money, and judicial resources to require a party to first proceed to trial, and only then permit an appeal of the lower court's decision regarding its jurisdiction over the matter — when that court never had jurisdiction in the first instance.

For the foregoing reasons, J&M's petition for writ of prohibition is granted.

IMBER, J., not participating.

E-Z CASH ADVANCE, INC. *v.* Deborah HARRIS

01-570 60 S.W.3d 436

Supreme Court of Arkansas
Opinion delivered December 6, 2001
[Petition for rehearing denied January 10, 2002.]

Hopkins & Allison, a Professional Association, by: *Gregory M. Hopkins* and *Jeffrey C. Humiston*, for appellant.

Morgan & Turner, by: *Todd Turner*; and *Orr, Scholtens, Willhite & Averitt, PLC*, by: *Chris Averitt*, for appellee.

DONALD L. CORBIN, Justice. Appellant E-Z Cash Advance, Inc., appeals the order of the Pulaski County Circuit Court denying its motion to compel arbitration. For reversal, E-Z Cash argues that a contract signed by Appellee Deborah Harris contained a valid arbitration clause, thus preventing her from filing suit in circuit court. We disagree, and thus, affirm.

This appeal stems from a dispute regarding the legality of certain loan transactions involving E-Z Cash and Harris. E-Z Cash is a corporation that is in the business of providing cash loans to individuals who present personal checks that are held until the borrower's next payday. These transactions are commonly referred to as "payday loans." In June 2000, Harris presented E-Z Cash with a personal check in the amount of $400 that it agreed to hold until Harris's next payday. Harris was then required to return to E-Z Cash to either redeem the loan for the full face amount of the check or to renew the loan. She decided to renew the loan by paying the interest and presenting a new check for the original amount of the cash received, plus an additional service charge for the extended term. As part of the transaction, Harris signed an "Arkansas Deferred Presentment Agreement," stating that there was a check cashing fee of $40, as well as a $10 deferred presentment fee. This form also stated that the $50 constituted a finance charge, with an annual percentage rate of 372.4 percent. Thereafter, Harris received $350 in cash. Harris continued this arrangement with E-Z Cash until August 3, 2000.

After Harris encountered difficulties repaying the interest due on her loans, she filed suit, individually and on behalf of similarly situated persons, against E-Z Cash. In her complaint, Harris alleged that E-Z Cash violated Article 19, § 13, of the Arkansas Constitution by charging interest in an amount exceeding the maximum allowable rate. Specifically, Harris averred that the "service charge" imposed by E-Z Cash amounts to interest, as the term is used in Section 13, and the annual interest rates range anywhere from 300 to 720 percent, thus violating Arkansas's constitutional prohibition against usury. Harris requested that she be appointed as a representative of the class and prayed for judgment in an amount equal to twice the interest paid by each member of the class, costs, and

attorney's fees. Harris also requested that the court declare the contracts at issue null and void.

E-Z Cash responded with a motion to dismiss Harris's suit on the ground that Harris signed a valid arbitration agreement and was thus barred from bringing suit in circuit court. In her response to the motion to dismiss, Harris contended that the circuit court should follow the reasoning of other jurisdictions that have refused to compel arbitration, particularly in situations involving payday loan transactions where the underlying loan transactions are illegal or unenforceable. E-Z Cash then filed a motion to compel arbitration. Harris responded that the contracts are void *ab initio* and are therefore invalid, and as such, a void contract may not be arbitrated.

The trial court held a hearing on the motion to compel on January 18, 2001. No witnesses testified, but attorneys representing both parties presented their arguments to the court. The trial court orally denied the motion to compel, stating from the bench:

> I've got to deny it, of course. I mean I've read the contract and it's almost like an adhesion clause. Plus, there's, of course, similar cases on this.
>
> This is a one-sided contract in regard to arbitration. I don't see any other way to read it. There's no obligation on behalf of check cashiers to do anything but sue them.

In its written order, filed January 25, 2001, the trial court denied the motion to compel, as well as the motion to dismiss, because the arbitration clause was contained in an adhesion contract, was one-sided, and unfair. The court further found that the agreement lacked mutuality, and was therefore unenforceable against Harris. From that ruling, comes the instant appeal.

At the outset we note that an order denying a motion to compel arbitration is an immediately appealable order. Ark. R. App. P.—Civ. 2(a)(12); *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 27 S.W.3d 361 (2000); *Walton v. Lewis*, 337 Ark. 45, 987 S.W.2d 262 (1999). We review a trial court's order denying a motion to compel *de novo* on the record. *Id.*

I. Arkansas Law Governs

E-Z Cash's first point on appeal is twofold. First, it argues that this court should apply the provisions of the Federal Arbitration Act ("FAA") to determine whether or not there is a valid arbitration agreement in this case because the underlying transactions involve commerce. E-Z Cash then avers that the FAA declares a strong public policy in favor of arbitration that mandates the enforcement of arbitration agreements. Thus, according to E-Z Cash's logic, this court should enforce the arbitration agreement in this case because public policy requires as much.

Harris argues that neither the FAA nor the Arkansas Arbitration Act are applicable here, because the contract at issue is usurious and, therefore, void. Alternatively, Harris argues that there is no enforceable agreement to arbitrate because the agreement lacks the required element of mutuality. We are unable to reach the merits of Harris's argument regarding the usurious nature of the contract because she failed to obtain a ruling from the trial court on this argument. Her failure to obtain such a ruling is a procedural bar to our consideration of this issue on appeal. *See Barker v. Clark*, 343 Ark. 8, 33 S.W.3d 476 (2000).

While we decline to reach the merits of Harris's argument that the contract is usurious, we also disagree with E-Z Cash's assertion that the FAA governs this case. The United States Supreme Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), held that the FAA may be applicable in both state and federal courts. Here, though, the arbitration agreement under the heading "Assignment and Choice of Law" specifically states: "We may assign or transfer this Agreement or any of our rights hereunder. This Agreement will be governed by the laws of the State of Arkansas, including without limitation the Arkansas Arbitration Act." In *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), the United States Supreme Court held that application of the FAA may be avoided where the parties agree to arbitrate in accordance with state law. Accordingly, Arkansas law, including the Arkansas Uniform Arbitration Act, governs the issue at hand.

II. Validity of Arbitration Agreement

We now turn to the issue of whether there is a valid and enforceable arbitration agreement in this case. E-Z Cash argues that the trial court erred in finding that the arbitration agreement was not an enforceable agreement. According to E-Z Cash, a two-part analysis must be utilized to determine whether there was a valid agreement between Harris and E-Z Cash that commits the issue to arbitration. First, the court must determine whether there is a valid arbitration agreement. Then, the court must determine if that arbitration agreement covers the dispute between the parties. Harris counters that the arbitration agreement is not enforceable because it is not supported by mutual obligations. In light of this court's recent decision in *Showmethemoney*, 342 Ark. 112, 27 S.W.3d 361, we agree with Harris that this arbitration agreement is unenforceable.

The Arkansas Uniform Arbitration Act, found at Ark. Code Ann. § 16-108-201—224 (1987 and Supp. 2001), outlines the scope of arbitration agreements in Arkansas. Section 16-108-201 states:

> (a) A written agreement to submit any existing controversy to arbitration arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> (b) A written provision to submit to arbitration any controversy thereafter arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract; provided, that this subsection shall have no application to personal injury or tort matters, employer-employee disputes, nor to any insured or beneficiary under any insurance policy or annuity contract.

Section 16-108-202(a) further states:

> On application of a party showing an agreement described in § 16-108-201 and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue

> so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

Clearly, under the foregoing statutory provisions, a party resisting arbitration may dispute the existence or validity of the agreement to arbitrate. *Showmethemoney*, 342 Ark. 112, 27 S.W.3d 361.

This court has held that arbitration is a matter of contract between parties. *See May Constr. Co. v. Benton Sch. Dist. No. 8*, 320 Ark. 147, 895 S.W.2d 521 (1995). There, this court stated:

> The same rules of construction and interpretation apply to arbitration agreements as apply to agreements generally, thus we will seek to give effect to the intent of the parties as evidenced by the arbitration agreement itself. 5 Am. Jur. 2d § 14; and *see Prepakt Concrete Co. v. Whitehurst Bros.*, 261 Ark. 814, 552 S.W.2d 212 (1977). It is generally held that arbitration agreements will not be construed within the strict letter of the agreement but will include subjects within the spirit of the agreement. Doubts and ambiguities of coverage should be resolved in favor of arbitration. 5 Am. Jur. 2d § 14; Uniform Laws Annotated, Vol. 7, Uniform Arbitration Act, § 1, Note 53 (and cases cited therein).

Id. at 149, 895 S.W.2d at 523 (quoting *Wessell Bros. Foundation Drilling Co. v. Crossett Pub. Sch. Dist., No. 52*, 287 Ark. 415, 418, 701 S.W.2d 99, 101 (1985)). Moreover, the construction and legal effect of a written contract to arbitrate are to be determined by the court as a matter of law. *Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001); *May Constr. Co. v. Thompson*, 341 Ark. 879, 20 S.W.3d 345 (2000).

E-Z Cash attempts to distinguish this case from that in *Showmethemoney*, 342 Ark. 112, 27 S.W.3d 361, by arguing that all of the essential elements of a valid contract are present in their agreement. In *Showmethemoney*, this court held that the essential elements of a contract include: (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *See also Foundation Telecomms., Inc. v. Moe Studio Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000). This court ultimately held that the arbitration agreement at issue in *Showmethemoney* was invalid because of a lack of mutual obligations. Specifically, the fact that the check casher had the right to seek redress in a court of law, while the customer was limited strictly to arbitration, demonstrated a lack of mutuality. This court explained:

> A contract to be enforceable must impose mutual obligations on both of the parties thereto. The contract is based upon the mutual promises made by the parties; and if the promise made by either does not by its terms fix a real liability upon one party, then such promise does not form a consideration for the promise of the other party. ". . . [M]utuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." A contract, therefore, which leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other.

342 Ark. at 120, 27 S.W.3d at 366. Thus, under Arkansas law, mutuality requires that the terms of the agreement impose real liability upon both parties. *Showmethemoney*, 342 Ark. 112, 27 S.W.3d 361; *Townsend v. Standard Indus., Inc.*, 235 Ark. 951, 363 S.W.2d 535 (1962). There is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to pursue relief through the court system. *See Showmethemoney*, 342 Ark. 112, 27 S.W.3d 361.

A review of the instant arbitration agreement reveals that there is no real liability imposed upon E-Z Cash. The arbitration agreement provides in relevant part:

> *ADDITIONAL TERMS AND CONDITIONS OF THIS AGREEMENT*
>
> *RETURNED CHECK CHARGE AND COLLECTION COSTS.* If the Check is returned to us from your financial institution due to insufficient funds, closed account, or a stop payment order, we have the right to all civil remedies allowed by law to collect the Check and shall be entitled to a returned check fee of $20.00, court costs and reasonable attorney fees pursuant to Act 1216 of 1999, § 6(g).
>
> . . . .
>
> 1. For purposes of this Agreement, the words "dispute" and "disputes" are given the broadest possible meaning and include, without limitation (a) all federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to the Applicant/Personal Information Form (the Application), this Agreement (including this arbitration provision and the fees

charges) or any prior agreement or agreements between you and us; (b) all counter claims, cross-claims and third-party claims; (c) all common law claims, based upon contract, tort, fraud and other intentional torts; (d) all claims based upon a violation of any state or federal constitution, statute or regulations; (e) all claims asserted by us against you, including claims for money damages to collect any sum we claim you owe us; (f) all claims asserted by you individually, as a private attorney general as a representative and/or member of a class of persons, or in any other representative capacity, against us and/or any of our employees, agents, officers, shareholders, directors, or affiliated entities (hereinafter collectively referred to as "related third parties"), including claims for money damages and/or equitable or injunctive relief.

2. Except as provided in *Paragraph 4* below, all disputes, including the validity of this arbitration provision *shall* be resolved by binding arbitration. Any party to a dispute, including related third parties, may send the other party written notice by certified mail return receipt requested of their intent to arbitrate and setting forth the subject of any of the following arbitration organizations to administer the arbitration: the *American Arbitration Association (1-800-778-7879), J.A.M.S., /Endispute (1-800-352-5267).* However, the parties may agree to select a local arbitrator who is an attorney, retired judge, or arbitrator registered and in good standing with an arbitration association and arbitrate pursuant to such arbitrator's rules. The party receiving notice of arbitration will respond in writing by certified mail, return receipt requested within twenty (20) days. If you demand arbitration, you must inform us in your demand of the arbitration organization you have selected or whether you desire to select a local arbitrator. If we or a related third party demand arbitration, you must notify us within twenty (20) days in writing by certified mail return receipt requested of your decision to select an arbitration organization or your desire to select a local arbitrator. If you fail to notify us, then we have the right to select an arbitrator organization. The parties to such dispute will be governed by the rules and procedures of such arbitration applicable to consumer disputes, to the extent those rules and procedures do not contradict the express terms of this agreement, including the limitations on the arbitrator below. You may obtain a copy of the rules and procedures by contacting the arbitration organization listed above.

. . . .

4. ALL PARTIES, *INCLUDING RELATED THIRD PARTIES, SHALL RETAIN THE RIGHT TO SEEK ADJUDICATION IN*

> *A SMALL CLAIMS TRIBUNAL FOR DISPUTES WITHIN THE SCOPE OF SUCH TRIBUNAL'S JURISDICTION.* Any dispute which cannot be adjudicated within the jurisdiction of a small claims tribunal *shall* be resolved by the binding arbitration set out in this Agreement. Any appeal of a judgement from a small claims tribunal *shall* be resolved by binding arbitration.

E-Z Cash argues that there is mutuality here because the agreement requires that both parties submit to arbitration, unless a matter falls within the exception for actions pursued in small claims courts. This argument is disingenuous, however, in light of the preceding provision governing collection of debts. Clearly, under that section, E-Z Cash has the right to pursue all civil remedies when a borrower's check is returned by his or her financial institution. Thus, E-Z Cash may sue to collect the amount of the returned check, plus seek to recover a $20 returned check fee, court costs, and reasonable attorney's fees. Taking into account their line of business, it is difficult to imagine what other causes of action against a borrower remain that E-Z Cash would be required to submit to arbitration. Harris and other borrowers, however, do not have the same ability to seek relief in the court system. Thus, the agreement to arbitrate is not supported by sufficient consideration, because Harris is the only party that has promised to forego her rights to seek redress in the court system. As previously stated, Harris's promise to submit to arbitration is not enforceable, because E-Z Cash has the option of pursuing arbitration or bringing suit in court. Because this arbitration agreement lacks the element of mutuality, it is not a valid and enforceable agreement. Accordingly, the trial court did not err in denying E-Z Cash's motion to compel arbitration.

Affirmed.

GLAZE and IMBER, JJ., not participating.

David LAIME and Jeanna Dodd *v.*
STATE of Arkansas

CR 01-559 60 S.W.3d 464

Supreme Court of Arkansas
Opinion delivered December 6, 2001

[redacted]

[redacted]

Wilson & Associates, P.L.L.C., by: *Patrick J. Benca*, for appellant David Laime.

Jeff Rosenzweig, for appellant Jeanna Dodd.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. The appellants in this case, David Laime and Jeanna Dodd, appeal from an order denying their motion to suppress drug evidence and statements. They raise seven points on appeal: (1) the state trooper lacked probable cause to make the initial stop of their vehicle; (2) the state trooper had no reasonable suspicion to detain them after proof of the vehicle's registration was provided; (3) invocation of one's constitutional rights cannot be grounds for probable cause; (4) the affidavit for search warrant omitted facts regarding the drug dog's reliability which caused a *Franks v. Delaware* violation; (5) the drug dog's "alert" on the vehicle did not constitute probable cause to search; (6) the search warrant was objectively unreasonable in stating that an invocation of constitutional rights provided probable cause; and (7) there was no proper basis for a nighttime search. We affirm the circuit judge's order denying the motion to suppress and reverse the decision by our court of appeals. *See Laime v. State*, 73 Ark. App. 377, 43 S.W.3d 216 (2001).

The facts given in this case are taken from Arkansas State Trooper David Ramsey's affidavit supporting the search warrant and probable cause for arrest as well as his testimony at the suppression hearing. We note initially that the affidavit and the testimony vary in certain important respects, which we will note in this opinion. At approximately 5:45 p.m. on July 28, 1998, Trooper Ramsey was patrolling Interstate 30 between Benton and Little Rock in a marked patrol unit. He observed a green 1986 Dodge van in the left-hand lane. The van was in the process of slowly passing two tractor-trailer trucks. Although the van was driving in the left lane of a double-lane stretch of I-30 with a 70 mile-per-hour speed limit, it was traveling at a speed of approximately 60 miles per hour. Two cars separated the trooper's patrol car from the van.

Trooper Ramsey believed that the van was hindering traffic and that the driver of the van was driving in violation of Arkansas's

left-lane law. *See* Ark. Code Ann. § 27-51-301(b) (Supp. 2001). When the van cleared the trucks, it pulled into the right-hand lane. According to the trooper's testimony, although the van was no longer in violation of any traffic law, he decided to pursue the left-lane violation. He pulled his patrol car behind the van and noted its Texas license plate number. He called the license plate number in to a state police operator to determine the validity of its registration, and the result of the call was that the van was not registered in Texas.

At this point, Trooper Ramsey pulled the van over to the side of the interstate to investigate its lack of registration. The trooper approached the driver of the van, David Laime, and requested to see his driver's license. Laime produced a Virginia identification card in his name. Trooper Ramsey asked Laime if he had a driver's license; he also asked whether the van belonged to Laime in light of the fact that its plates were from Texas and Laime's identification was from Virginia. Laime replied that the van did not belong to him but belonged to a friend and that he was driving to Little Rock to meet several people who were giving him a ride to Washington, D.C. Laime then referred to his passenger, who was later identified as Jeanna Dodd, and told the trooper that his passenger was planning to drive the van back to Texas after she dropped Laime off in Little Rock. Laime also told the trooper that he and Dodd were planning to meet some friends at a Little Rock restaurant for dinner at 6:00 p.m., and that it was these people who were then going to take him to Washington, D.C. At some point during this interchange, Laime produced a Virginia driver's license.

Trooper Ramsey next asked about the van's registration and insurance. Laime offered the trooper proof of insurance, but the proof showed that the vehicle insured was a Subaru, not a Dodge van. After receiving this information, Trooper Ramsey returned to his patrol car and ran the Texas license plate number through the law enforcement database a second time. Again, he received information that the van was not registered in Texas. According to his affidavit for probable cause, at this time he requested a criminal history search on Laime. According to his affidavit for a search warrant and subsequent testimony, the request occurred later. The trooper returned to the van and asked Laime to accompany him to his patrol car to answer some questions. Laime agreed. Laime then offered Trooper Ramsey the registration documents for the van. These documents showed that the van was registered to Jeanna Dodd in Houston, Texas. At that point, Trooper Ramsey still did not know that Jeanna Dodd was the name of Laime's passenger.

The registration had been issued that very day at approximately 12:30 p.m., in Houston, Texas. Trooper Ramsey testified at the suppression hearing that because of this information, his suspicions about the van's registration were dispelled. He wrote Laime a warning ticket for "license not on file." After the warning ticket, he ran the criminal history check on Laime, according to his affidavit for a search warrant. Hours later, back at the Bryant police station, he added an additional warning on the ticket for "impeding the flow of traffic."

During the interchange in the patrol car after Laime had submitted the van's valid registration, Laime asked several times why he was being stopped and detained. Trooper Ramsey testified at the suppression hearing that he tried to answer Laime's questions, but that "before I could get a chance to answer it he'd done fired up about four more." Laime told the trooper that he needed to get to Little Rock as soon as possible because his friends would not wait for him to arrive. He added that if he did not meet the friends for dinner, they would leave him and he would miss his ride to Washington, D.C. Trooper Ramsey asked Laime the names of his friends and at which restaurant he was meeting the friends. Laime responded that he could not remember either, but that his passenger knew. Laime then told Trooper Ramsey that his passenger was his sister. According to Trooper Ramsey's testimony on cross-examination at the suppression hearing, his suspicions were aroused solely on the basis of the above-stated facts, and he had at this point made up his mind to search the van. The trooper made no comparable statement in his affidavits or on direct examination.

Trooper Ramsey next testified at the suppression hearing that he asked Laime to remain in the patrol car while he checked with his passenger in the van about the dinner arrangements. Whether this conversation ever took place is a matter of factual dispute in this case. In reviewing Trooper Ramsey's two affidavits (one for the search warrant and the second for probable cause to arrest), no mention is made of this conversation. At that time, Dodd told the trooper that she and Laime were driving up from Texas to meet some friends, and that these friends were going to give him a ride to Washington, D.C. She told Ramsey that she and Laime were planning on meeting the friends for dinner and then she was taking the van back to Texas. She confirmed Laime's statement that she was his sister. However, she could not remember the name of the restaurant where they were to meet their friends or the names of the friends, but she said that Laime knew. According to Trooper

Ramsey's testimony at the suppression hearing, he did not yet know Dodd's name even after this exchange.

Trooper Ramsey testified that now he was suspicious of Laime and Dodd because their stories were vague and were "kind of falling apart." He added that he was concerned because neither of the subjects could remember the name of the restaurant at which they were planning to meet the friends or the friends' names, but each said the other knew those names. The trooper said he was also concerned because they were driving a van that belonged to a friend.

The trooper returned to his patrol car, where Laime was still seated. It was then that he ran a criminal history check on Laime, according to his testimony at the suppression hearing. The results showed that Laime had a drug arrest in Florida and a drug charge in Virginia.[1] The trooper next asked Laime if he had "ever been arrested before." Laime replied that he had had a speeding ticket or some kind of traffic offense several years ago but that he could not remember what it was for. Trooper Ramsey next asked Laime: "You're not one of them guys . . . carrying dope down the highway or anything . . . ?" The trooper also asked Laime if he had any "guns or dead bodies or stuff" in the van. Laime grew increasingly irritated during this exchange and repeatedly asserted that he needed to get back on the road to meet his friends. Trooper Ramsey described Laime's behavior as irate, "bad combative," and hostile, and noted that he was gesturing wildly and that his body language suggested that he was angry.

Because of this, the trooper called for backup. After this call, Trooper Ramsey asked Laime if he could search the vehicle.[2] Laime

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[1] As to when Trooper Ramsey got Laime's criminal history, the record is unclear. His affidavit for probable cause says the radio operator called back after the trooper asked Laime about his arrest record. The affidavit for search warrant does not state whether Trooper Ramsey had the criminal history before or after he questioned Laime about his record.

[2] The precise chronology of events is a matter of factual dispute in this case. According to his testimony on direct examination at the suppression hearing, it was at this point that Trooper Ramsey decided to search the van — *after* he had spoken with Dodd. However, in the affidavit that Trooper Ramsey wrote for the search warrant, the affidavit for probable cause, and his cross-examination, he makes no mention of Dodd in connection with his decision to search. Trooper Ramsey testified at the hearing that his memory was better at the times that he wrote the two affidavits than it was at the suppression hearing. On cross-examination, he admitted that he decided to search the van much earlier, before he ever spoke to Dodd.

vigorously objected to this. The trooper described what happened next at the suppression hearing:

> He starts in that I was beginning to violate his constitutional rights. That he's a law student and he knows right from wrong and that I was detaining him from getting to Little Rock by 6:00. By now I had the consent to search form out and I asked him did he know what this was. He said, "You're not going to look." I said, "Well, just let me explain this thing a minute." I started filling out the top part and he said, "You're not going to look." I tried to read the top part up there and fill in the dates and times and things like that on there. He's just telling me I'm not going to look.

After this exchange, Laime's demeanor deteriorated further, according to the trooper. He repeated: "You're violating my constitutional rights and I demand you let me go." Laime repeated that he was a law student and threatened civil litigation.

Trooper Ramsey went back to the van to talk to Dodd about getting her consent to search the van. He asked Dodd for identification. At this point, according to his testimony, he learned her name for the first time. He asked her why she had stated that the van belonged to a friend when it was registered in her name. He also asked her if she would consent to a search of the van, to which she replied that she did not have time for a search because of the dinner engagement. She denied having any contraband in the van. Trooper Ramsey further noted at the suppression hearing that Dodd was eating potato chips during this conversation, which he believed was inconsistent with her contention that she was on her way to a Little Rock restaurant for dinner.

Trooper Ramsey returned to the patrol car, where Laime was still sitting, and told Laime that he wanted to run his drug dog, Moose, around the van.[3] At this point, Laime "went ballistic," according to Trooper Ramsey. He insisted that he either be arrested or be released, and the trooper responded that Laime was not under arrest and was free to go. Laime immediately got out of the patrol car and hurriedly walked toward the van. Before Laime could reach the van, Trooper Ramsey stopped him and informed him that while he was free to go, he could not take the van with him because he planned on running the drug dog around it. Trooper Ramsey recalled his specific words: "Y'all are free to leave. You can go. You

[3] The drug dog apparently had been in the patrol car the entire time.

can walk. You can run. You can crawl, just get out of here." However, the trooper would not let them within 20 feet of the van for fear that the drug dog would bite them. This entire time, according to the trooper, Laime was repeatedly and boisterously asserting his constitutional rights, telling the trooper that he had no right to detain them, and that "this is America."

Three troopers then arrived as backup. At that time, Trooper Ramsey began running the drug dog, Moose, around the van. He testified at the suppression hearing that Moose was trained to respond to marijuana, cocaine, heroin, and methamphetamine. Moose "alerted" on the van four times, indicating the presence of illegal drugs. Trooper Ramsey informed Laime that Moose's behavior showed there were illegal drugs in the van, and that the troopers were going to search the van. One of the newly-arrived troopers escorted Laime to a patrol car and held him there while the other troopers searched the contents of the van.

During this search, the troopers found a small loose amount of brownish-green vegetable matter that they suspected was marijuana in the bottom of a pouch on the back of the driver's seat. The state crime laboratory later weighed the amount as .1 gram. They also found a marijuana seed in the pocket of the driver's side door. At this point, the troopers arrested Dodd and Laime for possession of a controlled substance.

The search of the van continued, and the troopers found a shotgun case containing about twenty blown glass pipes or bongs. Trooper Ramsey noted that they were new and still had price tags on them. The bongs did not appear to have been used to smoke marijuana. The troopers also found two locked safes, a large one and a small one. They pulled these safes out of the van and onto the side of the road. After Dodd refused to open the safes, Trooper Ramsey had the drug dog react to the safes. Moose alerted on both safes.

The troopers decided to place the safes back in the van and obtain a search warrant for them. During the course of placing the smaller safe into the van, the safe slipped accidentally and broke open on the road. Despite the drug dog's previous alert on the broken safe, there was nothing in the safe.

The troopers took Dodd and Laime to the Bryant police station and had the van towed there. Trooper Ramsey swore out an affidavit for a search warrant for the second safe in the van and took

it to the Bryant municipal judge's home. The judge signed the search warrant, and it was executed shortly before midnight that night on the safe in the van at the Bryant police station.

When the troopers searched the safe, they found several sheets of paper which were perforated. The sheets of paper contained a large number of doses of LSD, as indicated by a field chemical test the troopers performed on the paper. The troopers also found a film canister which contained what they believed to be cocaine residue and a leather pouch which contained a few marijuana seeds. The troopers further found some glass pipes containing marijuana residue.

On August 6, 1998, Laime and Dodd were charged by criminal information with the offenses of possession of LSD with intent to deliver, possession of drug paraphernalia, possession of cocaine, and possession of marijuana. They subsequently moved to suppress the physical evidence seized during the roadside search and the search of the safe which occurred at the Bryant police station. The motion also included a request for suppression of any statements made by them during the course of their contact with the state troopers. An amended criminal information eliminated the cocaine charge but added that Laime had a prior criminal conviction for illegal drug possession and was subject to enhanced sentencing under Ark. Code Ann. § 5-64-408 (Repl. 1997).

On May 5, 1999, the circuit judge held a hearing on the motion to suppress. The judge heard testimony from Trooper Ramsey and Trooper James Kelloms. On February 2, 2000, the circuit judge entered an order denying the motion to suppress. Laime and Dodd then entered conditional pleas of guilty, reserving their right to appeal the non-suppression order under Ark. R. Crim. P. 24.3(b). Laime was sentenced to ten years in prison. Dodd was sentenced to four months in prison and eight years probation.

I. Standard of Review

Laime and Dodd argue multiple grounds for reversal, as previously set out in this opinion. In most respects, their points for reversal overlap. We begin by noting the standard of review, which is critical to this case. In reviewing a ruling denying a defendant's motion to suppress, we make an independent determination based on the totality of the circumstances and view the evidence in the light most favorable to the State. We reverse only if the trial court's

ruling is clearly against the preponderance of the evidence. *Burris v. State,* 330 Ark. 66, 954 S.W.2d 209 (1997); *Wofford v. State,* 330 Ark. 8, 952 S.W.2d 646 (1997). When we grant a petition to review a decision of the court of appeals, we treat the matter as if the appeal had been originally filed in this court. *Thompson v. State,* 333 Ark. 92, 966 S.W.2d 901 (1998); *Frette v. City of Springdale,* 331 Ark. 103, 959 S.W.2d 734 (1998). This court defers to the trial court in assessing witness credibility. *E.g., Rankin v. State,* 338 Ark. 723, 1 S.W.3d 14 (1999); *Wright v. State,* 335 Ark. 395, 983 S.W.2d 397 (1998); *Tabor v. State,* 333 Ark. 429, 971 S.W.2d 227 (1998).

II. Traffic Stop

For their first point, Laime and Dodd contend that Trooper Ramsey did not have probable cause to make the initial stop of the van. They assert that the left-lane law, Ark. Code. Ann. § 27-51-301(b) (Supp. 2001), which they were allegedly violating, is unconstitutionally vague and that Trooper Ramsey only stopped their van as a pretext to search it. The State counters that under the standard established by this court in *Travis v. State,* 331 Ark. 7, 959 S.W.2d 32 (1998), Trooper Ramsey had more than sufficient probable cause to make the traffic stop.

We need not reach Laime's and Dodd's pretextual argument or their vagueness argument regarding § 27-51-301(b), because we conclude that the trooper's information about lack of a valid Texas registration for the van gave him probable cause to make a valid stop. It is true that in order for a police officer to make a traffic stop, he must have probable cause to believe that the vehicle has violated a traffic law. *Travis v. State, supra.* Probable cause is defined as facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. *Burris v. State, supra*; *Hudson v. State,* 316 Ark. 360, 872 S.W.2d 68 (1994). In assessing the existence of probable cause, our review is liberal rather than strict. *Brunson v. State,* 327 Ark. 567, 940 S.W.2d 440 (1997). Whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was actually guilty of the violation which the officer believed to have occurred. *Travis v. State, supra. See also Barrientos v. State,* 72 Ark. App. 376, 39 S.W.3d 17 (2001).

In *Travis v. State, supra,* we held that what appeared to be illegality regarding a license plate without expiration tags gave a

police officer probable cause to stop that vehicle and investigate the circumstances. This was so even though a Texas license plate was involved, and Texas had no requirement that expiration tags be on the license plate. Our holding in *Travis* comports with our other cases involving license plates and probable cause to stop. *See, e.g., Burris v. State, supra* (holding that probable cause to stop existed when trailer's license plate was illegally fastened and was flapping in the wind and taillight cover was broken); *Wilburn v. State,* 317 Ark. 73, 876 S.W.2d 555 (1994) (holding that a police officer had probable cause to stop a motorist when he discovered that the vehicle bore a license plate which was issued to a different car in violation of state law). *See also Wimbley v. State*, 68 Ark. App. 56, 3 S.W.3d 709 (1999) (holding that a police officer had probable cause to stop a truck which had no license plate in violation of state law).

We hold that the circuit judge did not err in finding that the traffic stop was valid.

III. Reasonable Suspicion

We turn next to Laime's and Dodd's claim that Trooper Ramsey lacked grounds to detain them after they presented proof that the van was validly registered in Texas.

Our rule which provides when a detention without an arrest may transpire reads as follows:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period

> the person detained shall be released without further restraint, or arrested and charged with an offense.

Ark. R. Crim. P. 3.1.[4] The rule is precise in stating that the reasonable suspicion must be tied to commission of a felony or a misdemeanor involving forcible injury to persons or property.

Our criminal rules also define "reasonable suspicion" as "a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." Ark. R. Crim. P. 2.1. This court has further said that "[w]hether there is reasonable suspicion depends on whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity." *Smith v. State*, 343 Ark. 552, 570, 39 S.W.3d 739, 750 (2001) (citing *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284 (1982)). *See also* Ark. Code Ann. § 16-81-202 (1987).

In this same vein, the General Assembly has passed legislation listing the factors to be considered in determining if a police officer has grounds to reasonably suspect:

> (1) The demeanor of the suspect;
>
> (2) The gait and manner of the suspect;
>
> (3) Any knowledge the officer may have of the suspect's background or character;
>
> (4) Whether the suspect is carrying anything, and what he is carrying;
>
> (5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors;
>
> (6) The time of the day or night the suspect is observed;

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[4] The length of time of the detention is not raised as an issue in this appeal. Rather, the issue raised is whether Trooper Ramsey had grounds to detain Laime and Dodd at all.

(7) Any overheard conversation of the suspect;

(8) The particular streets and areas involved;

(9) Any information received from third persons, whether they are known or unknown;

(10) Whether the suspect is consorting with others whose conduct is "reasonably suspect";

(11) The suspect's proximity to known criminal conduct;

(12) Incidence of crime in the immediate neighborhood;

(13) The suspect's apparent effort to conceal an article;

(14) Apparent effort of the suspect to avoid identification or confrontation by the police.

Ark. Code Ann. § 16-81-203 (1987). This court has stated that § 16-81-203 is merely illustrative, and not exhaustive, of the types of factors that may be considered in forming reasonable suspicion. *See Potter v. State*, 342 Ark. 621, 30 S.W.3d 701 (2000); *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999). As is the case with Rule 3.1, the reasonable suspicion under state statutes must be coupled to the fact that the suspect is involved in some felonious activity. *See* Ark. Code Ann. § 16-81-204 (1987). Specifically, § 16-81-204(a) refers to a reasonable suspicion that the person "is committing, has committed, or is about to commit a felony."

The genesis for both the criminal rule and state statute is *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the United States Supreme Court held that a police officer could detain a person without violating the Fourth Amendment if that officer had a reasonable suspicion that "criminal activity may be afoot." *Terry*, 392 U.S. at 30. Both Ark. R. Crim. P. 3.1 and § 16-81-204 are more specific in stating that the detention must be associated with suspected felonious activity or, in the case of Rule 3.1, either a felony or a misdemeanor involving forcible injury.

In the case at hand, the State sets forth five factors which, it asserts, gave Trooper Ramsey reasonable suspicion that criminal activity was underway or imminent:

(1) Laime's irritated, hostile, demanding, and combative demeanor, which includes his refusal to consent to a search and his invocation of his constitutional rights;

(2) The fact that both Laime and Dodd told Ramsey they were meeting people in Little Rock for dinner, but neither of them was able to name the restaurant or their dinner companions;

(3) Laime's assertion that the van was borrowed from a friend, but the van had actually been registered to Dodd earlier that day;

(4) The fact that Ramsey asked Laime if he had ever been arrested, and although Laime disclosed only a traffic violation, he had been previously arrested on drug charges;

(5) Dodd's consumption of potato chips, which was inconsistent with her assertion that she and Laime were on their way to Little Rock to eat dinner.

We begin by noting that the focal point for our analysis must be the time when Trooper Ramsey decided that the registration of the van was valid because at that point the reason for the stop had vanished. This court has held with respect to the issue of whether probable cause to arrest exists that (1) after-acquired knowledge is irrelevant to the probable cause analysis, and (2) only what the police officer knew at the time of arrest enters the analysis. *Friend v. State*, 315 Ark. 143, 865 S.W.2d 275 (1993) (citing *Beck v. Ohio*, 379 U.S. 89 (1964); *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986)). The same principle holds true with respect to a decision on whether to detain under Rule 3.1.

At the same time, this court recognizes that as part of a valid traffic stop, a police officer may detain a traffic offender while he completes certain routine tasks. This detention is, of course, unrelated to a Rule 3.1 detention. The Eighth Circuit Court of Appeals has discussed the detention associated with a valid traffic stop succinctly:

> [H]aving made a valid traffic stop, the police officer may detain the offending motorist while the officer completes a number of routine but somewhat time-consuming tasks related to the traffic violation, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning. *See United States v. Carrazco*, 91 F.3d 65, 66

> (8th Cir. 1996). During this process, the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered.

United States v. $404,905.00 In U.S. Currency, 182 F.3d 643, 647 (8th Cir. 1999). Routine questioning and the criminal history check appear to be precisely what Trooper Ramsey engaged in as part of a valid traffic stop.

Under these circumstances, we consider a criminal background check to have been not only routine but prudent. The van initially appeared to be unregistered; the trooper was given papers on a Subaru, not a Dodge van; the trooper was told that the van was owned by a friend and not by the driver or passenger; and Laime first gave the trooper a Virginia I.D. card and not a driver's license. Most importantly, according to one affidavit, the background check was set in motion *before* the question about the van's registration was resolved.

[redacted] We conclude that under the totality-of-the-circumstances standard and viewing the evidence in the light most favorable to the State, as we are required to do, reasonable suspicion of criminal activity was legitimately entertained by Trooper Ramsey. The background check first revealed a drug conviction which Laime lied about. The trooper's suspicions were magnified by the couple's ignorance of their destination and the names of their friends as well as Laime's ever-increasing agitation. All of this led to the canine sniff and the positive alert to drugs by the drug dog. We hold that the Fourth Amendment protection afforded Laime and Dodd was not violated in this case, and we affirm the circuit judge on this point.

[redacted] In holding as we do, we emphasize that Laime's invocation of his Fourth Amendment rights cannot be the sole basis for probable cause to search. *See Florida v. Bostick*, 501 U.S. 429 (1991) (a suspect's assertion of his constitutional rights cannot be the sole basis for probable cause to search); *Doyle v. Ohio*, 426 U.S. 610 (1976) (post-*Miranda* warnings silence cannot be used to impeach a defendant's credibility); *United States v. Hyppolite*, 65 F.3d 1151 (8th Cir. 1995) (refusal to consent to search cannot be sole basis for probable cause to search apartment). That principle is fundamental, and our jurisprudence is clear. The legitimate assertion of one's constitutional rights is not a weapon to be used against a criminal suspect.

Nor can mere nervousness, standing alone, constitute reasonable suspicion of criminal activity and grounds for detention. We agree with the Eighth Circuit Court of Appeals in this regard. *See United States v. Beck*, 140 F.3d 1129 (8th Cir. 1998). As was stated by the *Beck* court, initial signs of nervousness are commonplace when one is confronted by a law enforcement officer. *Id.* Nevertheless, Laime's conduct is distinguishable. It went from inquisitiveness to anger to combativeness when Trooper Ramsey began to delve into his criminal record and suggested a search of the van. The fact that criminal history and an angry response were involved distinguishes this case from the *Beck* facts. *See United States v. Lebrun*, 261 F.3d 731 (8th Cir. 2001).

As a final point, we discount the eating of snack food as a bonafide factor for reasonable suspicion.

IV. Drug Dog Search

Dodd briefly argues as one of her points that a dog sniff, standing alone, cannot constitute probable cause to search. Laime and Dodd argue much more extensively that Trooper Ramsey's affidavit supporting the search warrant was inadequate under *Franks v. Delaware*, 438 U.S. 154 (1978). They base their *Franks* argument on the trooper's failure to state in the affidavit that the drug dog, Moose, had already falsely alerted on one safe. They also assert that Trooper Ramsey knew that Moose had been inaccurate at least ten times and possibly as many as fifty times but did not mention this fact in the affidavit.

According to the Eighth Circuit Court of Appeals, a dog sniff that results in an alert on a container, car, or other item, standing alone, gives an officer probable cause to believe that there are drugs within the item, if the dog is reliable. *United States v. Sundby*, 186 F.3d 873 (8th Cir. 1999); *United States v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994). *See also Newton v. State*, 73 Ark. App. 285, 43 S.W.3d 170 (2001). In *Sundby*, the Eighth Circuit stated:

> A dog's positive indication alone is enough to establish probable cause for the presence of a controlled substance if the dog is reliable. To establish the dog's reliability, the affidavit need only state the dog has been trained and certified to detect drugs. An affidavit need not give a detailed account of the dog's track record or education.

Sundby, 186 F.3d at 876 (cases omitted). This court has never been confronted with the issue of whether a dog sniff, standing alone, provides probable cause to search.

We need not reach that issue in the instant case because the dog sniff was bolstered by other facts in the trooper's affidavit. Particularly, the search warrant and affidavit referred to Laime's criminal history, his failure to honestly disclose his drug arrest and charge, his refusal to reveal details about the van's ownership, his combative demeanor, and the marijuana and drug paraphernalia that the trooper found before the warrant was obtained.

We turn then to the allegation that Trooper Ramsey committed a *Franks* violation in this case. The *Franks* decision stands for the proposition that if a defendant shows by a preponderance of the evidence that (1) the affiant for a search warrant made a false statement knowingly and intelligently, or with reckless disregard of the truth, and (2) with the affidavit's false material set aside, the affidavit's remaining content is insufficient to establish probable cause, the search warrant should be invalidated. *State v. Rufus*, 338 Ark. 305, 993 S.W.2d 490 (1999) (citing *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993)). Matters omitted must be material circumstances which contradict or dispel the incriminating factors in the affidavit and which render what is in the affidavit effectively false because of their nondisclosure. *Biggers v. State*, 317 Ark. 414, 878 S.W.2d 717 (1994) (citing *Pyle, supra*).

We need not address this point because we conclude that upon finding marijuana and drug paraphernalia in the van following the drug dog's positive alert, the troopers had reasonable cause to believe that the van contained other things subject to seizure. Under our criminal rule and case law, a search of the van could commence under these facts without a search warrant. *See* Ark. R. Crim. P. 14.1; *Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996). As a result, any asserted defect in the affidavit for a search warrant is of no moment as a warrantless search could have been performed.

We affirm on this point.

V. Nighttime Search

Arkansas Rule of Criminal Procedure 13.2(c) authorizes a nighttime search under the following circumstances:

> Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:
>
> (i) the place to be searched is difficult of speedy access; or
>
> (ii) the objects to be seized are in danger of imminent removal; or
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;
>
> the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

Ark. R. Crim. P. 13.2(c). *See Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999).

We give the appellants' arguments under this point little credence. The search of the safe took place at the Bryant police station. The policy considerations that led to the adoption of Rule 13.2(c) and nighttime searches of dwellings simply do not pertain to a search of a van at a police station. We affirm on this point as well.

Affirmed.

CORBIN and HANNAH, JJ., dissent.

THORNTON, J., dissents. I dissent on the basis of the analysis provided in the Arkansas Court of Appeals' decision of *Laime v. State*, 73 Ark. App. 377, 43 S.W.3d 216 (2001).

JIM HANNAH, Justice, dissenting. I am concerned about the erosion of every citizen's right against unlawful search and seizure under both the Arkansas and the United States Constitutions. We may not abdicate our duty to protect the constitution and our citizens by allowing law enforcement officers to engage in unconstitutional conduct simply because as law enforcement officers their hunches often payoff. The analysis under our constitution and under the federal constitution in search and seizure cases

should not be reduced to simply determining whether the appellant is suspicious in some broad, undefined context, but rather, whether the facts infer the required proof for the action to be taken, in other words, whether the required proof of reasonable suspicion or probable cause is present.

The majority decides this case by finding reasonable suspicion to justify the continued detention and canine sniff. The majority finds the required reasonable suspicion based upon the following facts:

1. Laime's lie about his criminal background;

2. Dodd's and Laime's ignorance or refusal to state their destination and names of friends they were to meet; and,

3. Laime's increasing agitation.

Other facts are discussed. The majority states Laime's invocation of his right against unlawful search and seizure cannot be the sole basis for probable cause to search, and then states the assertion of one's constitutional rights is not a weapon to be used against a suspect. What is stated is not clear and implies invoking one's constitutional rights is a fact that weighs in favor of reasonable suspicion. Other facts are also discussed. The majority wisely ignores Ramsey's assertion that reasonable suspicion may be based upon when someone chooses to eat snack foods. However, we ought to take special note of Ramsey's assertion about the snack foods, for it shows us ever more clearly his intent in this matter. Ramsey had a hunch, and it was a correct hunch. His intent was to stop the van and search it. Once Ramsey stopped the van, he attempted to develop facts to justify his detention of Laime and the search of the van.

In summary, the facts show Laime declined to divulge details of the trip, of his criminal past, and that he was nervous. Nothing about these facts has any tendency in fact to show there was any contraband in the van. The facts might infer Laime was nervous and felt he would only make things worse by divulging information, especially information about his past. They could infer Laime was frightened. Nervousness and agitation could mean any number of things. I don't believe these facts under any reasonable analysis can be argued to be "specific, particularized and articulable reasons indicating the person or vehicle may be involved in prohibited criminal activity." *Potter v. State*, 342 Ark. 621, 627, 30 S.W.3d 701

(2000). This is the required inference. The facts support no such conclusion nor any conclusion even close to reasonable suspicion.

The facts relied upon in this case do infer something. They infer something about Ramsey's conduct. We cannot ignore Ramsey's conduct as it relates to the alleged facts he gives in support of his continued detention of the van after his reason for stopping the van on the basis of a lack of registration was resolved. First, I note it is obvious any purpose in making a lawful stop based on a report from Texas that the van lacked current Texas registration was completed prior to appellants's detention and the execution of the canine sniff. This is clearly so because Ramsey told Laime and Dodd they were free to go. *United States v. Beck*, 140 F.3d 1129 (8th Cir. 1998). Thus, in order to continue to detain appellants, there had to be events that transpired during the traffic stop that gave rise to reasonable suspicion. *Id.* Therefore, the court had to then determine whether Ramsey had a reasonable, articulable suspicion that appellant's van was carrying contraband or that other criminal activity may have been afoot. *Id.* While it is true that Ramsey's subjective intent in the stop will not invalidate the stop if there are other valid reasons for the stop, the facts developed during that stop do not support continued detention. Herein lies the majority's fundamental error in its analysis. The Fourth Amendment to the United States Constitution and the Arkansas Constitution will not allow the detention of the appellants on the basis that they were acting suspicious in Ramsey's subjective opinion. When all the pretense and fiction created by Ramsey is stripped away, it is facially apparent that the canine sniff was carried out because Ramsey wanted to search the van. That was his intent from the beginning. Ramsey asserts he stopped the van for impeding traffic flow; however, his own account contradicts that this could have been a valid concern. He states the van was traveling about 60 mph in a 70 mph zone while passing two tractor trailer rigs. He further states that none of the traffic in the area was moving at 70 mph. So we must ask at this juncture, where was the impediment to traffic? Ramsey notes that two vehicles were behind the subject van. He then asserts the van was holding them up. For authority he cites to Ark. Code Ann. § 27-51-301(b)(Supp. 2001), "driving continuously in the left lane. . . ." Obviously this was not occurring. Ramsey admits the van was passing the trucks. Ramsey, however, called in the license of the van and found it was not listed as registered. This gave him the right to stop the van. However, once that issue was resolved,

Ramsey detained them still based on the above noted facts. Testimony by Ramsey is conflicting, and does not support the conclusion that Ramsey had "specific, particularized and articulable reasons indicating the person or vehicle may be involved in prohibited criminal activity." *Potter,* 342 Ark. at 627.

The facts of this case are simple to understand. Ramsey stopped the van because he intended to search it. Ramsey asserts Laime was agitated. It seems so obvious that it need not be argued that an ordinary, reasonable person would rightfully become agitated when, without any cause whatever, he is asked by a law enforcement officer if he is carrying a dead body. Few of us would not be offended by an inference that we are a murderer, and most of us would be offended by baseless assertions that we are carrying drugs. That a person reacts in an expected and normal way to such accusations may not give rise to reasonable suspicion.

Next, the majority ought to consider that Ramsey feigned permission to leave after he completed his "investigatory" stop on Interstate 30. According to Ramsey, they were free to go. They could "walk or crawl," Ramsey told them, but they could not take their van. Ramsey's conduct showed that appellants were not free to leave. They were not free to leave because Ramsey intended to search the van.

We also ought to consider the request for consent to search. Ramsey's request for consent to a search was not a request. He did not ask if he could search and then move on to other questions relevant to his stop. He relentlessly pressed on. After Laime refused multiple verbal requests, Ramsey got out a consent form even though his requests had been rejected. Ramsey pressed on. Laime still denied the request. Ramsey still did not give up and respect the denial of his request. He began to try to read the form. Still Laime would not submit. Then Ramsey began to fill the form out. To what purpose? It was apparent Ramsey was hoping that by applying relentless pressure, Laime would submit to a search. Surely we have not reduced constitutional protections to only providing protection where the citizen, alone on the side of the road, has the courage to engage in an Olympic test of wills with law enforcement officers sworn to uphold the law and the Constitution. This decision leaves the citizens, who the Constitution is supposed to protect, to fend for themselves and to bear the burden of fighting off unrestrained law enforcement knowing that if they resist, their invocation of their constitutional rights will be interpreted as an admission of

guilt. One would hope we have moved beyond the grossly simplistic approach that a citizen will comply and allow a search because if he doesn't he must have something to hide. The Constitution is designed to protect the innocent from unlawful search and seizure. This court bears a duty to protect the Constitution. *Potter, supra.* Also, the constitutional guarantee against unlawful search and seizure must be construed in favor of the individual. *State v. Broadway*, 269 S.W.2d 215, 599 S.W.2d 721 (1980); *Lowery v. United States*, 128 F.2d 477 (8th Cir. 1942).

In the majority's decision, we learn that if someone lies about his criminal background when asked by police, is unable or unwilling to identify his destination and names of friends he is to meet, and seems agitated, that there is reasonable suspicion he is carrying contraband in his vehicle, or that he has committed or is about to commit a crime. There is nothing, taken individually, collectively, or in totality about these facts, that has any tendency to show anything was in the van or that a crime had been or was about to be committed. At most, they show the police officer had a nervous man before him who had a prior drug conviction. Nonetheless, these facts are found by this court to constitute the required "specific, particularized and articulable reasons indicating the person or vehicle may be involved in prohibited criminal activity." *See Potter,* 342 Ark. at 627. The facts provided are so woefully inadequate that a cursory review is all that is needed to show that the continued detention and canine sniff were unlawful. The facts are so amorphous that they mean nothing. The facts must be specific. The word specific means "precisely formulated or restricted, of an exact or particular nature." *The People v. C.T. Thomas,* 25 Cal. 2d 880, 898, 156 P.2d 7 (1945). There is nothing restricted or precise about these facts. Particular means "separate, single, specific, as opposed to general." *State v. Patterson*, 60 Idaho 67, 88 P.2d 493, 497 (1939). No particular facts inferring any criminal activity whatever are offered. Nothing about the facts in totality infers anything other than a nervous man who has a criminal background, which he is understandably not proud of. More is required of this court than such a mechanical review as is present here. So much time has passed since the decision in *Terry v. Ohio*, 390 U.S. 1 (1968) and similar cases under our own Constitution that discussion of this issue has digressed to lists of factors and facts from prior cases. This is misleading because the decision by the court must be based upon facts of the case that rationally infer a crime has been or is about to be committed. *Beck, supra.* The analysis has digressed to a conclusion of reasonable suspicion where a criminal defendant appears

merely suspicious in the opinion of law enforcement. Such conjectural suspicion is not sufficient. *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997). An "inchoate and unparticularized suspicion or 'hunch' " will not suffice. *Potter,* 342 Ark. at 625-626 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Nonetheless, in this case we allow a detention and search on a set of specious facts questionably and conflictingly presented by the officer, and cast aside fundamental constitutional rights.

This case should be reduced to its simplest terms so what this court is doing may be clearly understood. The majority finds the detention for the canine sniff was justified because Ramsey had a reasonable suspicion that a crime had been or was about to be committed. His testimony at the hearing varied fundamentally from his affidavit. His conduct shows he stopped the van to search it and everything else was an attempt to justify the detention and search. The facts in this case are abundantly clear. Ramsey saw a vehicle that fit his profile of one that he thought could be carrying drugs. He acted on a hunch. He stopped and search the van on that basis. Such an "inchoate and unparticularized suspicion or 'hunch' " will not suffice to support a search under the Fourth Amendment. *Potter v. State*, 342 Ark. at 625-626, (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

For the above reasons I respectfully dissent.

CORBIN, J., joins in this dissent.

MURPHY OIL USA, INC. *v.*
UNIGARD SECURITY INSURANCE COMPANY and
Employers' Surplus Lines Insurance Company,
Appellees; Employers' Surplus Lines
Insurance Company, *Cross-Appellant*;
Murphy Oil USA, Inc.; United States
Fidelity & Guaranty Company, *Cross-Appellees*

00-1408 61 S.W.3d 807

Supreme Court of Arkansas
Opinion delivered December 6, 2001
[Petition for rehearing denied January 10, 2002.]

[redacted]

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Arkansas Education Association; Arkansas State Chamber of Commerce; Arkla, Inc.; Associated Industries of Arkansas, Inc.; Deltic Timber Corporation; Dillard's, Inc.; Entergy Arkansas, Inc.; J.B. Hunt Transport, Inc.; The Poultry Federation; Riceland Foods, Inc.; Southwestern Energy Company; Tyson Foods, Inc.

ROBERT L. BROWN, Justice. Appellant Murphy Oil USA, Inc. appeals a grant of summary judgment in favor of appellee Unigard Security Insurance Company (Unigard) and appellee Employers' Surplus Lines Insurance Company (ESLIC).[1] In that summary judgment, the circuit court concluded that Unigard and ESLIC had no duty to defend their insured, Murphy Oil, in litigation brought by Harrison Brothers Dry Dock and Repair Yard. On appeal, Murphy Oil urges this court to reverse the summary judgment and then revisit and overrule our previous decision in *Unigard Sec. Ins. Co. v. Murphy Oil USA, Inc.*, 331 Ark. 211, 962 S.W.2d 735 (1998) (*Murphy I*). We agree with Murphy Oil that the summary judgment must be reversed, but we decline to overrule our previous decision. On cross-appeal, ESLIC contends that the circuit court erred in refusing to order cross-appellee Murphy Oil or cross-appellee United States Fidelity and Guaranty Company (USF&G) to reimburse it for costs advanced in two other lawsuits to Murphy Oil as part of its obligation to defend. We affirm the circuit court on the cross-appeal.

The underlying events which have led to several lawsuits against Murphy Oil were three petroleum spills at Murphy Oil's facility which occurred in 1970, 1975, and 1982. During those years, Murphy Oil occupied a facility which it leased from Blakely Corporation on Blakely Island, located in the Mobile River in Alabama. In 1970, Murphy Oil personnel overestimated the capacity of a tank and between 8,800 to 23,000 gallons spilled onto the ground. In 1975, between 22,000 and 26,000 gallons of gasoline leaked onto the ground because of a tank valve that was accidentally left open. In 1982, 4,600 gallons of diesel fuel leaked onto the ground through a corroded hole in the bottom of a tank. In April 1990, Blakely Corporation sued Murphy Oil in the Alabama federal district court for negligence, breach of the lease agreement, and trespass associated with the spills. The jury awarded Blakely $3.4 million in compensatory damages on the breach-of-lease claim but no damages for negligence or trespass. The jury also awarded $4.6

[1] The original style of this case was *Murphy Oil USA, Inc. v. United States Fid. & Guar. Co.*

million in punitive damages, which was subsequently reduced to $2 million. The total judgment in this litigation, when costs were included, was $5.8 million. This litigation in federal district court is referred to as *Blakely I.*

Murphy Oil then sued its liability carriers, including USF&G, Unigard, and ESLIC, in 1991 in Union County Circuit Court for indemnity associated with the *Blakely I* judgment. USF&G, as primary carrier, settled with Murphy Oil and paid the policy limits for the three years that the spills occurred. Following a jury trial, judgment for complete indemnity was entered in favor of Murphy Oil as against Unigard and ESLIC. Unigard and ESLIC appealed the judgment, and this court reversed in *Unigard Sec. Ins. Co. v. Murphy Oil USA, Inc., supra* (*Murphy I*). In doing so, this court held as a matter of law that the Unigard and ESLIC insurance policies afforded Murphy Oil no coverage for liability based on the breach-of-lease claim.

During the pendency of Murphy Oil's appeal to this court in *Murphy I*, a second action by the Blakely Corporation was pending against Murphy Oil in the Alabama federal district court entitled *Blakely Corp. v. Murphy Oil USA, Inc.* (*Blakely II*), in which Blakely sought a verdict for property damage caused by the three spills to an adjoining Blakely site. On March 11, 1996, the Union County Circuit Court held a hearing on Unigard's and ESLIC's duty to defend Murphy Oil in the *Blakely II* matter. Following the hearing, the court ruled from the bench:

> Of course, I have already ruled in the other case that there was a duty to defend, and I am going to make a similar ruling in this case that there is a duty on the part of ESLIC and Unigard to defend for the years 1970, '75 and '82 in the Blakely II matter.
>
> . . . .
>
> But it seems to me that the facts that are alleged are identical to what has been previously litigated. . . .

ESLIC then requested the circuit court to delay entering an order to that effect, so that it could add a cross-claim for the defense costs against USF&G. In *Blakely II*, summary judgment on the issue of Murphy Oil's liability for the spills was entered by the Alabama federal district court in favor of Murphy Oil. The summary judgment was affirmed by the Eleventh Circuit Court of Appeals. *See*

Blakely Corp. v. Murphy Oil, 141 F.3d 1189 (11th Cir. 1998) (unpublished table disposition).

Subsequently, a second amended complaint was filed in a third suit against Murphy Oil relating to the Blakely Island spills. This suit, entitled *Harrison Bros. Dry Dock & Repair Yard, Inc., et al. v. Murphy Oil USA, Inc.*, was filed in Mobile County Circuit Court in Alabama (*Blakely III*). In this suit, Harrison Brothers alleged claims of trespass, continuing trespass, nuisance, negligence, and wantonness, all relating to the "allow[ance of] petroleum products and/or other polluting, contaminating or hazardous substances to be discharged and/or released onto and into the ground, subsoil and/or ground water" on Murphy Oil's leased property that was located adjacent to the Harrison Brothers' property. Harrison Brothers also alleged that "[i]n or about August 1996, Plaintiffs discovered that the above described petroleum products and/or other polluting, contaminating or hazardous substances had migrated from the subject property onto Plaintiffs' property."

As a consequence of *Blakely III*, on April 24, 1999, Murphy Oil filed a seventh amended complaint in the ongoing action in the Union County Circuit Court and prayed for a declaratory judgment that both Unigard and ESLIC be obligated to defend Murphy Oil and to indemnify it for the defense costs incurred in its defense in *Blakely III*.[2] ESLIC answered and counterclaimed seeking a declaration that it did not have a duty to defend or indemnify Murphy Oil in either *Blakely II* or *Blakely III*. ESLIC further sought a judgment for defense costs paid to Murphy Oil under a reservation of rights in *Blakely II* and *III*.

In May 1999, Murphy Oil filed an amended and supplemental motion for partial summary judgment in Union County Circuit Court in which it requested the court to order Unigard and ESLIC to pay Murphy Oil's defense costs in *Blakely III*. Murphy Oil argued that *Blakely III* involved the same spills and many of the same issues as *Blakely I* and *Blakely II*. Thus, it argued, Unigard and ESLIC, as umbrella carriers, had a contractual duty to defend it which they inherited from the primary carrier, USF&G, which had already paid policy limits. Murphy Oil further asserted in its brief in support of the amended partial summary-judgment motion that the

[2] The Union County litigation had been continued as an ongoing matter since Murphy Oil first sued its liability carriers following *Blakely I* in 1991.

Harrison Brothers complaint in *Blakely III* plainly stated a claim that could activate the policy coverage of Unigard and ESLIC.

ESLIC responded to Murphy Oil's amended motion for partial summary judgment and cross-motioned for summary judgment for the reimbursement of defense costs paid to Murphy Oil, or, alternatively, for reimbursement of those costs from USF&G. ESLIC then filed a Combined Motion and Brief in Support of Summary Judgment as to *Blakely III*, in which it claimed that due to the Alabama statute of limitations on claims involving property damage and ESLIC's policy's definition of the term "occurrence," there could be no coverage under the policy and, thus, no duty to defend or indemnify.

On October 12, 1999, Unigard filed a Motion for Summary Judgment in which it alleged that the *Blakely III* complaint asserted a migration of contaminants and that migration is a slow process which would cause the event to be excluded under the Pollution Exclusion to its policy. Unigard submitted an affidavit in support of its motion from Dr. Gary R. Walter, a professional hydrogeologist, as well as the testimony of Jane Spellman, another hydrogeologist, who was Murphy Oil's expert witness.

On May 8, 2000, a hearing was held on the various motions. At the close of the hearing, the circuit court ruled:

> I understand that all these issues were raised back in '93, and I ruled in favor of Murphy on [them]. This set of facts is a little bit different. I'm going to grant summary judgment on both based upon the —
>
> . . . .
>
> — based upon the exclusionary provision of the policies that this was classic pollution, and the language is rather clear to the Court that they excluded coverage, and that ends the issue in my eyes on this particular fact situation — which is different from the previous case.
>
> . . . .
>
> And I'm persuaded by the language and the discussion in this *Bell* [*Lumber & Pole Co. v. United States Fire Ins. Co.*, 60 F.3d 437 (8th Cir. 1995)] case also.

. . . .

> Yes, I think [other pending motions] would be [moot] because this is a coverage question, and I have ruled that there's no coverage so duty to defend and all those would be out . . . the window.

In the resulting order of summary judgment, the circuit court made the following findings:

- there is no genuine issue of material fact;
- as a matter of law the insurance policies do not provide coverage for the claims asserted in *Blakely III*;
- Unigard and ESLIC are entitled to judgment as a matter of law on the claims asserted by Murphy Oil in its Seventh Amendment to Complaint that the carriers had an obligation to defend; and
- after hearing arguments of counsel, the Court denies ESLIC's request for reimbursement of the defense costs it has paid in *Blakely II* and *Blakely III*.

Murphy Oil brings this appeal, and ESLIC brings its cross-appeal.

I. Summary Judgment on Duty to Defend

Murphy Oil mounts a legion of arguments as to why summary judgment in favor of Unigard and ESLIC on their duty to defend was error.[3] We are persuaded, however, that Murphy Oil is correct that neither policy's Pollution Exclusion negates the duty to defend of the respective carrier.

We first address the test for determining a liability carrier's duty to defend. In examining the duty to defend, this court has recognized the general rule that the allegations in the pleadings

[3] We do not consider Murphy Oil's appeal from the denial of its motion for partial summary judgment. We have held repeatedly that appeals from a denial of a motion for summary judgment do not lie. *See, e.g., Ball v. Foehner*, 326 Ark. 409, 931 S.W.2d 142 (1996); *Rick's Pro Dive 'N Ski Shop, Inc. v. Jennings-Lemon*, 304 Ark. 671, 803 S.W.2d 934 (1991).

against the insured determine the insurer's duty to defend. *See Mattson v. St. Paul Title Co. of the South*, 277 Ark. 290, 641 S.W.2d 16 (1982); *Fox Hills Country Club, Inc. v. American Ins. Co.*, 264 Ark. 239, 570 S.W.2d 275 (1978); *Commercial Union Ins. Co. of America v. Henshall*, 262 Ark. 117, 553 S.W.2d 274 (1977). Additionally, this court has recognized that the duty to defend is broader than the duty to indemnify. *See Commercial Union Ins. Co. of America v. Henshall, supra*. However, the duty to defend arises when there is a possibility that the injury or damage may fall within the policy coverage. *See Home Indemnity Co. v. City of Marianna*, 291 Ark. 610, 727 S.W.2d 375 (1987). Conversely, where there is no possibility that the damage alleged in the complaint may fall within the policy coverage, there would be no duty to defend. *See* C.T. Drechsler, Annotation, *Allegations in Third Person's Action Against Insured as Determining Liability Insurer's Duty to Defend*, 50 A.L.R.2d 458 (1956). The *Home Indemnity Co.* case summarizes much of this law:

> Home's secondary argument is that genuine issues of material fact remain. We are not persuaded that that is so. One fact assertedly undecided deals with the issue of whether damages will result in the federal suit. But the duty to defend is broader than the duty to pay damages and as we have seen, it is enough if the *possibility* of damages exists. If injury or damage within the policy coverage could result, the duty to defend arises. *Commercial Union Ins. Co. v. Henshall*, 262 Ark. 117, 553 S.W.2d 274 (1977).

Home Indemnity Co., 291 Ark. at 618, 727 S.W.2d at 379. Accordingly, this court must examine whether the *Blakely III* complaint alleges facts which would come within the coverage of the Unigard and ESLIC liability policies. If so, their duty to defend arises.

Unigard relies on its Pollution Exclusion in its liability policy for its argument that there is no possibility that Unigard will be called upon to indemnify Murphy Oil. It further relies on the two opinions by the hydrogeologists submitted with its motion for summary judgment that migration caused the damage to the Harrison Brothers' property. We turn then to that exclusion in the liability policy to assess the potential for Unigard's liability. That section reads:

> *SEEPAGE, POLLUTION AND CONTAMINATION EXCLUSION CLAUSE*
>
> IT IS UNDERSTOOD AND AGREED THAT EXCEPT INSOFAR AS COVERAGE IS AVAILABLE TO THE

ASSURED IN THE UNDERLYING INSURANCES AS SET OUT IN THE SCHEDULE OF UNDERLYING POLICIES, THIS INSURANCE SHALL NOT APPLY TO ANY LOSS ARISING OUT OF CONTAMINATION OR POLLUTION.

NOTWITHSTANDING THE FOREGOING, IT IS UNDERSTOOD AND AGREED THAT THIS INSURANCE DOES NOT APPLY TO PERSONAL INJURY OR PROPERTY DAMAGE ARISING OUT OF THE DISCHARGE, DISPERSAL, RELEASE OR ESCAPE OF:

(1) SMOKE, VAPORS, SOOT, FUMES, ACIDS, ALKALIS, TOXIC CHEMICALS, LIQUIDS OR GASES, WASTE MATERIALS OR OTHER IRRITANTS, CONTAMINANTS OR POLLUTANTS INTO OR UPON LAND, THE ATMOSPHERE OR ANY WATERCOURSE OR BODY OF WATER, BUT THIS EXCLUSION DOES NOT APPLY IF SUCH DISCHARGE, DISPERSAL, RELEASE OR ESCAPE IS SUDDEN AND ACCIDENTAL;

(2) OIL OR OTHER PETROLEUM SUBSTANCE OR DERIVATIVE (INCLUDING ANY OIL REFUSE OR OIL MIXED WITH WASTES) INTO OR UPON ANY WATERCOURSE OR BODY OF WATER, WHETHER OR NOT SUCH DISCHARGE, DISPERSAL, RELEASE OR ESCAPE IS SUDDEN AND ACCIDENTAL.

Thus, the Unigard Pollution Exclusion contains an exception, and it is that exception upon which the resolution of this case turns. The exception reads: "but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental[.]" Murphy Oil contends that the 1975 spill during Unigard's coverage qualifies as a sudden and accidental release and that this is what caused the alleged damage to Harrison Brothers in *Blakely III*. Specifically, Murphy Oil emphasizes that the Harrison Brothers complaint bases its causes of action on the release of polluting substances onto the ground or into the ground water of the Murphy Oil leased property. Hence, Murphy Oil contends, the "release" in question relates to the three sudden and accidental spills, and this triggers the exception to the Pollution Exclusion and Unigard's liability for coverage. Unigard, on the other hand, focuses on events after the three spills and the alleged migration of the polluting substances from the Blakely property to the Harrison Brothers property over a period of years.

Truthfully, the Pollution Exclusion and its exception could be read either as Murphy Oil interprets it or in accordance with Unigard's reading. The test, however, is whether the mere possibility of coverage exists in this case. *See Home Indemnity Co. v. City of Marianna, supra.* We are mindful also of the principle that in testing the pleadings to determine if they state a claim within the policy coverage, we resolve any doubt in favor of the insured. *See Mattson v. St. Paul Title Co. of the South, supra.* We hold that there is a possibility that Unigard will be liable for coverage as a result of *Blakely III* based on the fact that the triggering spills may fall within the exception to the Pollution Exclusion. Accordingly, the duty to defend Murphy Oil comes into play. With regard to Unigard's contention that Murphy Oil failed to meet proof with proof because it did not counter the affidavits of the two hydrogeologists, we do not view those affidavits as determinative. Resolution of this case centers on the facts alleged and the policy language, and specifically on the Pollution Exclusion, and not on the fact that migration may have occurred.

Our analysis is similar with respect to ESLIC. The applicable Pollution Exclusion in ESLIC's policy reads:

> Endorsement #4
> It is agreed that this policy does not cover any liability for: —
>
> . . . .
>
> (3) Property damage caused by seepage, pollution or contamination, unless such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this Insurance, but this paragraph (3) shall not be construed as excluding any liability which would otherwise be covered under this Insurance for property damage caused by a sudden, unintended and unexpected happening during the period of this Insurance arising out of seepage, pollution or contamination.

Again, the exception to the exclusion is for damage caused by "a sudden, unintended and unexpected happening during the period of this Insurance arising out of" the pollution. In our opinion, this exception can be read as being broader than the exception in the Unigard policy. Regardless, Murphy Oil and ESLIC cross swords over whether the "sudden happening" refers to the initial spill in 1970 or to the alleged damage caused by the subsequent migration

of the contaminants. For the same reasons stated above, we believe the language can be legitimately read either way.[4] Moreover, the doctrine of *contra preferentum* would lead towards an interpretation of the exception favorable to Murphy Oil. *See, e.g., Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001). As a final point, we are not aware of a decision by the Alabama trial court in *Blakely III* concerning any applicable Alabama statute of limitations and the impact of that limitations statute on ESLIC's liability for coverage in the Harrison Brothers litigation. Once again, we hold that the possibility of liability coverage exists and that, as a result, ESLIC also has a duty to defend Murphy Oil in *Blakely III.*

We note where the circuit court relied on the case of *Bell Lumber & Pole Co. v. United States Fire Ins. Co.*, 60 F.3d 437 (8th Cir. 1995), in reaching its decision. The *Bell Lumber* case involved an action for declaratory judgment regarding the liability of insurance carriers and a motion for summary judgment by those carriers. In that case, the Pollution Exclusion and exception in the affected policy were comparable to the language in Unigard's policy. There were fifteen polluting events which involved tank overfills and cracks and leaks in the containers. The damage to property occurred after the contaminants entered the groundwater of a third party, the State of Minnesota, which occurred gradually over many years. The debate centered on whether the release or escape of the contaminants was sudden and accidental so as to fit within the exception or a gradual event which would fall under the general Pollution Exclusion. The trial court entered summary judgment in favor of the insurance carriers. The Eighth Circuit affirmed and concluded that Bell Lumber's liability was triggered only when damage was done to the property of the third party, that is, when the contaminant entered the groundwater of the state of Minnesota. Thus, the "release" envisioned by the exception was when the damage to the state's groundwater occurred and not the initial events when the contaminant leaked or poured onto the ground. In holding as it did, the Eighth Circuit rejected as *dicta* an assumption by the Minnesota Court of Appeals in a previous case that the relevant release under the exception was the initial spill onto the ground.

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[4] The appellees argue that at one point in this extensive litigation Murphy Oil contended the language was not ambiguous. Determination of whether ambiguity exists in policy language is ordinarily a question of law for the courts to resolve. *See Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001).

This court, of course, is not bound by the precedent of the Eighth Circuit Court of Appeals. *See, e.g., Romine v. Arkansas Dept. of Env. Quality*, 342 Ark. 380, 40 S.W.3d 731 (2000). But, in addition, the *Bell Lumber* case concerned only the ultimate issue of indemnity coverage and not the issue of an insurance carrier's obligation to defend. Plus, even in the *Bell Lumber* case, it was noted that different courts had voiced different opinions as to what was the relevant release. *See also Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189 (Pa. 2001) (proof of custom in the insurance industry may indicate that the "sudden and accidental" exception to the Pollution Exclusion meant "unexpected" and "unintended" and not a requirement of abruptness). Our focus in this appeal is on whether the *possibility* exists for indemnity by Unigard and ESLIC based upon the facts alleged. Using this liberal standard, we cannot conclude that that possibility does not exist.

Nor do we believe that this court's decision in *Murphy I* resolves this issue in favor of Unigard and ESLIC, as the appellees would have it. The parties were different in the underlying case of *Blakely I*, and the rationale for reversal by this court was that the jury-awarded damages for breach of a lease, not property damage. At this stage, we can only speculate as to the basis for a jury award, if any, in *Blakely III*.

Finally, we are cognizant of the case of *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986). In that case, the North Carolina Supreme Court concluded that the liability carriers had no duty to defend their insured, Trash Removal Services, Inc., against a third-party complaint that Trash Removal Services had delivered hazardous waste to a landfill over a six-year period that resulted in contamination of groundwater beneath the landfill. The policies of Peerless Insurance Company and Pennsylvania National Mutual Casualty Insurance Company had comparable language to that in the policies of Unigard and ESLIC. What distinguishes the *Waste Mgmt.* case, however, from the facts of the present case is that a "sudden release" of contaminants was not alleged in the *Waste Mgmt.* matter. On the other hand, as already stated in this opinion, Harrison Brothers did allege that Murphy Oil allowed "polluting, contaminating or hazardous substances to be discharged and/or released onto and into the ground" that Murphy Oil was leasing. That allegation certainly could embrace a sudden release such as occurred during the period of ESLIC's coverage in 1970 or during the course of Unigard's coverage in 1975.

■ We reverse the circuit court on this point and hold that Unigard and ESLIC have a duty to defend Murphy Oil in *Blakely III* during their periods of respective coverage.

II. Revisiting Murphy I

Murphy Oil next urges that this court should revisit and overrule our decision in *Murphy I*. The crux of Murphy Oil's argument is that because the California Supreme Court ruled in favor of the policyholder in a similar case and this court was misled in *Murphy I*, we should correct our mistake.

■ We find Murphy Oil's initial premise, which is based on law of the case, to be faulty. The underlying litigation for *Murphy I* was *Blakely I*, and we are convinced that *Blakely III* and *Blakely I* are not the same case. The parties are different, and we can only speculate as to what the triggering spills for liability may be in *Blakely III*, because that is not altogether clear from the *Harrison Brothers* complaint. Migration is also alleged in *Blakely III*, but was not a factor in *Blakely I*. Furthermore, the liability of Murphy Oil has yet to be decided in *Blakely III*, much less the grounds for that liability. In sum, we do not believe that the doctrine of law of the case applies to these circumstances for a reason different than that posited by Murphy Oil.

■ Having said that, to the extent Murphy Oil is urging the reversal of a three-year-old case based on a 1999 California decision [*Vandenberg v. Superior Court*, 21 Cal. 4th 815, 982 P.2d 229, 88 Cal. Rptr. 2d 366 (1999)], we decline to do so. In *Thiel v. Priest*, 342 Ark. 292, 28 S.W.3d 296 (2000), this court noted that while it does have the power to overrule prior decisions, it is necessary, as a matter of public policy, to uphold those decisions unless a great injury or injustice would result. *See id.* (citing *Sanders v. County of Sebastian*, 324 Ark. 433, 922 S.W.2d 334 (1996)). In *Thiel*, we noted that "[t]he United States Supreme Court has recognized that adherence to precedent promotes stability, predictability, and respect for judicial authority." *Id.* at 300, 28 S.W.3d at 300 (citing *Sanders, supra*; *Zinger v. Terrell*, 336 Ark. 423, 985 S.W.2d 737 (1999)). In *Aka v. Jefferson Hosp. Ass'n, Inc.*, 344 Ark. 627, 42 S.W.3d 508 (2001), we made similar statements regarding *stare decisis*:

> As a general rule, we are bound to follow prior case law under the doctrine of *stare decisis*, a policy designed to lend predictability and stability to the law. *State Office of Child Support Enforcem't v. Mitchell*,

> 330 Ark. 338, 343 (1997) (citing *Parish v. Pitts*, 244 Ark. 1239, 1252, 429 S.W.2d 45, 52 (1968) (superseded by statute on other grounds)). Indeed, it is well-settled that "[p]recedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable." *Mitchell*, 330 Ark. at 343 (quoting *Parish*, 244 Ark. at 1252). Our test is whether adherence to the rule would result in "great injury or injustice." *Mitchell*, 330 Ark. at 343 (quoting *Independence Fed. Bank v. Webber*, 302 Ark. 324, 331, 789 S.W.2d 725, 730 (1990)).

Aka, 344 Ark. at 641, 42 S.W.3d at 518.

It is our belief that overruling precedent after three short years would lend instability to our common law. It is true that differing views were expressed in *Murphy I*, evidencing the point that justices could differ dramatically over the law and the result in the case. We cannot, however, conclude that our opinion in *Murphy I* attains the high standard of patent error or manifest injustice necessary for us to overrule this precedent.

III. Cross-Appeal by ESLIC

a. Murphy Oil.

ESLIC contends in its cross-appeal that because of this court's decision in *Murphy I*, there could be no potential for indemnity in *Blakely II* and *Blakely III*.[5] We disagree. We have already held in this opinion that *Murphy I* does not control this issue and that the possibility for indemnity coverage by ESLIC exists with regard to the facts alleged in *Blakely III*, and, thus, the duty to defend is triggered.

Moreover, in *Blakely II*, Murphy Oil prevailed, and so the question of indemnity coverage was not at issue. On the duty to defend, the circuit court ruled in *Blakely II* that ESLIC had that duty, and no effort was taken by ESLIC to appeal that ruling. It is simply too late to appeal that issue in connection with the circuit

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[5] It is somewhat unclear whether ESLIC is appealing from a denial of its motion for partial summary judgment or an adverse order relating to its prayer for declaratory relief in its counterclaim. We will treat this as an appeal from the latter. As previously mentioned in this opinion, this court does not countenance appeals from denials of motions for summary judgment. *See Rick's Pro Dive 'N Ski Shop, Inc. v. Jennings-Lemon*, 304 Ark. 671, 803 S.W.2d 934 (1991).

court's order in *Blakely III*, which, as has already been stated in this opinion, involved different parties and different facts.

Costs incurred by ESLIC in each case in defending Murphy Oil were appropriate. We affirm the circuit court on this facet of the cross-appeal.

b. USF&G.

ESLIC further contends that regardless of whether USF&G has exhausted its primary coverage for the three spill years, one of which was 1970, it has not done so for the other years in which it insured Murphy Oil. According to ESLIC, the *Blakely II* and *Blakely III* complaints precipitated USF&G's duty to defend for those additional years in which additional spills may have occurred; thus, it has an obligation to reimburse ESLIC in the amount of $113,432.42 for defense costs paid in connection with *Blakely II*. ESLIC also prays that this court remand the case with instructions to the circuit court to allocate the costs required to defend Murphy Oil in *Blakely III* between USF&G and ESLIC.[6]

We see no reason to reverse the circuit court on this point in connection with either *Blakely II* or *Blakely III*. USF&G paid the policy limits for 1970 for the 1970 spill, at which time ESLIC had umbrella coverage, and also paid the policy limits for the spills in 1975 and 1982. Saddling USF&G with a duty to defend for additional, unspecified spills in unnamed years would require this court to enter the realm of gross conjecture and speculation. It is further notable that neither USF&G nor ESLIC maintains that it had any exposure for those years when the contaminant was allegedly migrating as opposed to its initial release. The only conceivable exposure could be for a sudden event such as the 1970 spill, and USF&G exhausted its coverage for that occurrence. Under these facts, there is no additional duty to defend on the part of USF&G.

We affirm the circuit court on this point as well.

Direct Appeal reversed and remanded.

Cross-Appeal affirmed.

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[6] According to ESLIC, it should only be liable for one year (1970) out of the twenty-four years since the spill, and USF&G should be liable for the balance.

GLAZE and CORBIN, JJ., not participating.

SPECIAL JUSTICE CHARLES A. BANKS joins.

SPECIAL JUSTICE W.H. "SONNY" DILLAHUNTY joins.

SHELTER MUTUAL INSURANCE COMPANY *v.*
Linda KENNEDY

01-329 60 S.W.3d 458

Supreme Court of Arkansas
Opinion delivered December 6, 2001

Daggett, Donovan, Perry & Flowers, PLLC, by: *Robert J. Donovan*, for appellant.

Easley, Hicky & Hudson, by: *Michael Easley*, for appellee.

RAY THORNTON, Justice. On January 7, 1999, appellee, Linda Kennedy, was involved in an automobile accident with John Reynolds. Appellant, Shelter Mutual Insurance Company, provided appellee's automobile insurance at the time of the accident. Under the terms of her insurance policy, appellee had $5,000 in medical coverage and $25,000 in underinsured motorist coverage. Appellee's policy also contained a subrogation clause[1]. As a result of the accident, appellee incurred approximately $6,500 in medical bills. Pursuant to the terms of appellee's policy, appellant paid $5,000 of appellee's medical expenses.

At the time of the accident, Mr. Reynolds was insured by Nationwide Insurance Company (Nationwide). Mr. Reynolds's policy provided $25,000 in liability coverage. On June 8, 2000, Nationwide paid appellee $11,000 to settle her claims against Mr. Reynolds. Appellee, thereafter, released all claims against Mr. Reynolds. Appellee settled her claims against Mr. Reynolds against the advice of her attorney.

After entering into this settlement agreement, appellee requested that appellant waive its right to subrogation. Appellant denied appellee's request. On June 15, 2000, appellee filed a complaint in the Circuit Court of St. Francis County, requesting that appellant be denied the right of subrogation. Appellee argued that appellant should not be allowed to enforce its subrogation rights because appellee was inadequately compensated in her settlement with Nationwide.

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[1] The policy language stated:

In the event of any payment under coverages A, B, C, E, F, or G of this policy, or under any other coverage where permitted by applicable law, we will be subrogated to all rights of recovery for which the insured or any person receiving the payment may have against any person or organization. The insured, or such person, shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured, or such person, shall do nothing after loss to prejudice these rights.

On February 12, 2001, a hearing was held on appellee's complaint. On that same day, an order was entered in which the trial court found that appellant was not entitled to subrogation. The trial court, relying on *Franklin v. Healthsource of Arkansas*, 328 Ark. 163, 942 S.W.2d 837 (1997), determined that appellee was not wholly compensated by her settlement with Nationwide. On February 26, 2001, the trial court awarded appellee's attorney $1,225 in attorney's fees.

It is from these orders that appellant appeals, raising two points for our consideration. We affirm the trial court on the first point, and reverse the trial court's award of attorney's fees.

■ In its first point on appeal, appellant argues that the trial court erred when it found that appellee was not wholly compensated by her settlement with Nationwide and denied appellant the right to subrogation. Specifically, appellant argues that because appellee settled for less than Mr. Reynolds's policy limits then she should be estopped from arguing that she was not "made whole." In bench trials, the standard of review on appeal is not whether there is any substantial evidence to support the finding of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702 (1997).

■ Appellant argues that appellee was estopped from arguing that appellant was not entitled to subrogation because appellee settled for less than Mr. Reynolds's insurance policy's limits. We have outlined the principles one must establish to prove estoppel in *City of Russellville v. Hodges*, 330 Ark. 716, 957 S.W.2d 690 (1997). In *Hodges*, we explained:

> Four elements are necessary to establish estoppel. They are: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that the conduct be acted on or must act so that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the facts; and (4) the party asserting the estoppel must rely on the other's conduct and be injured by that reliance.

Id.

Appellant raised the affirmative defense of estoppel in its amended answer. This amended answer was filed on the day this matter was set for trial.

Appellee argues that appellant should be procedurally barred from raising this issue on appeal because appellant failed to develop this defense below. Appellee further argues that the only issue before the trial court and before our court on review is whether appellee was "made whole" through her settlement with Nationwide.

Based upon our review of the abstract, we conclude that we cannot consider the issue of estoppel on appeal. We have held that something more than a mere assertion of an argument in the pleadings is required to preserve an issue for appellate review. *Seyller v. Pierce and Company, Inc.*, 306 Ark. 474, 816 S.W.2d 577 (1991). In this case, appellant's amended answer stated: "[H]aving previously settled her claim for eleven thousand dollars ($11,000.00) the plaintiff is now estopped to deny the adequacy of such settlement." Appellant did not pursue the affirmative defense of estoppel at trial, and failed to establish the elements of estoppel at trial. Moreover, the trial court's order did not address the issue of estoppel. Because appellant did not develop the affirmative defense of estoppel below, we cannot consider this issue on appeal.

Having determined that we cannot consider the issue of estoppel on appeal, we turn next to the issue of whether the trial court's order finding that appellee was not "made whole" is erroneous. The trial court's finding that appellant was not entitled to subrogation because appellee was not "made whole" was based on *Franklin v. Healthsource of Arkansas, supra.* In *Franklin*, Curtis Franklin had a health insurance contract with Healthsource of Arkansas, that included a subrogation clause and an assignment-of-benefits clause. Following an automobile accident, Healthsource paid $71,120.65 of Franklin's medical bills. Franklin's medical expenses were in excess of $124,000. He had additional damages valued at over $400,000. *Id.*

Franklin then sued the other driver and accepted an offer from the driver's insurance carrier to settle for $25,000. *Id.* Healthsource, in a subsequent action, claimed it was entitled to the entire $25,000 under the subrogation clause in its contract. The trial court agreed with Healthsource and distributed the funds to it, less attorney's fees for Franklin's attorney. *Id.*

Upon appellate review, we reversed the trial court. We explained that "subrogation is recognized or denied upon equitable principles" and further explained that Healthsource was not entitled to subrogation because "an insured's right to subrogation takes

precedent over that of an insurer, so the insured must be wholly compensated before an insurer's right to subrogation arises; therefore, the insurer's right to subrogation arises only in situations where the recovery by the insured exceeds his or her total amount of damages incurred." *Id.*

We do not agree with the trial court's finding that *Franklin* controls the outcome of the case now before us. The facts in the case *sub judice* are distinguishable from the facts in *Franklin*. Notwithstanding our conclusion that there are differences between *Franklin* and the case now under consideration, we recognize that the principle outlined in *Franklin*, which holds that subrogation is an equitable right to which an insurer is not entitled unless the insured is wholly compensated for his injuries, must be considered in our review of the trial court's order.

We now consider the question of whether appellant was entitled to subrogation. Appellee settled with Mr. Reynolds for $11,000.[2] As a result of the accident, appellee incurred approximately $6,500 in medical bills. At trial, appellee testified that she was still having medical problems as a result of the accident. Specifically, she explained that she could not use one of her hands and that she had trouble keeping her balance. She further stated that she has seen a doctor on several occasions since her settlement with Mr. Reynolds. Appellee also noted that as a result of the injuries sustained during the accident she would require additional medical treatment. Appellant did not contest the evidence offered by appellee. Having reviewed the evidence, we conclude that the trial court's finding that appellee was not made whole by her settlement with Mr. Reynolds, and that therefore appellant was not entitled to the equitable right of subrogation was not clearly erroneous.

In its final point on appeal, appellant contends that the trial court erred when it granted appellee's request for attorney's fees. The trial court's order did not rely on a specific statutory provision when it awarded appellee's request. We have noted that as a general rule, attorney's fees are not allowed in Arkansas unless expressly authorized by statute. *Elliott v. Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991).

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[2] We note that after paying medical bills, attorney's fees, and setting aside appellant's subrogation money, appellee only received $2,097.37 from her settlement with Mr. Reynolds.

Appellee asserts that attorney's fees were proper under either Ark. Code Ann. § 16-22-308 (Repl. 1999) or Ark. Code Ann. § 23-79-208 (Repl. 1999). Arkansas Code Annotated § 16-22-308 is a general statute providing for the recovery of attorney's fees in actions for breach of contract. It provides:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney fee to be assessed by the court and collected as costs.

Id.

Arkansas Code Annotated § 23-79-208 is a statute that allows the recovery of attorney's fees where an insurer fails to pay benefits when they become due. The statute in pertinent part states:

> In all cases where loss occurs and the cargo, fire, marine, casualty, fidelity, surety, cyclone, tornado, life, health, accident, medical, hospital, or surgical benefit insurance company and fraternal benefit society or farmers' mutual aid association liable therefor shall fail to pay the losses within the time specified in the policy after demand made therefor, the person, firm, corporation, or association shall be liable to pay the holder of the policy or his assigns, in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorney's fees for the prosecution and collection of the loss.

Id.

In order to determine whether attorney's fees could be awarded under either of these statutory provisions, it is necessary to review appellee's complaint to determine the nature of appellee's legal action. Appellee filed a complaint requesting that the trial court "conduct a hearing, and make a determination that the plaintiff [appellee] by reason of an $11,000.00 settlement herein, is inadequately compensated, and that subrogation back to the defendant [appellant] will not lie."

After reviewing appellee's complaint, we conclude that appellee did not assert a cause of action which would entitle her to

receive attorney's fees. Specifically, appellee was not seeking recovery based on a breach of contract claim, nor was she seeking to enforce the terms of an insurance policy, but rather appellee was seeking relief from a specific term in her insurance policy which permitted subrogation to appellant if appellee recovered from a tortfeasor. Because there is no statutory provision which would allow attorney fees under the facts presented in this case, we reverse the trial court's award of attorney's fees.

Affirmed in part; reversed in part.

GLAZE, J., concurs.

CORBIN and HANNAH, JJ., dissent.

DONALD L. CORBIN, Justice, dissenting. I cannot abide by the majority's conclusion that Appellee Linda Kennedy was not made whole by her settlement with the tortfeasor's insurer. Moreover, I believe that if she has not been fully compensated for her injuries, she has no one but herself to blame. Accordingly, I must dissent.

The facts are undisputed that Appellee was injured in an automobile accident with John Reynolds, who was insured by Nationwide Insurance Company. As a result of her injuries, Appellee incurred around $6,500 in medical bills. Her insurer, Appellant Shelter Mutual Insurance Company, paid $5,000 of Appellee's medical expenses. Appellee procured the services of an attorney to represent her claim against Reynolds and Nationwide. Against the advice of her attorney, Appellee agreed to settle for the sum of $11,000. Appellee chose to settle knowing full well that the amount she received was less than half of the policy limit. She also knew that out of her settlement, she would have to reimburse Appellant for the $5,000 it paid for her medical bills, pursuant to the subrogation provision of her insurance contract. When Appellant refused to waive its subrogation right, Appellee filed this suit, claiming that she had not been made whole for her injuries.

In the first place, I take issue with Appellee's claim and the trial court's corresponding finding that she has not been made whole by her settlement. Based on what? As the majority points out, Appellee had a net gain from her settlement of approximately $2,100, after paying medical bills, attorney's fees, and setting aside Appellant's subrogation amount. From my review of the record, I am not convinced that this amount is insufficient to fully compensate her.

The only evidence presented of possible future damages was Appellee's own self-serving testimony. She did not present any evidence as to the value of her alleged future damages. It is beyond me how, without such evidence, the trial court could have found that Appellee was not made whole by the settlement. As such, I believe his finding is clearly erroneous.

Moreover, if we were to accept her claim that she is still experiencing pain from her injuries, I am greatly troubled by the fact that she admitted that she is no longer undergoing physical therapy, that she will not take her prescribed pain medication, and that she refuses to have surgery to relieve her pain. This testimony demonstrates to me that Appellee's continued pain is due to her refusal to take part in any affirmative treatment.

In the second place, I disagree with the majority's application of *Franklin v. Healthsource of Ark.*, 328 Ark. 163, 942 S.W.2d 837 (1997), in this case. Although the majority acknowledges that the facts in *Franklin* are distinguishable from those in the present case, it nonetheless proceeds to apply the reasoning and holding of *Franklin*. I believe this is error.

In *Franklin*, the insured was injured in an automobile accident and incurred approximately $124,000 in medical bills. Additionally, there was testimony demonstrating that his future damages amounted to approximately $400,000. Franklin's insurer, Healthsource, paid in excess of $71,000 of those medical bills. Franklin settled his claim against the tortfeasor and the tortfeasor's insurance carrier for $25,000, the full amount of the liability policy. Thereafter, Healthsource sought the full amount of the settlement as subrogation. This court held, and rightly so, that Franklin's right of subrogation took precedent over that of Healthsource because he had not been made whole, even after he received the full value of the liability policy. The decision in *Franklin* was based on equitable principles.

In the present case, Appellee was fully aware that she was settling her claim for less than the policy amount available. Indeed, her decision to settle was made against the advice of her attorney and with the full knowledge that she would have to reimburse Appellant, pursuant to the subrogation clause of her insurance contract. Had she received the full amount of Reynolds's policy and still not been made whole, under *Franklin*, Appellant would not be entitled to enforce its subrogation contract. Because she chose to settle for less than the full amount of the policy, and, apparently, less

than the full amount of her damages, her equitable claim of subrogation is not superior to Appellant's, and *Franklin* is not controlling. For these reasons, I respectfully dissent.

HANNAH, J., joins in this dissent.

FOREMAN SCHOOL DISTRICT NO. 25 *v.* Leo Pat STEELE

01-543 61 S.W.3d 801

Supreme Court of Arkansas
Opinion delivered December 6, 2001

Lavender & Barnette, PLC, by: *Shannon Tuckett* and *G. William Lavender*, for appellant.

John W. Walker, P.A., for appellee.

JIM HANNAH, Justice. Appellant Foreman School District No. 25 (the District) appeals the Little River County Circuit Court's summary judgment in favor of Appellee Leo Pat Steele in a breach of contract claim where the District failed to pay Steele for a year's employment after improperly attempting to nonrenew his

contract. This case calls for the interpretation of the 1994 version of the Arkansas Teacher Fair Dismissal Act ("TFDA").

In 1993, the District hired Steele to be the high school principal for the 1993-1994 school year. His one-year contract began on July 1, 1993, at an annual rate of $40,000. Because Steele was a first-year employee, he was a "probationary teacher" as defined by the Arkansas Teacher Fair Dismissal Act ("TFDA").

On March 22, 1994, Foreman School District Superintendent Sam Pickle mailed Steele a notice that Pickle was going to recommend nonrenewal of Steele's contract for the 1994-1995 school year, citing various management and disciplinary problems Pickle saw in Steele's operation of the high school. Steele received the notice on or about March 24, 1994.

On April 21, 1994, Steele hand-delivered a response letter to the school board president requesting a hearing on Pickle's recommendation. Steele indicated in his letter that he had requested information regarding Pickle's grounds for his decision not to recommend renewal of his contract, and noted that he had not received the information at that time. He further requested five days from the time he received that information until a hearing to get prepared.

Pursuant to the terms of the TFDA, the school board was required to hold a hearing within ten days, but no sooner than five days, from Steele's request for a hearing. The parties did not agree to postpone the hearing beyond the ten-day period, and the hearing was not scheduled or held before May 2, 1994, the tenth day after Steele's request for a hearing. In fact, a hearing was not held until May 6, 1994. At the hearing, Steele objected to the hearing being held outside the ten-day period, noting that the school board's failure resulted in an automatic renewal of his contract for the 1994-1995 school year. The board disagreed, and then acted upon Pickle's recommendation not to renew Steele's contract. The school board hired a new principal for the 1994-1995 school year.

Steele filed a complaint in federal court two years and nine months later alleging that his contract was not renewed because he supported a black counselor who had been terminated by the school district. He also alleged that his nonrenewal violated the terms of the TFDA. A jury trial was held on the discrimination issue, after which the jury returned a verdict in favor of the school

district. The federal district court, however, dismissed without prejudice Steele's TFDA issues and gave Steele thirty days to file that claim in state court.

Within thirty days, Steele filed a complaint in state court on October 7, 1998. Steele alleged in his complaint that the school breached the employment contract that was renewed when the District improperly proceeded on his nonrenewal hearing. Specifically, Steele noted that the District did not strictly comply with the TFDA, which requires that a hearing be held within ten days of his request for that hearing, thus causing the nonrenewal action to be void.

The District filed its answer on November 9, 1998. The District then filed a motion for summary judgment on January 27, 1999, arguing that Steele, as a probationary teacher, could not appeal the school board's decision of nonrenewal, that the circuit court did not have jurisdiction to hear an appeal from a school board's decision of nonrenewal, that even if Steele could appeal his action was barred under the seventy-five-day limitations period under the TFDA, and that he has no breach of contract claim because no contract existed. Steele responded to the District's motion for summary judgment and filed a cross-motion for summary judgment on February 22, 1999. Steele argued in his motion that the District was required to strictly comply with the TFDA in order to nonrenew his contract, and the District's failure to strictly comply with the Act's terms rendered the District's attempts to nonrenew his contract void. As such, his contract was automatically renewed under the terms of the TFDA, and the District's resulting failure to pay Steele's salary was a breach of his employment contract. The District replied on August 25, 1999.

A hearing was held on these motions on September 7, 1999, and the trial court entered its order on January 12, 2000. The court found that Steele's claim was based on the theory of breach of contract because the school board's attempt to nonrenew Steele's contract did not strictly comply with the terms of the TFDA, thus rendering the nonrenewal attempt void. As such, Steele's contract was automatically renewed, and the District then failed to honor that contract.

The District moved for reconsideration on March 30, 2000, and Steele responded to that motion on April 18, 2000. A hearing was held on April 18, 2000, on the issue of damages. The District also filed a posttrial brief on April 28, 2000, contending that the

trial court's decision that Steele was entitled to his $40,000 salary was in error because Steele did nothing to mitigate his damages. On October 11, 2000, the trial court issued a letter opinion, and on October 18, 2000, a final judgment, finding that the District owed Steele his contract salary of $40,000 reduced by $5,486 as the amount of wages earned by Steele as mitigation. The District filed its notice of appeal on November 17, 2000, from the final judgment issued on October 18, 2000.

This matter is here as an appeal from summary judgment. It is well settled that summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Wallace v. Broyles*, 331 Ark. 58, 66, 961 S.W.2d 712 (1998) (quoting *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997)); *Pugh v. Griggs*, 327 Ark. 577, 824 S.W.2d 387 (1992). 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.* As we further explained in *Wallace*, we will not engage in a "sufficiency of the evidence" determination. We have ceased referring to summary judgment as a drastic remedy. We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we only approve the granting of the motion when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admission on file is such that the nonmoving party is not entitled to a day in court, *i.e.*, when there is not any genuine remaining issue of fact and the moving party is entitled to judgment as a matter of law. *Id.*; *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000).

On appeal, the District again raises its arguments from its motion for summary judgment. Specifically, the District argues that Steele, as a probationary teacher, could not appeal the school board's decision of nonrenewal, that the circuit court did not have jurisdiction to hear an appeal from a school board's decision of nonrenewal, that even if Steele could appeal his action was barred under the seventy-five-day limitations period under the TFDA, and that he has no breach of contract claim because no contract existed. Steele responds that he is not litigating the "nonrenewal" of his contract because that action, being void, never took effect. Rather, Steele notes that he is litigating a breach of his contract because the contract was automatically renewed. Steele notes that the standard of compliance is strict compliance, and that the District did not strictly comply with the Act. Therefore, what was before the circuit

court and what is before this court is a simple breach of contract claim. Furthermore, Steele notes that his complaint was not barred by the seventy-five-day limitation because he was a probationary teacher, not a nonprobationary teacher. Therefore, he is only bound by the five-year statute of limitation for breach of a written contract.

The TFDA, codified at Ark. Code Ann. §§ 6-17-1501—6-17-1510 (Repl. 1993), has been the subject of several changes over the last few years. However, because the acts that give rise to this case took place in 1994, that version of the TFDA applies. In the 1994 version of the TFDA, Steele was a "probationary teacher," which is defined in section 6-17-1502(a)(2) as:

> (2) "Probationary teacher" means a teacher who has not completed three (3) successive years of employment in the school district in which the teacher is currently employed.

In section 6-17-1503, the General Assembly laid out the construction of the statutory scheme, noting that:

> This subchapter is not a teacher tenure law in that it does not confer lifetime appointment nor prevent discharge of teachers for any cause which is not arbitrary, capricious, or discretionary. *A nonrenewal*, termination, suspension, or other disciplinary action by a school district *shall be void* unless the school district strictly *complies with all provisions* of this subchapter and the school district's applicable personnel policies.

(Emphasis added.) Furthermore, section 6-17-1506 notes that a teacher's contract can be renewed automatically "unless by May 1 of the contract year, the teacher is notified by the school superintendent that the superintendent is recommending that the teacher's contract not be renewed. . . ." Finally, if a teacher has been notified that his contract will not be renewed, that teacher can file a written request for a hearing with the school board. Ark. Code Ann. § 6-17-1509(a). Upon receipt of that request, the school board must grant a hearing no sooner than five days nor more than ten days after the request has been served, unless the teacher and board mutually agree in writing to postpone the hearing to a later date. Ark. Code Ann. § 6-17-1509(c)(1).

Our case law has interpreted these statutory provisions in several cases. In certain cases prior to 1989, we held that substantial compliance with the notice requirements sufficed. *See, e. g., Murray*

v. Altheimer-Sherrill Pub. Sch., 294 Ark. 403, 743 S.W.2d 789 (1988); *Lee v. Big Flat Pub. Sch.*, 280 Ark. 377, 658 S.W.2d 389 (1983). However, in 1989 the General Assembly enacted Act 625 which amended the TFDA and added this sentence to Ark. Code Ann. 6-17-1503:

> A nonrenewal, termination, suspension, or other disciplinary action by a school district shall be void unless the school district *strictly complies* with all provisions of this subchapter and the school district's applicable personnel policies.

(Emphasis added.)

Under the TFDA, nonrenewal of a contract is void unless procedures are strictly followed. Ark. Code Ann. § 6-17-1503; *Western Grove School Dist. v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994).[1] Strict compliance can be waived, however, by express agreement in writing between the teacher and the school board. *Lester v. Mount Vernon-Enola School Dist.*, 323 Ark. 728, 917 S.W.2d 540 (1996).

Based on these statutes and cases, it is clear that the District's attempts to nonrenew Steele's contract are void because the District did not strictly comply with the TFDA. Specifically, the District's failure to hold a hearing within ten days of Steele's written request for a hearing render the District's actions void. While the District briefly argues that Steele waived his right to a hearing within the required time by requesting that he have five days in advance of the hearing to prepare with documents he had not received, this request does not meet the statutory requirement that a hearing delay be expressly agreed upon in writing by the teacher and the school board. The TFDA requires that if a hearing is to be postponed to a later date, the teacher and board must agree "in writing" to such a postponement, presumably so this exact issue will not arise. *See* Ark. Code Ann. § 6-17-1509(c)(1). Steele's request does not qualify as a "waiver" of the ten-day requirement because the school board could have still complied with this request within the ten day period required by the statute. It merely failed to do so. Furthermore, we have discussed "waiver" in the context of a TFDA case in *Lester, supra,* and stated:

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[1] The Arkansas General Assembly amended Ark. Code Ann. § 6-17-1503 in Act 1739 of 2001 to require only "substantial compliance" with the TFDA.

> In every case of which we are aware, we have held that a waiver of a right requires knowledge of that right on the part of the party alleged to have waived it. In *Bethell v. Bethell*, 268 Ark. 409, 597 S.W.2d 576 (1980), we quoted from *Continental Ins. Cos. v. Stanley*, 263 Ark. 638, 569 S.W.2d 653 (1978), our standard statement on the subject as follows:
>
> > Waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits. It may occur when one, with full knowledge of material facts, does something which is inconsistent with the right or his intention to rely on that right. . . . The relinquishment of the right must be intentional. . . .
>
> That case involved waiver of the right to alimony by failure to request it. Other cases in which we have uttered the same or similar language in various contexts include *Ingram v. Wirt*, 314 Ark. 553, 864 S.W.2d 237 (1993); *Worth v. Civil Service Comm'n*, 294 Ark. 643, 746 S.W.2d 346 (1988); and *Mobley v. Estate of Parker*, 278 Ark. 37, 642 S.W.2d 883 (1982).
>
> While there is evidence that Mr. Lester knew of some, if not most, of his rights under the Act, we have carefully combed the record for any evidence that he was aware of his right to have the hearing no fewer than five days after his request. We found no such evidence.

Lester, 323 Ark. at 732. In this case, there is no evidence that Steele knew of his ability to waive the right to a hearing within ten days and that his letter asking for five days from the receipt of his requested information, which he had been waiting on for up to a month, was any attempt to ask for a continuance. The District could have complied with his request within time to still hold a hearing within ten days. This the District did not do. Therefore, the District's waiver argument is meritless because of the lack of a mutual agreement in writing to delay the hearing.[2]

Because the District's waiver argument fails, the District's failure to strictly comply with the TFDA by not holding a timely hearing rendered its attempts to nonrenew Steele's contract void.

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[2] The argument that the trial court made an impermissible finding of fact on waiver in its summary judgment was not raised by the District and is not before us.

See Western Grove School Dist., supra. In *Western Grove School District,* this court held that that school district's attempts to "reassign" a teacher at a different position at lower wages was actually a nonrenewal. Therefore, because the school district did not follow the notice requirements necessary for effectuating a nonrenewal, the entire attempted action by the school district was void, and the teacher was reinstated into the position under the terms of the original contract because it was automatically renewed. *Id.*

Here, because the attempted nonrenewal did not strictly comply with the terms of the TFDA, the action became void, and on May 1, 1994, Steele's contract was automatically renewed under the terms of his original contract. At that point, the District could have instituted suspension or termination proceedings, but it did not. As such, Steele was a contracted probationary teacher for the 1994-1995 school year.

The District alleges that this action is controlled by the TFDA, which does not allow an outside breach-of-contract claim.[3] However, the District's failure to strictly comply with the TFDA's terms rendered the District's actions void, and takes this lawsuit outside the confines of the TFDA. This is not an appeal from the decision for nonrenewal, which would require us to consider the viability of an appeal by a probationary teacher. Rather, the resulting breach became an original cause of action properly filed in circuit court.

Because the attempted nonrenewal was void and Steele was under a new, identical contract for the 1994-1995 school year, the District breached Steele's contract by failing to reinstate him or pay him his salary. "A person may be liable for breach of contract if the complaining party can prove the existence of an agreement, breach of the agreement, and resulting damages." *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 231-232, 33 S.W.3d 128 (2000); *Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 298, 948 S.W.2d 388, 395 (1997); *Rabalaias v. Barnett*, 284 Ark. 527,

[3] The 1994 and current version of the TFDA do not address appeals from a school board's decision involving a probationary teacher, only those regarding the dismissal of a nonprobationary teacher, who does have the right to appeal the school board's decision. However, this court has decided the issue of an appeal by a probationary teacher in a nonrenewal case in *McGee v. Amorel Public Schools*, 309 Ark. 59, 64, 827 S.W.2d 137 (1992), in which this court stated, "As a probationary teacher, McGee does not have a statutory right to appeal to circuit court the school board's decision of nonrenewal of his contract." However, the distinction here is that Steele is not appealing the decision of nonrenewal, but is instead pursuing his common-law breach-of-contract claim.

683 S.W.2d 919 (1985). Breach of a written instrument or contract is controlled by a five-year statute of limitations. *See* Ark. Code Ann. § 16-56-111 (Supp. 2001). Here, because the contract was automatically renewed by statute, there is no doubt that a contract existed. And failure by the District to comply with a term of the contract, i.e., paying Steele's salary, clearly became a breach of that contract. Certainly, although Steele waited over four years to file the state-court action, he was still within his five-year time limit to file a breach-of-contract claim. As such, we find that the trial court did not err in granting summary judgment in favor of Steele.

Affirmed.

IMBER, J., not participating.

R.N. *v.* J.M. and B.M.

01-174 61 S.W.3d 149

Supreme Court of Arkansas
Opinion delivered December 6, 2001
[Petition for rehearing denied January 10, 2002.]

Barrett & Deacon, A Professional Association, by: *D. Price Marshall Jr.* and *James F. Gramling, Jr.*, for appellant.

Goodwin, Moore, Colbert, Broadway & Gray, LLC, by: *Harry Truman Moore* and *Mary L. Broadway*, for appellees.

JIM HANNAH, Justice. Appellant R.N. appeals the decision of the Craighead County Chancery Court[1] denying his petition to establish paternity of a minor child, A.M., who was born to Appellee J.M. during her marriage to Appellee B.M. J.M. and B.M. are still married. In this appeal, we are asked to interpret and harmonize Ark. Code Ann. §§ 9-10-104 (Repl. 1998 and Supp. 2001), 9-10-108 (Repl. 1998 and Supp. 2001), and 16-43-901 (Repl. 1999), which deal with the establishment of paternity.

The facts of this case are essentially undisputed. J.M. and B.M. were married in 1992 and are still married. Between late 1996 and early 1997, J.M. and R.N. were involved in an ongoing sexual relationship. During this period of time, J.M. continued to have sexual relations with her husband, B.M. J.M. gave birth to a child, A.M., on August 17, 1997. A.M. has lived with J.M. and B.M. since her birth. While R.N. claims that J.M. told him that "she was 99 percent sure the child was his," J.M. claims she only said "it was like 95 percent sure" that R.N. was the father of the child. Although R.N. has not established a relationship with A.M., he testified that he wanted to establish a relationship with the child, but that J.M. would not allow him to see her. Since A.M.'s birth, R.N. has seen the child on two occasions, once at J.M.'s home and again at R.N.'s office.

On April 7, 1998, R.N. filed the petition for paternity, and on April 20, 1998, he filed a motion for paternity testing pursuant to Ark. Code Ann. § 9-10-108. J.M. responded denying that R.N. is A.M.'s father and moved to dismiss the action on three grounds: (1) R.N. lacked standing because A.M. is presumed to be legitimate,

[1] Pursuant to the passage of Arkansas Constitutional Amendment 80, which went into effect on July 1, 2001, our state courts are no longer separated into chancery and circuit courts. Rather, these courts have merged and now carry only the designation of "circuit court." Therefore, although the trial court in this case was originally a chancery court, in will herein be referred to as the circuit court.

and the Arkansas paternity statutes only apply to illegitimate children; (2) R.N. has no constitutionally protected interest because he has not established a relationship with A.M.; and (3) R.N. should be equitably estopped from bringing the paternity action because he waited until A.M. was almost nine months old before filing the paternity action.

After a hearing on August 31, 1999, the chancellor granted J.M.'s motion to dismiss R.N.'s petition for paternity. In the order entered on August 15, 2000, the court found that as a matter of law R.N. lacked standing to bring the paternity action and that he is equitably estopped from bringing the action. The trial court also adopted as its conclusions of law the legal arguments in J.M.'s motion to dismiss and brief in support of the amended response to the motion for paternity testing. The pleadings were incorporated by reference in the court's order.[2]

I. Standing

In his first point on appeal, R.N. argues that section 9-10-104 of the Arkansas paternity statutes grants him standing and that section 9-10-108 requires the trial court to order paternity or DNA testing upon motion of either party. *See* Ark. Code Ann. §§ 9-10-104 and 9-10-108. In response, J.M and B.M. contend that R.N. lacks standing under section 9-10-104 because that section grants standing to a putative father only when the child is illegitimate, and A.M. is presumed to be legitimate as she was conceived and born during marriage. J.M. and B.M. further assert that paternity testing should be controlled by Ark. Code Ann. § 16-43-901, which permits the trial judge to order paternity testing if the judge concludes such testing is in the child's best interest. R.N. responds that section 9-10-104 specifically grants a putative father the right to petition to establish paternity even when the child is presumed legitimate. He states that even though being conceived and born during marriage creates a presumption of legitimacy, that presumption is rebuttable by evidence of impotency, lack of access between husband and wife, or genetic testing. R.N. argues that the use of the phrase "the trial court shall order" in section 9-10-108 makes genetic testing mandatory upon either party's motion. He relies on our canon of statutory interpretation that a general statute must give

[2] B.M. was allowed to intervene in this action on June 29, 1999, and he later joined J.M. in her motion to dismiss R.N.'s paternity suit.

way to a specific statute to support his contention that the mandatory language of section 9-10-108 controls because it is specific to a paternity action; whereas, the permissive language in section 16-43-901 is general in that it applies to any court action.

The resolution of the question of R.N.'s standing to petition for paternity requires us to interpret the Arkansas paternity statutes. We review issues of statutory construction *de novo* because it is our responsibility to determine what a statute means. *Clemmons v. Office of Child Support Enforcement*, 345 Ark. 330, 47 S.W.3d 227 (2001) (citing *Stephens v. Arkansas School for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000) and *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999)). While we are not bound by the trial court's ruling, we will accept the trial court's interpretation of a statute unless it is shown that the trial court erred. *Id.* The purpose of statutory interpretation is to give effect to the intent of the General Assembly. *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999). We first seek the legislature's intent by giving the words of the statute their ordinary and usual meaning in common language. *Stephens v. Arkansas School for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000). Where the meaning is clear and unambiguous, we do not resort to the rules of statutory interpretation. *Id.*

R.N. filed his petition to establish his paternity of A.M. under section 9-10-104 of the paternity statutes. This section was amended by Act 1184 of 1995 to read as follows:

> 9-10-104. *Suit to determine paternity of illegitimate child.* Petitions for paternity establishment may be filed by:
>
> (1) A biological mother;
>
> (2) A putative father;
>
> (3) A person for whom paternity is not presumed or established by court order; or
>
> (4) The Office of Child Support Enforcement.[3]

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[3] It should be noted that Act 1184 of 1995, as codified at Ark. Code Ann. § 9-10-104 (Repl. 1998) states as follows:

> 9-10-104. Suit to determine paternity of illegitimate child.
>
> Petitions for paternity establishment may be filed by:
>
> (1) A biological mother;

R.N. asserts that section 9-10-104 plainly creates standing for him as a putative father. A "putative father" is defined throughout the Arkansas Code as any man not legally presumed or adjudicated to be the biological father of a child, but who claims or is alleged to be the biological father of the child. *See* Ark. Code Ann. §§ 9-9-501(11) (Repl. 1998), 9-27-303(42) (Supp. 2001), 16-43-901(h) (Repl. 1999), 20-18-701(5) (Repl. 2000). R.N. claims to be the biological father of A.M., but he is not legally presumed or adjudicated to be the biological father of A.M. Thus, R.N. is, by statutory definition, a putative father.

As to the phrase, "[s]uit to determine paternity of illegitimate child," that now appears in section 9-10-104, R.N. contends that it is merely a descriptive heading, and descriptive headings in the code do not have the effect of law. R.N. is correct that descriptive headings in the code are not law. *See* Ark. Code Ann. § 1-2-115(b) (Repl. 1996) ("(b) Unless otherwise provided in this Code, . . . the descriptive headings or catchlines immediately preceding or within the text of the individual sections . . . do not constitute part of the law and shall in no manner limit or expand the construction of any section."). While it is true that a previous version of section 9-10-104, as amended by Act 725 of 1989, did not include the above-quoted descriptive heading, it is now a part of the statute after the General Assembly amended section 9-10-104 in 1995 and included the heading or title of the statute in the enactment of the statute, thus making the heading itself part of the statute. *See* 1995 Ark. Acts 1184.

Without this phrase, the statute would clearly grant R.N. standing. We must, therefore, determine whether the language in the descriptive heading that is now a part of the statute effectively denies R.N. standing to petition for the establishment of A.M.'s paternity. The paternity statutes do not provide us with a definition of the term "illegitimate child," but this court has defined that term in *Willmon v. Hunter*, 297 Ark. 358, 360, 761 S.W.2d 924, 925 (1988): "[A]n illegitimate child is a child who is born at the time that his parents, though alive, are not married to each other." The paternity statutes at that time provided that "any man alleging to be

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(2) A putative father;

(3) A person for whom paternity is not presumed or established by court order; or

(4) The Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration.

the father of an illegitimate child may petition . . . for a determination of the paternity of the illegitimate child." Ark. Code Ann. § 9-10-104(a) (1987).

We also reiterated in *Willmon* the general principle of law that a child is presumed legitimate if the parents were married at the time of the child's conception or birth. *Id.* This principle has been recognized by the General Assembly when enacting laws concerning inheritance. *See* Ark. Code Ann. § 28-9-209 (1987). In *Willmon*, we held that the presumption of legitimacy of a child born during a marriage, as well as the presumption of legitimacy of a child conceived but not born during the marriage, are rebuttable and do not preclude a party from litigating the issue of paternity. *Willmon v. Hunter, supra. See also, Thomas v. Pacheco*, 293 Ark. 564, 740 S.W.2d 123 (1987) (permitting the mother to litigate the issue of illegitimacy even though the child was conceived *and* born during marriage). In other words, even when the term "illegitimate child" was included within the text of the statute, and not merely in the descriptive heading, we have held that a putative father was not precluded from petitioning to determine paternity in cases where the child was presumed legitimate.

The General Assembly included a reference to the term "illegitimate child" in the 1995 amendments to the paternity statutes knowing of our earlier decisions that a presumption of legitimacy is rebuttable notwithstanding the specific reference to that same term in a previous version of section 9-10-104. *See Thomas v. Pacheco, supra.*, and *Willmon v. Hunter, supra.* "[W]hen the construction of a statute is at issue, we will presume that the General Assembly, in enacting it, possessed the full knowledge of the constitutional scope of its powers, full knowledge of prior legislation on the same subject, and full knowledge of judicial decisions under preexisting law." *Davis v. Old Dominion Freight Line, Inc.*, 41 Ark. 751, 756, 20 S.W.3d 326, 329 (2000). Because the legislature is presumed to have known of our decisions, we conclude that the plain language of section 9-10-104 grants R.N. standing to petition to determine the paternity of A.M. In other words, it gives R.N. the opportunity to bring his cause before the court.

Although section 9-10-104 gives R.N. standing to petition for paternity, at issue here is whether paternity testing is mandatory under section 9-10-108 or discretionary under section 16-43-901 in relation to these facts. R.N. urges this court to hold that the trial court erred in refusing to order the DNA testing as requested in his

motion for paternity testing pursuant to Ark. Code Ann. § 9-10-108. The trial court applied section 16-43-901, which is permissive and allows a trial court to determine what is in the child's best interest before ordering a paternity test. *See* Ark. Code Ann. § 16-43-901(g). R.N. argues that the mandatory testing required under section 9-10-108 should control because it is a specific statutory right to DNA testing in the course of a paternity proceeding, and the best interest analysis should be done after the trial court has the benefit of all the material facts, including the DNA or paternity test.

Whether sections 9-10-108 and 16-43-901 conflict is a question of statutory interpretation. We have often noted that "[i]t has long been the law in Arkansas that a general statute must yield when there is a specific statute involving the particular subject matter." *Shelton v. Fiser*, 340 Ark. 89, 94, 8 S.W.3d 552, 560 (2000). *See also, Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997); *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994); *Conway Corp. v. Construction Eng'rs, Inc.*, 300 Ark. 225, 782 S.W.2d 36 (1989). However, statutes relating to the same subject are said to be *in pari materia* and should be read in a harmonious manner, if possible. *Stephens, supra*; *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

While the language of the two statutes appears at first to be in conflict, a full reading of the statutes and the situations to which they apply clarify that section 16-43-901 is the more specific of the two and can be applied harmoniously with section 9-10-108. Under section 9-10-108, the trial court is directed that it "shall" order testing upon the motion of either party to the paternity action; whereas, under section 16-43-901 the trial court "may" order testing where it can assist the trial judge in the determination of paternity in the particular situation where the child is presumed legitimate by being born during the marriage of the mother and her husband. Section 16-43-901(g) instructs the trial court to consider the best interest of the child in determining paternity in the specific situation when the child is presumed legitimate; whereas, section 9-10-108 contains no such instruction for the general determination of paternity. By finding that section 16-43-901 addresses a more limited and specific situation than does section 9-10-108, we not only can address the particular situation of determining the true parentage of a presumed legitimate child born of a marriage, but the court can also harmonize these two statutory sections.

As the court of appeals noted in *Leach v. Leach*, 57 Ark. App. 155, 942 S.W.2d 286 (1997), Act 657 of 1989, codified at section 16-43-901, abolished Lord Mansfield's Rule. The court of appeals stated:

> The common-law rule, articulated in 1777, states the declarations of husband and wife cannot be admitted to bastardize a child born after marriage. The statute now permits a mother, her husband, and a putative father to testify about the paternity of a child. However, the strong presumption of the legitimacy of a child born of marriage continues to be one of the most powerful presumptions in Arkansas law. Only upon clear and convincing evidence may the court find this presumption overcome. This statute also provides:
>
>> The court shall consider foremost the interest of the child in making any determination hereunder and consider only testimony and evidence which will serve the best interest of the child in its findings pursuant to this section.

Id. at subsection (g)(2).

In *Leach*, the court of appeals reversed the chancellor's decision to award custody of two children born of the marriage, although the older child was admittedly not the husband's, to the mother so that the children would not be separated, although the father had had temporary custody during the divorce proceedings. While the issue of paternity *testing* did not arise in that case because the husband and wife did not make it an issue, the issue of paternity itself was raised *sua sponte* by the court. The chancellor determined that because the older child was not the husband's, the husband could not have custody of her. The court of appeals reversed because illegitimizing the daughter was not in her best interest under the facts of that particular case. The court of appeals recognized that in considering paternity involving a child born of a marriage whose legitimacy is presumed, such a special and specific situation arises requiring the chancellor to step in and exercise discretion to determine an outcome in the best interest of the child whose life will be most affected by any change in parentage. *See* Ark. Code Ann. § 16-43-901(g)(1) and (2). While *Leach* has no precedential value for us, its reasoning is sound and in accordance with the application of this statute to this specific situation. The discretionary "may" language in section 16-43-901(e)(1) allows a chancellor to consider the particular circumstances of each case and the child's best interest before ordering a paternity test that could

forever change a child's life, perhaps merely because the adults who caused such a tumultuous situation are curious to know the results of their infidelity.

Furthermore, because the bulk of section 16-43-901 addresses such a specific situation rather than the general situation of establishing paternity under section 9-10-108, R.N.'s contention that section 9-10-108 is more specific merely because it uses the word "shall" is in error. By reaching that conclusion, we would necessarily void the language in section 16-43-901(e)(1), which gives the trial judge discretion to order the test if it assists the court in the determination of parentage after considering the child's best interest under section 16-43-901(g)(2). Instead, by our determination that section 16-43-901 is more specific in its application to this particular type of paternity challenge than the general paternity-testing statute at section 9-10-108, both statutes can be read in harmony to recognize that the presumption of legitimacy of a child born during a marriage is a presumption to protect the child whose interests should be considered first and foremost. And while this presumption is rebuttable according to law, the challenging party must first show that rebutting that presumption is in the best interest of a child whose parents were married at the time the child was born and perhaps, as in this case, remain married and plan to continue as the only parents the child has ever known.

Opponents to our decision would argue that giving the trial judge discretion in such a case would erase a putative father's ability to rebut the presumption of legitimacy where perhaps the only way to rebut that presumption is through DNA testing. However, it is this discretion in section 16-43-901 that allows the trial judge to provide the necessary level of objective reasoning to protect the best interest of a child who is presumed legitimate while still considering the interests of a putative father or other party who seeks to rebut the presumption. Otherwise, the presumption of legitimacy loses any real meaning if a putative father, for instance, has the ability, by merely requesting a paternity test, to forever change the presumed legitimacy of a child born of a marriage. We are not willing to minimize this presumption where section 16-43-901 clearly addresses a specific situation in which paternity is challenged within the larger and less specific arena of paternity challenges under section 9-10-108.

In two particular cases in the 1980s, we addressed the issue of a party's ability to challenge paternity when a child is presumed legitimate. In *Thomas v. Pacheco*, *supra*, we allowed a mother to

litigate the issue of paternity even though the child was conceived and born during her marriage. We noted that while there is a strong presumption of legitimacy for a child born during marriage, the presumption was rebuttable by evidence of the father's impotence or the non-access of the parties. *Id.* We reversed the trial court's findings concerning paternity for two reasons. One, the trial court erred in allowing the husband and wife to testify concerning non-access during the period of conception. Lord Mansfield's Rule, a rule of evidence dating back to the 1770s and adopted in Arkansas in 1915, prohibited a husband or wife from testifying concerning non-access of the husband. Thus, the trial judge abused his discretion in allowing the testimony. *Id.* Second, we held that even though blood tests established a 99.5% probability that the husband was not the father, the court failed to follow the required procedure by allowing a telephone deposition, rather than a personal appearance, by the doctor who performed the test. *Id.* Significantly, we did not dismiss the case but remanded it, allowing the parties to continue to litigate the issue of paternity in spite of the presumption of legitimacy and the wording of the statute that appeared to limit petitions to cases of an illegitimate child. *Id.*

In *Willmon v. Hunter, supra*, we upheld the right of a putative father to litigate the issue of paternity over the presumption of legitimacy of a child conceived during marriage but born out of wedlock. In deciding that case, we held that the presumption of legitimacy was not irrebuttable. We also held that there was no public policy that would prohibit a putative father from seeking to establish his paternity of a child presumed legitimate. *Id.* In 1988, we held that a putative father was not entitled to notice because he did not avail himself of his rights to petition for paternity or take other affirmative action to establish a relationship with the child. *In re the Adoption of S.J.B.*, 294, Ark. 598, 745 S.W.2d 606 (1988). Furthermore, we stated: "The Arkansas law governing the establishment of paternity by the county court is applicable to all putative fathers." *Id.* at 603. The *Willmon* holding, like the *Pacheco* and *Adoption of S.J.B.* holdings, were made under the 1981 statute, the text of which specifically referred to an illegitimate child.

While these cases establish that a putative father or other recognized party under section 9-10-104 may petition to establish paternity, a matter we do not dispute here, any further application of those decisions to this case must fail. Those cases were decided prior to the enactment of section 16-43-901 through Act 657 of 1989, which generally did away with Lord Mansfield's Rule. Thus, while *Thomas v. Pacheco* and *Willmon v. Hunter* recognize a party's standing

to challenge presumed paternity, the language in section 16-43-901 still retains the trial judge's discretion to consider first and foremost the best interest of the child before making any decision regarding the receipt of evidence, including whether to order DNA tests. *See* Ark. Code Ann. § 16-43-901(e)(1) and (g)(2).

In conclusion on this issue, we find that the trial court erred in holding that R.N. did not have standing to petition to establish paternity. We reverse and remand to the circuit judge with the instruction that prior to ordering paternity testing, the circuit judge shall first conduct a hearing to determine whether it is in the best interest of the child to order a paternity test pursuant to section 16-43-901(g)(2), and then to further determine any related issues pursuant to the directives of that statute.

II. Equitable Estoppel

Even though R.N. has statutory standing, J.M. and B.M. assert that R.N. should be equitably estopped from bringing a paternity action because he waited until A.M. was almost nine months old before initiating the action. R.N. argues that J.M. and B.M. failed to present sufficient facts to meet their burden of proof on the elements of equitable estoppel. The trial court ruled that as a matter of law, R.N. was estopped from pursuing his paternity action. We review chancery cases *de novo* on the record, but we will not reverse a chancellor's findings of fact unless they are clearly erroneous. *Wisener v. Burns*, 345 Ark. 84, 44 S.W.3d 289 (2001).

We have defined equitable estoppel as "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." *Clemmons*, 345 Ark. at 352 (citing 28 AM. JUR.2d *Estoppel and Waiver*, Page 353 § 28 (2000)). We have established four necessary elements of equitable estoppel:

> (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his or her conduct be acted on or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the latter must be ignorant of the true facts; and (4) must rely on the former's conduct to his or her injury.

Miller County v. Opportunities, Inc., 334 Ark. 88, 96, 971 S.W.2d 781 (1998). The essence of J.M. and B.M.'s estoppel argument is that R.N. should be estopped from bringing a paternity action because, although he knew that he was probably A.M.'s biological father, he allowed B.M. to establish and develop a close relationship with A.M. during the first nine months of the child's life.

B.M., as the proper party to assert the equitable estoppel claim, had the burden of proving each of the four elements of equitable estoppel. However, there is no proof in the record as to what B.M. knew and when, although at some point he knew there was a question about A.M.'s paternity. Furthermore, B.M. offered no evidence to show that he relied on R.N.'s conduct to his detriment. We must therefore conclude that, without the strict proof necessary to support B.M.'s estoppel claim, the trial court was clearly erroneous in concluding that R.N. was equitably estopped from bringing the paternity action as a matter of law.

III. Equal Protection

The dissent asserts that by reaching this conclusion we are violating the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because we are "discriminating" against illegitimate children by not providing them a "best interest" hearing upon the determination of paternity. Nothing could be further from the truth.

To begin with, we note that none of the parties to this action raised this issue in the trial court, and they do not attempt to raise the issue in their briefs to this court. The dissent raises this issue *sua sponte* despite our longstanding rule that, with the notable exception of matters involving subject-matter jurisdiction, we will not consider issues raised for the first time on appeal, even where the issue is a matter of constitutional magnitude. *Furman v. Holloway*, 312 Ark. 378, 383, 849 S.W.2d 520, 523 (1993); *Burke v. Strange*, 335 Ark. 328, 983 S.W.2d 389 (1998), *Tabor v. State*, 333 Ark. 429, 971 S.W.2d 227 (1998).

On the merits, the dissent bases its argument on *Gomez v. Perez*, 409 U.S. 535 (1973), a case in which the United States Supreme Court determined that a Texas court's action in a paternity and support case violated the Equal Protection Clause. In *Gomez,* the appellant filed a petition in Texas District Court seeking support from the appellee on behalf of her minor child. After a

hearing, the state trial judge found that appellee was "the biological father" of the child, and that the child "needs the support and maintenance of her father," but concluded that because the child was illegitimate "there is no legal obligation to support the child and the Plaintiff take nothing." The Court of Civil Appeals affirmed this ruling over the objection that this illegitimate child was being denied equal protection of law. The Texas Supreme Court refused application for a writ of error, finding no reversible error. On review, the Supreme Court held that a state may not "invidiously discriminate" against illegitimate children by denying them substantial benefits accorded children generally, and that once a state creates a judicially enforceable right on behalf of children for necessary support from their natural fathers, there is no constitutionally sufficient justification for denying these necessary rights to a child simply because her natural father has not married her mother, and such denial is a denial of equal protection.

Clearly, the Court in *Gomez* saw that providing fewer rights to a child simply because he or she is illegitimate is a violation of equal protection. The *Gomez* case and its holding neither factually nor substantively apply here, however. Rather, in this case, by requiring paternity testing under Ark. Code Ann. § 9-10-108 in a case involving an illegitimate child, the courts will actually be effectuating the intent of the United States Supreme Court in *Gomez* by requiring that illegitimate children who do not have a father will not only be able to establish parentage, but will also be afforded all of the rights and benefits accorded children who are presumed legitimate. Hence, the "best interest" of an illegitimate child, including but not limited to the rights and benefits of having a father and the right of receiving support from the father, will always be to have parentage established for an illegitimate child, thus negating any need for a "best interest" hearing under Ark. Code Ann. § 16-43-901. The State, as well, will benefit from the establishment of paternity for an illegitimate child where certain support obligations will transfer to the rightful bearer of those responsibilities. Furthermore, required testing under Ark. Code Ann. § 9-10-108 in a case involving an illegitimate child actually raises the rights of an illegitimate child to the same level as those who are presumed legitimate, thus satisfying the Equal Protection Clause by actually conferring upon them "substantial benefits accorded to children generally." *Gomez*, 409 U.S. at 538 (1973).

As a final point, R.N. argues that the trial court erred in ruling that he did not have a protectable constitutional interest that would

grant him standing. Because we have ruled that R.N. has statutory standing to bring the petition, we need not address this point.

Reversed and remanded.

THORNTON, J., concurs.

GLAZE, BROWN, and IMBER, JJ., dissent.

RAY THORNTON, Justice, concurring. The majority of the court has decided that R.N. has standing under Ark. Code Ann. § 9-10-104 (Repl. 1998) to bring a paternity action challenging the legitimacy of a child, A.M., who is presumed to be legitimate because she was both conceived and born during the continuing marriage of her parents, J.M. and B.M. Both J.M. and B.M., the married couple to whom A.M. was born, strongly object to R.N.'s efforts to have the child declared illegitimate.

The public policy of our state regarding the presumption of legitimacy of a child born during marriage was declared in *Thomas v. Pacheco*, 293 Ark. 564, 740 S.W.2d 123 (1987), where we stated:

> Marriage is still considered an honorable institution; children born during marriage should be deemed legitimate, and legal efforts to declare such children illegitimate should not be made easy. Belief in that principle is so great that we have created a legal presumption to protect it. This presumption, that a child born during marriage is the legitimate child of the parties to the marriage, is one of the strongest presumptions recognized by the law.

Thomas, *supra* (citing *Jacobs v. Jacobs*, 146 Ark. 45, 225 S.W.22 (1920)). We also made a strong public policy declaration in support of the presumption of the legitimacy of a child born during marriage in *Hall v. Freeman*, 327 Ark. 148, 936 S.W.2d 761 (1997), where we stated: "Nothing in the statutes creating the paternity action purports to do away with the presumption of legitimacy of a child born during marriage." *Id.*

However, the majority of the court today holds that the legislature did not mean what it said when it enacted Act 1184 of 1995, which clearly states who has standing to bring a paternity action in a suit to determine the paternity of *an illegitimate child*. Act 1184 of 1995, which is codified at Ark. Code Ann. § 9-10-104, provides in its entirety:

Be it Enacted by the General Assembly of the State of Arkansas:

SECTION 1. Arkansas Code § 9-10-104 is hereby amended to read as follows:

"9-10-104. Suit to determine paternity of illegitimate child. Petitions for paternity establishment may be filed by:

(1) A biological mother;

(2) A putative father;

(3) A person for whom paternity is not presumed or established by court order; or

(4) The Office of Child Support Enforcement."

Id.

While I have great difficulty in comprehending the reasoning employed by the majority in conferring standing upon R.N., I recognize that the majority of this court has authority to interpret the statute. It has done so in today's opinion by declaring that R.N. has standing to bring a paternity action under Ark. Code Ann. § 9-10-104. Accordingly, I reluctantly accept the majority's conclusion to confer standing upon R.N.

However, accepting that R.N. has standing to bring a paternity action, as declared by today's decision, I wholeheartedly agree with the majority's decision that, pursuant to Ark. Code Ann. § 16-43-901 (Repl. 1998), the best interests of the child should be considered by the trial court before ordering a blood test.

For these reasons, I respectfully concur.

ROBERT L. BROWN, Justice, dissenting. I agree with Justice Imber's dissenting opinion. But like Justice Thornton in his concurring opinion, I am troubled by the General Assembly's enactment of Act 1184 of 1995, which lists who has standing to sue to determine paternity. Act 1184 reads:

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. Arkansas Code § 9-10-104 is hereby amended to read as follows:

> "9-10-104. Suit to determine paternity of *illegitimate* child. Petitions for paternity establishment may be filed by:
>
> (1) A biological mother;
>
> (2) A putative father;
>
> (3) A person for whom paternity is not presumed or established by court order; or
>
> (4) The Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration."

Act 1184 of 1995 (emphasis added).

The critical question for me is where did the language "9-10-104. Suit to determine paternity of illegitimate child," which is included in Act 1184, come from? In reviewing Act 725 of 1989, which rewrote § 9-10-104, this language is not included. This means that under Act 725, paternity suits could be brought respecting either illegitimate or legitimate children. However, in checking the 1989 Pocket Supplement of the Family Law Code and the 1992 Replacement Volume as well, the language concerning an "illegitimate child" was added by the codifier as a heading to § 9-10-104, even though Act 725 made no reference to illegitimate children. Descriptive headings and titles added by a codifier, of course, are merely for convenient reference and do not have the force of law. Ark. Code Ann. § 1-2-115 (Repl. 1996).

Act 1184 of 1995 was a comprehensive act that amended forty-one statutes relating to the Office of Child Support Enforcement. In amending § 9-10-104, Act 1184 picked up the codifier's heading relating to paternity suits for illegitimate children as part of the enactment. Nowhere else in the Act is reference made to illegitimacy. The title of Act 1184 does not allude to illegitimate children, and no Emergency Clause is included in the Act. By adding the codifier's heading, Act 1184 of 1995 significantly amended Act 725 of 1989, which did not limit paternity suits to illegitimate children. Of course, this is a major policy shift. The question then is whether enacting a codifier's title was legislative error or not. Ordinarily, the presumption is made in favor of error-free enactments. Yet, I am reluctant to countenance a policy shift of such consequence based on the inclusion of a codifier's heading without any further statement by the General Assembly. It appears the General Assembly

may well have inadvertently picked up the codifier's heading in comprehensive legislation without further consideration and without intending to significantly alter the statute.

The General Assembly should review § 9-10-104 at its next legislative session in light of today's decision and other recent decisions of this court which relate to who can raise paternity questions and with respect to what children. This is a major policy issue that cries for clear resolution.

ANNABELLE CLINTON IMBER, Justice, dissenting. I agree with the majority that Ark. Code Ann. § 9-10-104 (Repl. 1998 and Supp. 2001) confers standing on R.N. to petition for the establishment of paternity. However, I disagree with the majority's conclusion that the substantive right to mandatory paternity testing provided in the paternity testing permissive after a hearing on the best interest of the child. Furthermore, I must dissent because the majority has interpreted our paternity statutes in such a way as to offend the United States Constitution.

The majority would allow a putative father to have standing under section 9-10-104 of the paternity statutes, but then would strip him of his substantive right to mandatory paternity testing granted under section 9-10-108 if the child is presumed legitimate. Once a party has standing, that party has all the substantive rights that flow from standing. In that case of a paternity action, if a putative father has standing, he is entitled to all the substantive rights granted to him by the General Assembly under the paternity statutes, including those granted to either party under section 9-10-108. The majority concludes that the General Assembly intended for a putative father to have standing to file a paternity action where the child is presumed legitimate and also for the putative father to somehow lose standing when he attempts to invoke his right to mandatory testing. The majority cannot have it both ways — either a putative father has standing and all the rights that flow therefrom, or he does not. The General Assembly made it clear that he does.

Sections 9-10-108 of the paternity statutes and 16-43-901 both provide for genetic testing to establish paternity. The mjority correctly points out that statutes dealing with the same subject matter should be read harmoniously if possible, but if the statutes conflict, then the more specific statute takes precedence over the more general statute. *See Shelton v. Fiser*, 340 Ark. 89, 94, 8 S.W.3d 552, 560 (2000); *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The majority asserts that the trial court should

grant a motion to test for paternity only after conducting a hearing to determine the best interest of the child, not because section 9-10-108 of the paternity statutes authorizes the judge to do so, but because section 16-43-901 of the evidentiary statutes does.

The majority attempts to harmonize the two statutes by simply ignoring the rights granted to a party to a paternity action under section 9-10-108 if the child is presumed legitimate. A more consistent reading of the statutes is that they merely provide for paternity testing under two different circumstances. In a non-paternity case where evidence of paternity becomes an issue, section 16-43-901(g)(1) of the evidentiary statutes allows the trial court to order paternity testing under section (e)(1) after a hearing on the best interest of the child under section (g)(2). In a paternity case, section 9-10-108 of the paternity statutes grants a substantive right to the parties to request and obtain paternity testing without such a hearing. The facts in the instant case bring the testing under the mandatory provisions of section 9-10-108 because paternity is the central issue of the case. If the General Assembly had intended for the paternity testing upon the motion of a party to a paternity action to be conditioned on a hearing to determine the best interest of the child, it could have done so. However, the General Assembly did not require such a hearing, and this court is not empowered to add that restriction to the statute.

The majority also states that to the extent section 9-10-108 and 16-43-901 conflict, section 16-43-901 should take precedence because it deals specifically with a situation in which the child is presumed legitimate. The majority does not disagree that if section 9-10-108 takes precedence, the plain language of the statute makes the paternity testing mandatory because of the use of the phrase "the trial court shall order. . . ." Ark. Code Ann. § 9-10-108(a)(1). The majority's analysis of specific versus general statutes is flawed. The cases cited by the majority in support of the proposition that a general statute must yield to a statute specific to the subject matter are instructive on the issue of how to distinguish a specific statute from a general one. In *Shelton v. Fiser*, 340 Ark. 90, 8 S.W.3d 552 (2000), the statute of limitations relating specifically to minor children in a medical malpractice case took precedence over a general statute of limitation for actions by minors. In *Board of Trustees v. Stodola*, 328 Ark. 194, 942 S.W.2d 255 (1997), the specific statute relating to forfeiture of personal property from drug trafficking took precedence over a general statute covering goods confiscated from any crime. In *Donoho v. Donoho*, 318 Ark. 637, 887 S.W.2d 290 (1994), a statute prohibiting setoffs for money judgments to a

defendant after the plaintiff commenced suit against the defendant took precedence over a statute generally allowing setoffs in money judgments. In *Conway Corp. v. Construction Engineers, Inc.*, 300 Ark. 225, 782 S.W.2d 36 (1989), a statute not requiring a taxing unit to accept the lowest bid on public improvement contracts took precedence over a general statute requiring the acceptance of the lowest bid. In each case, the general or specific nature of a statute was determined by how broad a range of legal actions were covered by the statute in question. Where the statute specifically related to the subject matter of the case at bar, it took precedence over statutes that only generally related to the subject matter.

In reaching its conclusion, the majority states that section 16-43-901 is more specific than section 9-10-108 because it is limited to circumstances "in which the child is born during marriage and is presumed legitimate." This assertion is not supported by the plain language of the statute. The General Assembly clearly sets out the broad range of legal actions covered by section 16-43-901: "The purpose of this section is to enable the courts to receive into evidence relevant facts concerning the paternity of a child *in any court proceeding or administrative hearing involving paternity* or support obligation for a child." Ark. Code Ann. § 16-43-901(g)(1). (Emphasis added.) On the other hand, the plain language of section 9-10-108 sets out its limited scope. "Upon motion of either party in *a paternity action*, the trial court *shall order* that the putative father, mother, and child to submit to scientific testing for paternity. . . ." Ark. Code Ann. § 9-10-108(a)(1). (Emphasis added.) Section 16-43-901 applies to legal proceedings in general, including administrative hearings. Section 9-10-108 is limited to paternity actions.

The instant case is a paternity action, and so, according to our caselaw, the statute that is specific to the subject matter takes precedence over a general statute covering a broad range of legal proceedings. Section 9-10-108 specifically applies only to paternity actions and takes precedence over Section 16-43-901 that applies to a broad range of legal proceedings.

The majority's reliance on *Leach v. Leach*, 57 Ark. App. 155, 942 S.W.2d 286 (1997), is misplaced because *Leach* was a divorce action, not a paternity action under section 9-10-104. *Id.* The court of appeals correctly applied the general provisions of section 16-43-901 in *Leach* because it was a divorce action, and paternity testing under section 9-10-108 can only be initiated by a party to a paternity action. In the instant case, the paternity of A.M. has not been established. Once paternity is established, then the circuit court

must, as the court of appeals required in *Leach*, consider the best interest of A.M. in matters of visitation, custody, support, or other issues affecting the child.

I must also dissent because the majority has interpreted the paternity statutes in a manner that calls into question their constitutionality under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The majority's decision creates two standards — one for children presumed legitimate, and another standard for children not presumed legitimate. According to the majority opinion, after a paternity suit is initiated under section 9-10-104, if the child is presumed legitimate the trial court is to apply section 16-43-901 to a motion for paternity testing and only grant the testing if a hearing determines it is in the child's best interest to do so. However, if the child is not presumed legitimate, a motion for paternity testing is governed by section 9-10-108 and the testing is mandatory without a "best interest" hearing. Thus, a "best interest" hearing is afforded to a presumed legitimate child, but denied to a child not presumed legitimate. The United States Supreme Court has stated that "[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded to children generally." *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

Because I believe that the majority's interpretation of sections 9-10-108 and 16-43-901 discriminates against children not presumed legitimate in violation of the Equal Protection guarantees of the Fourteenth Amendment, I must respectfully dissent.

GLAZE, and BROWN, JJ., join in this dissent.

John Lee HUDDLESTON *v.* STATE of Arkansas

CR 00-697 61 S.W.3d 163

Supreme Court of Arkansas
Opinion delivered December 6, 2001

Appellant, pro se.

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

PER CURIAM. Appellant was convicted in Sebastian County of possession of amphetamine with intent to deliver and possession of drug paraphernalia. He was sentenced as a habitual offender to life imprisonment and ten years' imprisonment, with the sentences to run concurrently. Appellant was also fined $10,000.00 for possession of drug paraphernalia. Appellant filed a motion for new trial and two amended motions. A hearing was held, and the motions for new trial were denied. Appellant's convictions were affirmed by this court. *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999). Appellant then filed a timely petition for postconviction relief pursuant to Ark. R. Crim. P. 37 in the trial court, raising claims of ineffective assistance of trial and appellate counsel. The circuit court denied the petition without an evidentiary hearing. Appellant appeals to this court. We find no error and affirm.

Appellant's first claim on appeal from the denial of the Rule 37 petition consists of three sub-parts: (1) trial counsel was ineffective for failing to establish that Kelly Mendoza was an agent for the State, (2) trial counsel failed to call Gary Lee, Greg Stevens, and Jimmy Cureton as witnesses, and (3) trial counsel failed to proffer the testimony of Lee, Stevens, and Cureton.

First, appellant claims that Mendoza, who was with appellant when he was arrested, was acting on behalf of state drug investigators when she planted the drugs on appellant that led to his arrest. According to appellant, trial counsel was aware of this. The circuit court denied appellant's claim on the basis that matters of trial tactics and strategy are not grounds for postconviction relief. *See Neal v. State*, 270 Ark. 442, 456, 605 S.W.2d 421, 427 (1980).

On direct appeal, appellant claimed that the trial court erred in denying his motion for new trial based upon a claim of ineffective assistance of counsel. This court found that appellant's claim was procedurally barred because appellant failed to abstract the guilt phase of his trial and because appellant failed to argue that Mendoza was an agent for the State, a claim for which the trial court made no specific ruling. *Huddleston, supra.*

In its brief, the State argues that because appellant raised this claim of ineffectiveness on direct appeal as permitted by *Missildine v. State,* 314 Ark. 500, 863 S.W.2d 813 (1993), he cannot raise it again in a Rule 37 proceeding. According to the State, if an appellant is permitted to raise ineffective-assistance claims on direct appeal, then raise the previously barred or new ineffective-assistance claims in a Rule 37 petition, an appellant is able to have such claims considered in two successive state court proceedings, which is contrary to the prohibition under Rule 37 on the filing of successive petitions. The State urges this Court to overrule *Missildine* and hold that ineffective-assistance claims can be raised only in postconviction proceedings. We disagree with the State and decline to overrule *Missildine.*

Missildine does not present the problems that the State contends. Even if there was a motion for new trial which raised some claims of ineffective assistance of counsel, this does not preclude the petitioner from filing a Rule 37 petition later, provided the claims in the petition are being raised for the first time. We agree that claims of ineffective assistance raised in a new trial motion are settled by the trial court; however, claims *not* raised in the motion for new trial are proper in Rule 37 proceedings.

As stated, on direct appeal this Court found that appellant's claim of ineffectiveness was procedurally barred because appellant failed to abstract the guilt phase of his trial and to argue that Mendoza was an agent for the State, a claim for which the trial court made no specific ruling. *Huddleston, supra.* It was appellant's obligation to obtain a ruling in order to properly preserve an issue for review. *Beshears v. State*, 340 Ark. 70, 72, 8 S.W.3d 32, 34

(2000). We have repeatedly stated that the failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes review on appeal. *Jackson v. State*, 334 Ark. 406, 412, 976 S.W.2d 370, 373 (1998). Because this claim was decided on direct appeal, we decline to consider the issue in these proceedings. *See Neal, supra,* at 447, 605 S.W.2d at 424.

Appellant also claims that trial counsel failed to interview and call as witnesses Lee, Stevens, and Cureton and that he failed to proffer their testimony. According to appellant, these witnesses, if called, would have testified at trial that Mendoza told them that she "set up" appellant. However, appellant claims that trial counsel misrepresented the substance of their testimony to the court by stating that the three men would testify about Mendoza's setting up other individuals, not appellant; therefore; the trial court disallowed the testimony. The circuit court found that trial counsel's decision of whether or not to call these witnesses was a matter of trial strategy, which is outside the purview of Rule 37. Additionally, the circuit court noted that these contentions were addressed on appeal; therefore, they are not grounds for relief under our postconviction rule. *Id.*

The issue of trial counsel's failure to call these witnesses was addressed in appellant's motions for new trial. At the hearing on the motions, all three witnesses were present. Stevens and Cureton testified that had they been called as witnesses, they would have testified that Mendoza told them she planted drugs on appellant at the request of police. However, Lee invoked his Fifth Amendment privilege. Appellant testified that each of these witnesses would have testified that Mendoza set him up. Because this issue was addressed in appellant's motions for new trial, they cannot be raised again in a Rule 37 petition.

Appellant's second claim on appeal from the denial of his Rule 37 petition is that trial counsel was ineffective when he failed to disclose a conflict of interest. Appellant claims that at the time of appellant's criminal trial, the Sebastian County Public Defender's Office, trial counsel's employer, was also representing Lee on an unrelated charge. Appellant claims that trial counsel did not disclose that his office was representing Lee, and therein lies the alleged conflict. According to appellant, trial counsel failed to interview and call Lee as a witness at trial, because Lee was being represented by the Public Defender's Office. Appellant claims he was prejudiced by trial counsel's failure to call Lee as a witness because Lee would

have testified that Mendoza told him that she "set up" appellant the night of the arrest.

This claim was raised on direct appeal, and this Court found that because the trial court did not rule on this claim, the point was not preserved for appellate review. *Huddleston, supra.* In addition, the circuit court did not rule on this issue in denying appellant's Rule 37 petition. As stated previously, failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes review on appeal. *Jackson, supra.*

Appellant's third claim is that trial counsel was ineffective by failing to inform appellant of a plea offer. According to appellant, the State offered to recommend a fifteen-year sentence in exchange for appellant's guilty plea; however, trial counsel never communicated this offer to appellant. In denying appellant's petition, the circuit court found that appellant provided no support for this assertion. Although appellant did not raise this claim in his motions for new trial, the issue was addressed at the hearing on the motions. At the hearing, Ron Fields, former Prosecuting Attorney for the Twelfth Judicial District, testified that after leaving the prosecutor's office for private practice, he became involved in appellant's case at the request of appellant's mother. Upon realizing a conflict because of his position as former prosecuting attorney, Fields withdrew from the case. According to Fields, the plea offer to which appellant is referring has to do with a federal felon in possession of a firearm charge. According to Fields, he did not work out a deal for appellant with the State.

In *Scott v. State*, 286 Ark. 339, 691 S.W.2d 859 (1985) (*per curiam*), this court denied a petitioner's claim that counsel was ineffective for failure to communicate a plea offer because a bare assertion of an offer by the petitioner alone is insufficient reason to grant a hearing. *Id.* at 340, 691 S.W.2d at 860. This Court stated:

> If it were otherwise, even where there had been no plea negotiations, a petitioner could open a judgment of conviction to collateral attack based on his mere contention that there was a plea offer. A collateral attack on a valid judgment must be founded on more than an unsubstantiated allegation if the presumption that a criminal judgment is final is to have any meaning. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Id. at 340-41, 691 S.W.2d at 860. Because appellant provides no evidence that a state plea offer existed which trial counsel failed to

communicate to him, appellant's claim for ineffective assistance has no merit and is therefore denied.

Finally, appellant claims that appellate counsel was ineffective for failing to abstract the guilt phase of appellant's trial, which resulted in the procedural bar on direct appeal of appellant's claim that trial counsel was ineffective for failing to present evidence that Mendoza was acting as a government agent and planted drugs on appellant. This Court found that appellant failed to abstract the guilt phase of his trial and to argue that Mendoza was an agent for the State; therefore, the trial court made no ruling, and appellant's claim was procedurally barred. *Huddleston, supra.*

As previously stated, it is appellant's obligation to obtain a ruling in order to properly preserve an issue for review. *Beshears, supra.* Failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes review on appeal. *Jackson, supra.* Because this claim was decided on direct appeal, we decline to consider the issue in these proceedings. *See Neal, supra.*

Affirmed.

IMBER, J., not participating.

Terrance ROBINSON and
Tamagum Antonio Robinson
v. STATE of Arkansas

CR 01-351 60 S.W.3d 484

Supreme Court of Arkansas
Opinion delivered December 6, 2001

Roy Lewellen, for appellants.

No response.

PER CURIAM. On October 11, 2001, this court issued a *per curiam* directing the Supreme Court Clerk to accept a substituted copy of the trial transcript in this matter when all of the attorneys of record certify to the Clerk by affidavit that the trial transcript is true, accurate, and complete. *Robinson v. State*, 346 Ark. 266, 57 S.W.2d 162 (2001) (*per curiam*). We further directed the attorneys of record to reconstruct the record in the appeal, *including trial exhibits*, and certify in the same affidavit that the full record with the transcript and exhibits is accurate and complete. *Id.*

On October 26, 2001, attorney for the appellants filed a "Certification" and stated that the trial transcript was complete but that the thirteen trial exhibits are "presumed lost." On November 7, 2001, the deputy prosecuting attorney filed an affidavit approving the trial transcript and stating in part: "If requested, I will attempt to reconstruct the trial exhibits."

We *again* direct counsel of record to reconstruct the trial exhibits, as they appear pertinent to this appeal, and certify the same to this court by affidavit. *See* Ark. R. App. P.—Civ. 6(d); Ark. R. App. P.—Crim. 4(a). This must be done within thirty days from the date of this *per curiam*.

IMBER, J., not participating.

Phillip WILLIAMS *v.* STATE of Arkansas

CR 01-1170 60 S.W.3d 485

Supreme Court of Arkansas
Opinion delivered December 6, 2001

Thomas B. Devine, III, Public Defender, for appellant.

No response.

PER CURIAM. Thomas B. Devine III, a state-salaried, full-time conflicts public defender for the Sixth Judicial District, was appointed by the trial court to represent Appellant Phillip Williams, an indigent defendant, in his capital murder case. Following a trial, Williams was sentenced to life in prison without parole. A timely notice of appeal and request for the transcribed record have been filed.

Mr. Devine now asks to be relieved as counsel for Mr. Williams in this criminal appeal as a result of this court's decision in *Rushing*

v. State, 340 Ark. 84, 8 S.W.3d 489 (2000). In *Rushing*, this court determined that state-salaried, full-time public defenders were ineligible for compensation by the court for work performed in the appeal of a matter in which the public defender represented the defendant. 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).

Since the time of these decisions, however, the law has changed. In the most recent legislative session, the Arkansas General Assembly amended Ark. Code Ann. § 19-4-1604 through Act 1370 of 2001, which now provides that "[p]ersons employed as full-time public defenders who are not provided a state funded secretary may also seek compensation for appellate work from the Arkansas Supreme Court or the Arkansas Court of Appeals." Mr. Devine's motion to be relieved as counsel on appeal is denied because the motion does not contain information regarding whether he is provided a state-funded secretary. Mr. Devine may resubmit his motion, providing information about whether he is provided a state-funded secretary, in order for us to determine whether he qualifies for dismissal in light of the amendment to Ark. Code Ann. § 19-4-1604.

Dale HURST, Donny Hurst, d/b/a Hurst Brothers, Trustee of the Glen Cox Residual Trust, *et al. v.* Herman HOLLAND, The Estate of Addie Holland, Fred Holland, Ted Holland, Bob Holland

01-603 61 S.W.3d 180

Supreme Court of Arkansas
Opinion delivered December 13, 2001

Grider Law Firm, PLC, by: *M. Joseph Grider*, for appellants.

David J. Throesch, for appellees.

TOM GLAZE, Justice. The appellants in this case are Dale Hurst and Donny Hurst, who are trustees of the Glen Cox Residual Trust, and who farm tracts of land in Randolph County known as the Cox Trust Estate and the Cherry Estate. The appellees are Herman Holland and other members of his family (collectively referred to simply as "Holland,") who own and farm the tract of land directly south of the Cox Estate.

In 1993, the farmland at issue in this case experienced a flood. In 1995, Holland constructed a levee along the eastern boundary of their land in order to prevent further flooding. On June 15, 1995, the Hursts filed suit in Randolph County Chancery Court, requesting injunctive relief and alleging that Holland did not have the appropriate governmental permits to build the levee. The

Hursts further alleged that the building of the levee would cause flooding of their land, in that the levee directed water away from Holland's property and away from the main drainage ditch that flowed from north to south. Following a series of continuances, the Hursts filed an amended complaint on May 9, 1996, adding an allegation that the construction of the levee would cause damage to their grain bins, as well as damage to the Cherry Estate. Also in 1996, during the pendency of this suit, both the Cherry and Cox lands farmed by the Hursts were flooded.

On September 25, 2000, the trial court held a hearing on the Hursts' petition for injunctive relief; that hearing resulted in an order, entered on March 2, 2001, finding that the Hursts had an adequate remedy at law under Randolph County Ordinance No. 150, captioned the "Flood Damage Prevention Code." That county ordinance provides that when it is alleged that the Floodplain Administrator has erred in the enforcement or administration of the ordinance — for example, by erroneously issuing a development permit — the Appeal Board shall hear and render judgment on the appeal. The trial court concluded that the Hursts should have taken the matter to the Randolph County Appeal Board rather than pursuing injunctive relief.

From that order, the Hursts have brought the present appeal, wherein they argue that the trial court erred in ruling that Ordinance No. 150 required them to appeal to the Appeal Board, because that Board did not exist when the Hursts initially petitioned the court for injunctive relief in 1995, or when the chancery court held its hearing in September of 2000. In fact, the Appeal Board was not created until December 14, 2000, nearly three months after the hearing in this matter.

Ark. Code Ann. §§ 14-268-101 to -105 (Repl. 1998), is captioned "Flood Loss Prevention." These statutes, enacted in 1969 following the passage of the National Flood Insurance Act, provide communities in Arkansas with the authority to take "appropriate actions to prevent and lessen . . . flood hazards and losses." § 14-268-101(5). In seeking an injunction against the Holland levee, the Hursts proceeded under § 14-268-105, which provides as follows:

> *Every structure*, building, fill, or development *placed or maintained within any flood-prone area in violation of measures enacted under the authority of this chapter is a public nuisance. The creation of any of these may be enjoined and the maintenance thereof may be abated by action*

> *or suit of* any city, town, or county, the state, or *any citizen of this state.* (Emphasis added.)

The trial court, however, ignored this language and instead relied on the Randolph County ordinance, which was passed in 1987 pursuant to the authority granted by § 14-268-104(a), which states the following:

> In addition to all other powers, and notwithstanding any provision of any other law, each city, town, or county in this state is authorized to enact, adopt, and enforce ordinances; building or zoning codes, or other appropriate measures regulating, restricting, or controlling the management and use of land, structures, and other developments in flood-prone areas.

Among the measures local communities may take are, for example, the restriction of development and use of land which is exposed to flood damage, guiding the development of proposed construction away from locations threatened by flood hazards, and regulating the types, purposes, and uses of structures, buildings, developments, or fills permitted to be erected or improved in flood-prone areas. § 14-268-104(b).

The Randolph County ordinance, on which the trial court relied, established the county tax assessor as the Floodplain Administrator, and empowered that office with the duty to "review, approve or deny all applications for development permits required by adoption of this ordinance." As noted above, if a party believes the Floodplain Administrator has made an erroneous decision regarding the enforcement of the ordinance, that party may take an appeal, defined in relevant part as a "request for a review of the Floodplain Administrator's interpretation of the ordinance," to the Appeal Board. The ordinance also provides that any person aggrieved by a decision of the Appeal Board may "appeal such decision in the courts of competent jurisdiction."

Here, however, the parties agree that there was no such Appeal Board in 1995, when the injunction was originally sought, or in September of 2000, when the trial court held a hearing on the matter. While the trial court concluded that the Hursts had an adequate remedy at law by taking their appeal to the Appeal Board, we disagree. A person need not exhaust his or her administrative remedies when to do so would be futile. *See Cummings v. Big Mac Mobile Homes, Inc.*, 335 Ark. 216, 980 S.W.2d 550 (1998) (exhaustion of administrative remedies is not required where no genuine

opportunity for adequate relief exists, where irreparable injury will result if the complaining party is compelled to pursue administrative remedies, or where an administrative appeal would be futile). Here, the Hursts had no adequate relief under County Ordinance 150 because there was no Board to which they could have appealed.[1]

Further, we note that the statute under which the Hursts proceeded — § 14-268-105 — does not require an aggrieved party to exhaust his administrative remedies prior to seeking injunctive relief. The statute simply permits a party to enjoin a public nuisance without directing that any other steps be taken prior to requesting such relief. The county ordinance, however, does not allow for any kind of injunctive relief, and as such, did not provide the Hursts with an adequate remedy.

The trial court erred in ruling that the Hursts had an adequate remedy at law and were required to pursue their case before the Appeal Board. Ordinarily, this court tries equity cases *de novo* and resolves the factual and legal questions raised therein. *See Burnette v. Perkins & Assocs.*, 343 Ark. 237, 33 S.W.3d 145 (2000) (the appellate court may always enter such judgment as the chancery court should have entered upon the undisputed facts in the record). Here, however, because that court's ruling did not consider the evidence or the merits of the case, we reverse and remand for further proceedings so that the lower court may consider and decide whether injunctive relief was proper. *See Ferguson v. Green*, 266 Ark. 556, 587 S.W.2d 18 (1979) (the appellate courts have the discretion to remand an equity case for further proceedings when it is clear that the chancery court's decision was based upon an erroneous theory, and this court cannot determine from the record the rights and equities of the parties).

Holland contends that any error in the trial court's denial of injunctive relief was harmless because the Hursts failed to prove any damages. We do not reach this argument because of our decision to remand the case to the trial court. In addition, Holland asserts that the Hursts' action should be barred from appealing the Floodplain Administrator's decision to the Appeal Board because more than five years have passed since the initial petition for relief. However, this argument was never raised below, and we will not consider it for the first time on appeal. *See Ghegan & Ghegan, Inc. v.*

[1] We note that although the Hollands have provided us with an addendum including a purported notice of appeal to the Appeal Board and that Board's decision, these documents do not appear in the record, and thus, we do not consider them in reaching our conclusion.

Barclay, 345 Ark. 514, 49 S.W.3d 652 (2001). Further, the argument is raised with no further discussion, and with only a citation to a statute that does not exist (Ark. Code Ann. § 16-15-115). This court has repeatedly held that we do not consider assignments of error that are unsupported by convincing authority. *See, e.g., Public Defender Comm. v. Greene County*, 343 Ark. 49, 32 S.W.3d 470 (2000); *Federal Fin. Co. v. Noe*, 335 Ark. 78, 983 S.W.2d 107 (1998).

For the foregoing reasons, we reverse and remand this case for further proceedings.

IMBER, J., not participating.

Martha COLLINS *v.* Cornelius COLLINS

00-1412 61 S.W.3d 818

Supreme Court of Arkansas
Opinion delivered December 13, 2001
[Petition for rehearing denied January 17, 2002.*]

* ARNOLD, C.J., and GLAZE and IMBER, J.J., would grant.

Christopher C. Mercer, Jr., for appellant; *David O. Bowden*, of counsel.

Jan Dewoody Scussel, for appellee.

DONALD L. CORBIN, Justice. This is a domestic-relations case involving a dispute over whether funds obtained in conjunction with a settlement under the Federal Employers Liability Act ("FELA") are marital property for purposes of the marital-distribution statute. Appellant Martha Collins raises the following allegations of error on appeal: (1) the chancellor applied the wrong standard of proof in evaluating the evidence to determine whether the funds were marital property; and (2) the chancellor erred in awarding the entire FELA settlement to Appellee Cornelius Collins. This case was certified to us from the Arkansas Court of Appeals; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(6) and (d). We affirm.

The record reflects that the parties were married on August 1, 1969, and three children were born of that marriage. The parties separated on August 14, 1995, with Appellee filing a claim for divorce on December 21, 1995, in the Jefferson County Chancery Court. Appellant filed a cross-claim for divorce, and on June 13, 1996, a decree of divorce was entered granting Appellee an absolute divorce. During the divorce hearing, it was announced that the parties had entered into a property settlement agreement. As part of that agreement, Appellant was granted a fifty-percent interest in any proceeds awarded to Appellee as a result of his FELA claim, with the exception of those funds exempted under Ark. Code Ann. § 9-12-315(b)(6) (Repl. 1998). The property settlement agreement also provided that Appellee would notify Appellant prior to any settlement of the FELA claim.

After the parties separated, Appellee was injured in an accident that gave rise to his FELA claim. The accident occurred on October 2, while Appellee was employed as an engineer with Southern Pacific Transportation Company/Union Pacific Transportation Company ("the railroad"). Appellee was sitting in a locomotive awaiting orders when some runaway cars struck the locomotive, throwing him about the engine. He suffered immediate injuries to his back, neck, and shoulders and was taken to the emergency room at Jefferson Regional Hospital. Appellee was initially referred to physical therapy, but after his condition failed to improve, he sought the care of an orthopedic specialist, Dr. George Schoedinger. A CAT scan performed in February 1995, revealed that Appellee

suffered injuries to three different discs that required surgical intervention. Appellee underwent the first of three surgeries on April 1996, a diskectomy at L5/S1, which is at the belt level of the spine. Appellee underwent an anterior diskectomy and fusion at C3/4 and C4/5 in April 1997, after losing the use of his left arm. Finally, in April 1998, Appellee underwent an L5 fusion that resulted in the insertion of a titanium cage in his back.

Appellee was unable to return to work for the railroad following his accident. Prior to the accident, Appellee held two other jobs in addition to his job with the railroad. He owned and operated CK&M Bodyshop and was also an active member of the Arkansas National Guard. After the accident, Appellee was no longer able to manage the bodyshop and sold it to one of his employees in July 1997. Appellee was also honorably discharged from the National Guard because he was found to be physically unfit for continued service.

Appellee filed a FELA claim against the railroad in federal court in St. Louis, Missouri, alleging that he was injured as a result of his employer's negligence. He sought past and future damages for severe pain and suffering, medical care and attention, psychological and emotional injury, mental anguish and anxiety, and lost wages and benefits. A trial of the matter began on April 6, 1999, in St. Louis. Prior to the submission of any evidence, Appellee and the railroad reached an agreement to settle the matter. In exchange for releasing his employer from any claims of liability, Appellee was awarded a gross settlement of $742,000.00. The following amounts were immediately deducted from the settlement: $185,500.00, for attorney's fees; $52,310.46, for litigation expenses; $4,000.00, for any expenses incurred but not yet billed; $3,394.09, to repay the Railroad Retirement Board for previously paid disability benefits; and $1,400.00, for any uncovered medical expenses that will be returned to Appellee if not used. An additional $4,631.07 was added to the settlement amount for payment of certain work costs. Appellee also received a check for $14,856.85, to cover outstanding medical bills that he previously paid.[1]

[1] The chancellor erroneously states in his order that Appellee received several checks totaling $14,856.85 that were made payable to various medical providers. Although the check was made payable to Appellee, his uncontradicted testimony revealed that the $14,856.85, as well as the other checks issued to pay medical providers were never given to him, but rather were disbursed by his attorneys.

Appellee ultimately received a lump-sum payment of $480,787.18, in settlement of his FELA claim. This amount will increase to $505,426.32, if certain monies withheld for future costs are returned to Appellee. The chancellor ordered Appellee to deposit $240,393.59, an amount equal to one-half of the lump-sum payment, into a savings account in his name alone until a determination was made of what portion, if any, Appellant was entitled to under the property settlement agreement. A hearing on the matter was held on November 23, 1999, and continued until February 3, 2000. Appellant argued that she was entitled to one-half of the settlement proceeds, as they constituted marital property not exempted by section 9-12-315(b)(6). Appellee countered that Appellant was not entitled to any portion of the proceeds, as they were proceeds awarded for permanent disability, and thus were excepted from the definition of marital property.

The evidence presented to the chancellor included the testimony of three witnesses: Appellant, Appellee, and Freddie Lee Kelly, the purchaser of CM&K Bodyshop. Also admitted into evidence were numerous depositions of witnesses, ranging from medical experts to economics experts, including three depositions of Dr. Schoedinger. Other evidence included Appellant's extensive medical records, a transcript of the settlement hearing in the FELA claim, and the release and resignation signed by Appellee in the FELA case. The chancellor requested that the parties submit briefs and then took the matter under advisement.

The chancellor issued his findings of fact and conclusions of law on June 20, 2000. Therein, the chancellor stated that Appellee had the burden of rebutting the presumption that the proceeds were marital property by a preponderance of the evidence. After setting forth a summary of this court's most recent holdings in similar cases, the chancellor concluded that the evidence established that Appellee suffered a degree of permanent disability caused by his work-related injury. He also credited the findings of Dr. Edwin Wolfgram that Appellee suffers from major depressive disorder and that Appellant failed to rebut this opinion with any other evidence. Thus, the chancellor ruled that the settlement proceeds were not marital property and, therefore, not subject to division. An order reflecting the chancellor's findings was subsequently entered on July 11, 2000. From this order, comes the instant appeal.

It is well established that this court reviews chancery cases, including those involving the division of property, *de novo* on appeal. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001); *Box v.*

Box, 312 Ark. 550, 851 S.W.2d 437 (1993). We do not reverse a finding of fact made by the chancellor unless it is clearly erroneous. *Id.*; *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000). A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 34 S.W.3d 360 (2001). We give due deference to the chancellor's superior position to determine the credibility of witnesses and the weight to be given their testimony. *Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999).

I. Quantum of Proof

For her first point on appeal, Appellant argues that the chancellor's findings were based on an erroneous standard of proof. Specifically, Appellant argues that the chancellor erroneously based his findings on a preponderance of the evidence, and that where a party seeks to prove that property is excepted from the definition of marital property, the quantum of proof required is that of clear and convincing evidence. Appellant relies on some cases from our court of appeals where the announced standard of proof was that of clear and convincing evidence. *See Jablonski v. Jablonski*, 71 Ark. App. 33, 25 S.W.3d 433 (2000); *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996). Appellee argues that the cases relied on by Appellant are inapposite to the case at hand because those cases deal with situations where separate property has been co-mingled with marital property or title to the property is held in both spouses' names. We agree with Appellee.

While this court has held that clear and convincing evidence is required to rebut a presumption that property titled in both spouses' names is separate property, we have never addressed the standard of proof necessary to prove that funds are excepted from the definition of marital property. We are guided by the principle that the quantum of proof generally required in civil cases is that of preponderance of the evidence. *See Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), *cert. denied*, 475 U.S. 1036 (1986); *McWilliams v. Neill*, 202 Ark. 1087, 155 S.W.2d 344 (1941)). Accordingly, we cannot say that it was error for the chancellor to weigh the evidence under a preponderance standard of proof.

II. FELA Settlement Proceeds

We now turn to Appellant's argument that the chancellor erred in awarding the entire FELA settlement to Appellee as nonmarital property. Appellant contends that Appellee failed to present sufficient proof that the proceeds were awarded for a permanent disability or future medical expenses, and it was error for the chancellor to find that the entire settlement was excepted from the definition of marital property. Appellee argues that the chancellor's award was correct because the overwhelming evidence established that he suffered a permanent disability that resulted in the FELA settlement.

This court's treatment of disability payments in the context of martial division has varied over the years. In 1987, however, the General Assembly passed Act 676 of 1987, adding certain exceptions for benefits received in connection with a personal injury or worker's compensation claim to the definition of marital property. This act now codified at section 9-12-315(b) provides in relevant part:

> (b) For the purpose of this section, "marital property" means all property acquired by either spouse subsequent to the marriage except:
>
> . . . .
>
> (6) Benefits received or to be received from a workers' compensation claim, personal injury claim, or social security claim when those benefits are for any degree of permanent disability or future medical expenses [.]

The first case to apply this new exception was *Clayton v. Clayton*, 297 Ark. 342, 760 S.W.2d 875 (1988). At issue in *Clayton* was whether a spouse's unliquidated FELA claim constituted marital property. After recognizing that the statute did except certain benefits, including FELA claims, this court held that only that portion of such funds awarded for any degree of permanent disability or future medical expenses is excepted and that the remaining benefits are subject to division as marital property. The decision in *Clayton* is distinguishable from the situation now at hand. At the time the parties were divorced, negotiations had not yet begun on the husband's FELA claim, and this court refused to rule on any division of the claim, because the record was insufficient to determine what portion of the FELA benefits might constitute marital property.

Here, the record is replete with evidence regarding the nature of the husband's injuries, his inability to work, and even evidence from Appellee's FELA attorney regarding the strategy behind the pursuit of the FELA claim. Thus, we must determine if this evidence was sufficient to establish that the settlement proceeds were not subject to division as marital property.

A review of the record before this court reveals that Appellee submitted ample evidence to demonstrate that his settlement was awarded for a degree of permanent disability. At the outset, we recognize the long-standing principle that this court defers to the chancellor's credibility assessments. *McKay*, 340 Ark. 171, 8 S.W.3d 525. For purposes of clarity, we begin with a review of the medical evidence submitted in this case. This evidence consisted of a multitude of medical records, including records from Appellee's three surgeries and extensive physical therapy. There were also three depositions of Dr. Schoedinger admitted into evidence. During a deposition taken on October 2, 1995, Dr. Schoedinger opined within a reasonable degree of medical certainty that Appellee's injuries were attributable in whole or in part to his work-related accident. This opinion was reiterated in a January 13, 2000 deposition of Dr. Schoedinger who again opined that the accident caused Appellee's injuries that in turn required surgical intervention. Dr. Schoedinger also testified that Appellee was permanently disabled from doing the job of an engineer. This opinion was corroborated by another expert witness, Dr. Calvin Benton, a former medical director for Southern Pacific Railroad. Dr. Benton testified in a deposition for the FELA case that based upon a review of his medical records, Appellee was unable to return to work for the railroad.

Appellee also underwent two Functional Capacity Evaluations ("FCE"), performed by a physical therapist. The first FCE was an eight-hour assessment conducted after Appellee's first two surgeries on September 19, 1997. It revealed that Appellee had limited ability with regards to the amount of sitting, standing, and walking that he could endure. The therapist opined that Appellee could do some part-time work, building up to full-time work in the light-duty classification. A second FCE was conducted on October 16, 1998, and showed a marked reduction in his endurance, marked increase in his level of pain, and decreases in his strength. This time the therapist opined that Appellee would be unable to do full-time sedentary work, noting that his pain was too overpowering.

Dr. Schoedinger also referred Appellee to Wilbur Swearingin, a certified rehabilitation counselor. They met on three separate occasions. After reviewing Appellee's medical and psychiatric records, as well as the results of his FCE's, Swearingin testified in a deposition in the FELA case that he did not believe Appellee was able to work full time in October 1997. He further stated that he did not believe that he could offer Appellee any assistance to find other employment because of his medical situation.

In addition to this medical evidence, Appellee offered the deposition testimony and medical records of Dr. Edwin Wolfgram, his treating psychiatrist.[2] Dr. Wolfgram diagnosed Appellee as suffering from a single-episode major depressive disorder, chronic post traumatic stress disorder, and pain disorder. According to Dr. Wolfgram, Appellee was depressed because he was used to working sixteen to twenty hours per day but now could do nothing. He opined that Appellee was incapable of working in any consistent manner, and that his psychiatric conditions alone had rendered him permanently and totally disabled. According to Dr. Wolfgram, Appellee's psychiatric conditions originated with his work-related accident.

Also included in the evidence was the deposition testimony of Dr. James Long, a professor of economics at Auburn University hired by Appellee to calculate his wage losses to retirement age. Dr. Long determined Appellee's wage losses from October 2, 1995, discounting it to present value, based on Appellee's wages at the time of the accident, his fringe benefits and any mitigating income. According to Dr. Long's calculations, Appellee's past wage losses totaled $244,784.00. Dr. Long then determined Appellee's future wage losses as follows: losses of $1,226,101.00, if Appellee retired at the age of 65; losses of $1,426,851.00, for retirement at 67; and losses of $1,735,573.00, for retirement at the age of 70.

Appellant also deposed Nelson Wolff, Appellee's FELA attorney on September 3, 1999, in connection with the divorce case. According to Wolff, the railroad paid most, but not all, of Appellee's medical bills during the course of the lawsuit, therefore resulting in the allocation of a portion of the FELA proceeds as payment to those medical providers. When asked if he had any type of breakdown of the proceeds actually paid to Appellee, Wolff responded

[2] Dr. Wolfgram's deposition was entered into evidence in this matter to show what evidence was available to the parties in the FELA suit, not for the purpose of proving the truth of the matters asserted.

that he did not, but explained that Missouri jury instructions and verdict forms are general forms that do not allow for an apportionment of damages. Wolff also testified that after the parties agreed to reach a settlement on April 6, they decided to go ahead and complete the paperwork the following day because both parties were anxious to settle the matter. Wolff stated that it was his and Appellee's position throughout the litigation and settlement that Appellee suffered a severe injury as a result of the work-related accident. According to Wolff, there was compelling evidence to establish that Appellee was severely and permanently disabled as a result of the accident and that his subsequent medical treatments left him disabled from gainful employment.

In sum, the overwhelming evidence before the chancellor established that Appellee suffered a permanent disability that ended his career with the railroad and has prevented him from maintaining gainful employment. In addition, Appellee testified about the nature and extent of his injuries, and stated that the pain he continues to suffer as a result of those injuries prevents him from maintaining gainful employment. He stated that prior to the settlement, he attempted to work part time, first as a substitute teacher and then doing some office work, but was unable to stay with either job. He also testified that he was forced to sell CM&K Bodyshop because he was unable to do the physical activities required of the business. Appellant stated that he received occupational-disability benefits following the accident, but returned $3,394.09 of his disability and sick pay to the Railroad Retirement Board from his settlement proceeds.

Moreover, in agreeing to settle his FELA claim, Appellee acknowledged that he suffered from a permanent disability resulting in his inability to return to work for the railroad. The release referenced the specific accident that led to Appellee's injuries and states in relevant part:

> Considering myself permanently disabled as a result of said accident and injuries, I further agree as a consideration for the payment to me of the sum of money mentioned herein, that I shall not return, nor attempt to return, to work for the Union Pacific Railroad Company/Missouri Pacific Railroad Company/Southern Pacific Railroad Transportation Company, or any affiliated or subsidiary companies in any capacity, and I hereby resign from active service effective this date. As a further consideration of this settlement, I hereby agree to never return or attempt to return to the

> employ of Union Pacific Railroad Company, its successors, affiliates, assigns, or subsidiaries, in any capacity, and any attempt to do so will be grounds for immediate disqualifications and/or dismissal.
>
> That in determining said consideration there has been taken into consideration not only the ascertained injuries, disabilities and damages but also the possibility that the injuries sustained may be permanent and progressive and recovery therefrom uncertain and indefinite, so that consequences not now anticipated may result from the said accident, and for the consideration of the amount aforementioned, it is the express intention and desire of the undersigned to release, discharge and acquit Union Pacific Railroad Company/Missouri Pacific Railroad Company/Southern Pacific Transportation Company, their agents, servants and employees, and all other persons, firms and corporations liable, or who might be claimed liable, from any and all claims, demands and choses in action arising from the injuries, disabilities and damages sustained in the said accident which are uncertain, indefinite and the consequences of which are not now anticipated[.]

In *Skelton v. Skelton*, 339 Ark. 227, 5 S.W.3d 2 (1999), this court held that a husband provided sufficient proof to establish that his disability payments were exempt from the definition of marital property. In reaching this conclusion, this court utilized a two-prong test originally set forth in *Mason v. Mason*, 319 Ark. 722, 895 S.W.2d 513 (1995). The first prong requires that the claim be for a degree of permanent disability or future medical expenses. Second, the injury must be sustained while on the job or in the consequence of a tortious act. *Id.*

Here, there was evidence about the extent of Appellee's injuries and the continued problems he experiences as a result of the accident. The evidence specifically demonstrated that Appellee suffers from a degree of permanent disability. The evidence also demonstrated that Appellee has been unable to maintain gainful employment due to his permanent disability. Moreover, the release executed in conjunction with the settlement of Appellee's FELA claim, recognized that Appellee was permanently disabled. We believe this evidence was sufficient to satisfy the first prong of the *Mason* test, that the FELA proceeds were awarded for a degree of permanent disability. It is also undisputed that Appellee's injury was sustained in the course of his employment, thus satisfying the second prong of *Mason*. The chancellor relying on this court's previous decisions in *Mason* and *Skelton* determined that Appellee proved by

a preponderance of the evidence that the settlement proceeds were awarded as a result of his permanent disability.

The dissent erroneously concludes that this case should be remanded because the chancellor failed to allocate the settlement proceeds. Pointing specifically to evidence of Appellee's past lost wages, the dissent states that it was error for the trial court not to divide the $244,784.00 as marital property. This argument, however, amounts to nothing more than the dissent substituting its judgment for that of the chancellor. The evidence regarding the past lost wages came in the form of an expert's deposition testimony taken prior to trial in preparation for Appellee's FELA suit. Dr. Long, an economics expert retained by Appellee, testified regarding his opinion of Appellee's past and future lost wages. There was absolutely no evidence that any part of the actual settlement proceeds represented a portion of lost wages, past or future. There is nothing in the record before us to indicate that the trial court did not consider this evidence in reaching his conclusion that the entire settlement was awarded for a degree of permanent disability.

In fact, as previously pointed out, the overwhelming amount of evidence presented in this matter supports the chancellor's conclusion that this award was for a degree of permanent disability and, thus, not subject to division as marital property. The chancellor analyzed the evidence before him in a manner consistent with this court's analysis in *Skelton*, 339 Ark. 227, 5 S.W.3d 2. First, the chancellor determined that based on the evidence before him the settlement was awarded for a degree of permanent disability. Secondly, he determined that the disability was job related. Only then did the chancellor conclude that the award was not marital property and therefore not subject to division. In the absence of any proof to the contrary, we cannot say that the chancellor was clearly erroneous in finding that the FELA proceeds were not subject to division as marital property.

III. Analytic vs. Mechanistic Approach

Finally, Appellee urges this court to adopt the analytic approach in determining the nature of personal injury settlements for purposes of marital distribution. Appellee contends that with the enactment of section 9-12-315(b)(6), Arkansas in fact adopted the analytic approach. Appellant argues that this issue is not properly before us, as Appellee failed to raise it below. Appellant also

argues that this court has already adopted the mechanistic approach, and such an approach should remain the law. We decline to reach the merits of Appellee's argument on this point, as it is raised for the first time on appeal. *See Webber v. Webber*, 331 Ark. 395, 962 S.W.2d 345 (1998). Our refusal to address this issue in the present case does not foreclose the possibility of addressing it in the future when the issue is properly before us.

Affirmed.

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

TOM GLAZE, Justice, dissenting. I disagree with the majority decision. The court's holding does correctly recognize that *Clayton v. Clayton*, 297 Ark. 342, 760 S.W.2d 875 (1988), controls, but the court then erroneously applies the rule in *Clayton*.

In *Clayton*, this court held that a spouse's Federal Employers' Liability Act (FELA) claim for an unliquidated personal injury is subject to being divisible as marital property under Ark. Code Ann. § 9-12-315, however, the *Clayton* court excepted from marital property those FELA benefits received for any degree of permanent disability or future medical expenses. In *Clayton*, this court remanded, instructing the lower court to hold further proceedings and to make necessary findings to determine what benefits were to be considered marital property and distributed under § 9-12-315.

Unlike in *Clayton*, here appellee Cornelius Collins settled his FELA claim with his employer, Union Pacific Railroad Company (Union Pacific), in the gross amount of $742,000, but deducting therefrom attorneys' fees, litigation and other costs, leaving him a lump-sum payment of $480,717.18. Collins then structured this net amount, claiming all of it was for permanent disability or future medical expenses, thus, making these specific benefits indivisible as non-marital property under § 9-12-315(b)(6).[1] The trial court then improperly adopted Collins's manipulation of his settlement terms that completely excluded his wife, Martha Collins, from sharing in any of his FELA benefits.

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[1] Provision (b)(6) reads:

(b) For the purpose of this section, "marital property" means all property acquired by either spouse subsequent to the marriage *except*:

(6) Benefits received or to be received from a workers' compensation claim, personal injury claim, or social security claim when *those benefits* are *for* any degree of *permanent disability or future medical expenses*. (Emphasis added.)

Our court and the General Assembly have clearly decided that divorcing spouses should share in unliquidated personal injury claims — except for permanent disability and future medical expenses. Consequently, we should not permit an injured spouse to settle around the other spouse by manipulating settlement terms so as to designate all benefits as resulting from a permanent disability.[2]

Mr. Collins's unrebutted expert testimony rendered by Dr. James Long at the hearing on this matter reflects Collins had suffered past wage losses in the amount of $244,784.00.[3] That being so, such past lost-wage benefits accumulated during the marriage are clearly marital property to be equally distributable under § 9-12-315(a). The trial court's failure to state reasons for failing to divide these lost wages equally was error. *See Harvey v. Harvey*, 295 Ark. 102, 747 S.W.2d 89 (1988); *see also Duncan v. Duncan*, 11 Ark. App. 25, 665 S.W.2d 893 (1984). Candidly, it makes no sense for the trial court to accept the injured spouses' argument that he sustained a permanent injury without acknowledging he also suffered past medical expenses and lost income. In fact, as already pointed out, that is exactly what the proof here showed below. For this reason alone, this case should be reversed and remanded for further proceedings.

Another benefit in issue arises involving a $14,856.85 check which was made payable to Mr. Collins. Although the trial court's finding suggests Mr. Collins received checks payable to medical providers in the amount of $14,856.85, the record reflects a check was made payable in this amount to Mr. Collins.[4] It appears the trial

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[2] In Mr. Collins's release to Union Pacific, he said, "Considering myself permanently disabled as a result of said accident and injuries, I further agree as a consideration for the payment to me of the sum of money mentioned herein, that I shall not return, nor attempt to return to work for [Union Pacific]."

[3] The majority opinion concedes this testimony, but then suggests there is nothing in the record to indicate the chancellor did not consider this evidence in reaching his conclusion that the entire settlement was awarded for permanent disability. Again, the majority loses sight of the fact that past lost wages are marital property and, once that was established, it was the chancellor's responsibility to comply with the requirement to state the basis for not dividing the property equally. No such reasons or findings are found in the chancellor's decision.

[4] At pages 96-109 in the transcript, particularly Mr. Collins's attorney, Nelson Gregory Wolff, testified to damages sustained by Mr. Collins and how settlement monies were disbursed. Wolff said:

> There are checks that are paid to Neal (Collins), and on the back, he endorsed to medical providers for, for Neal himself so he can walk out of the office and not worry about having to deal with paying medical bills now, in the future or expenses or anything.

court's finding was clearly erroneous on this point, and it, too, should be reconsidered by the trial court on remand.

In conclusion, I point out that my earlier interpretation of Arkansas' marital property statute, Ark. Code Ann. § 9-12-315 (Repl. 1998), was that a spouse's "unliquidated" personal injury claim is not marital property. However, I lost that argument in a 4-3 decision in *Bunt v. Bunt*, 294 Ark. 507, 744 S.W.2d 718 (1988) (Hickman, Purtle and Glaze, JJ., dissenting). In that dissent, I posed a series of questions concerning problems that likely would arise when judges would be required to retain jurisdiction to divide future proceeds from personal injury claims.

While I remain firmly convinced that a spouse's unliquidated personal injury claims should not be marital property, our case law now clearly holds otherwise. In addition, the General Assembly has not deemed it necessary to modify § 9-12-315 so as to except such personal injury claims; instead, in 1987, it merely amended § 9-12-315(b), only to exclude the marital property benefits from personal injury claims when those *benefits are for* any degree of *permanent disability or future medical expenses*. However, by endorsing a procedure under § 9-12-315, whereby an injured spouse can unilaterally settle his personal injury claim so as to exclude his or her spouse, we can expect more cases like the instant one and ex-spouses will find themselves without recourse to protect whatever benefits that were intended for them under the statute. We should reverse and remand for the reasons above.

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

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* * *

The first check was in the amount of $14,856.85 that was made payable to Neal. That was a breakdown of part of the settlement so that he wouldn't have to carry it all in a big lump sum. He received a bigger check later. At the bottom he gets another check in the amount of $480,787.18.

These checks were all payable to Neal. Some of them were on behalf of outstanding medical bills that may have been related or unrelated to the case and that is how they were prepared. The checks that have medical providers in parenthesis, were all medical bills due and owing at the time of settlement.

Clearly from Wolff's unrebutted testimony, Mr.Collins was paid for past medical expenses and checks were both related and unrelated to Collins's FELA claim. Obviously, the past medical expenses are not excepted from the marital property statute, and if the chancellor desired to treat these checks as nonmarital, he was required to state his reasons for doing so. Again, the chancellor merely accepted Mr. Collins's settlement terms as providing all funds paid to be for permanent disability and future medical expenses, which was wrong.

ANNABELLE CLINTON IMBER, Justice, dissenting. I agree with Justice Glaze's dissenting opinion. Appellee not only claimed a degree of permanent disability and future medical expenses, but he also claimed past medical expenses, past lost-wage benefits, and pain and suffering. As noted by Justice Glaze in his dissenting opinion, the amounts allocable to past lost-wage benefits and past medical expenses are easily deducible. Likewise, the record contains ample evidence from which a reasonable inference could be drawn that would preponderate in finding some of the loss sustained to be due to pain and suffering. The fact that a specific allocation was not made in the settlement documents should not preclude a finding that the award was intended to compensate for a particular purpose and the amount thereof; this is the province of the fact-finder in every case. The majority's holding today effectively overrules our decisions in *Clayton v. Clayton, supra*, and *Bunt v. Bunt, supra,* by permitting a settlement loophole to transmute marital property into nonmarital property. The case should be reversed and remanded for a determination and division of amounts that are allocable as past lost-wage benefits, past medical expenses, and pain and suffering.

ARNOLD, C.J., and GLAZE, J., join in this dissent.

TRI-STATE DELTA CHEMICALS, INC., d/b/a UAP Mid-South *v.* Nelson CROW, William Day, William Day and Sons, Larry Hillis, Moss Farms, Inc., Peacock and Staudinger, Prairie Creek Farms, Inc., Greg Simpson, and Guy Teeter

01-624 61 S.W.3d 172

Supreme Court of Arkansas
Opinion delivered December 13, 2001

Wyatt, Tarrant & Combs LLP, by: *Ross Higman*; and *The Eilbott Law Firm*, by: *Don A. Eilbott*, for appellant.

Gibson Law Office, by: *Charles S. Gibson*, for appellees.

DONALD L. CORBIN, Justice. This appeal raises an issue of first impression: Whether a defendant's default on a suit filed in circuit court effectively waives any right to compel arbitration. Appellant Tri-State Delta Chemicals, Inc., d/b/a UAP Mid-South (UAP), appeals the order of the Desha County Circuit Court granting a default judgment in favor of Appellees Nelson Crow; William Day; William Day & Sons; Larry Hillis; Moss Farms, Inc.; Peacock & Staudinger; Prairie Creek Farms, Inc.; Greg Simpson; and Guy Teeter. For reversal, UAP argues that the trial court erred in granting the default judgment and thereby denying its motion to compel arbitration. Appellees contend that this appeal should be dismissed for lack of a final order under Ark. R. Civ. P. 54(b), as damages have not yet been determined. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We dismiss the appeal.

The record reflects that Appellees filed their complaint against UAP on April 10, 2000. The complaint alleged actions for breach of implied warranty of fitness, constructive fraud, actual fraud, and breach of fiduciary duties, based on UAP's sale of cotton seed to Appellees. Appellees alleged that UAP knew that the seed was old when it sold the seed to Appellees and that such old seed would result in less crop yield. Service of the suit was made on UAP's Arkansas agent, Prentice Hall Corporation System, on April 20, 2000. Under Ark. R. Civ. P. 12(a), UAP, which is a nonresident corporation, was required to file its answer within thirty days after service. UAP did not file an answer.

On August 16, 2000, Appellees filed a motion for default judgment. That same afternoon, UAP filed a motion for an extension of time to file an answer to the complaint. On August 25, 2000, UAP filed a motion to dismiss under Rule 12(b)(6) and, alternatively, a motion to compel arbitration of the dispute. UAP contended that Appellees were contractually obligated to arbitrate any disputes arising out of the purchase of seed from UAP, and that they were also obligated to arbitrate under Ark. Code Ann. § 2-23-101 to -110 (Repl. 1996 and Supp. 2001).

On October 23, 2000, a hearing was held on the motion for default judgment. UAP presented testimony from several witnesses on the issue of its failure to timely plead or otherwise defend the suit. The motion for arbitration was not litigated at that time, as the

trial court concluded that the default motion needed to be considered first. In an order filed November 6, 2000, the trial court granted Appellees a default judgment and denied "[a]ll pleadings for affirmative relief filed to the contrary by the Defendant." UAP timely filed a notice of appeal from that order.

Appellees move to dismiss this appeal on the ground that the default judgment did not address the issue of damages, and that the judgment therefore is not final under Rule 54(b). Appellees rely on *Sevenprop Assocs. v. Harrison*, 295 Ark. 35, 746 S.W.2d 51 (1988), wherein this court held that a default judgment is not a final, appealable order if the issue of damages remains to be decided. *See also String v. Kazi*, 312 Ark. 6, 846 S.W.2d 649 (1993).

UAP, on the other hand, asserts that it is not appealing the default judgment, only the denial of the motion to compel arbitration. UAP asserts that this is a proper interlocutory appeal under this court's holdings and Ark. R. App. P.—Civ. 2(a)(12). *See, e.g., Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 27 S.W.3d 361 (2000); *Walton v. Lewis*, 337 Ark. 45, 987 S.W.2d 262 (1999). While we agree that, generally, a denial of a motion to compel arbitration is an immediately appealable order, we do not believe that an interlocutory appeal will lie under the circumstances of this case. Instead, we agree with Appellees that UAP waived any right it may have had to compel arbitration when it failed to timely assert arbitration as a defense to the suit.

Although this is a matter of first impression in Arkansas, other jurisdictions have addressed this issue. For example, in *Charming Shoppes, Inc., v. Overland Constr., Inc.*, 186 Misc. 2d 293, 717 N.Y.S.2d 860 (N.Y. Sup. Ct. 2000), the court held that by failing to file an answer to the plaintiff's lawsuit within the time prescribed by law, the defendant waived its right to arbitrate the dispute. The court explained:

> Though arbitration clauses are generally enforceable, they cannot be used to bypass the statutory provisions requiring that pleadings be answered or to thwart a proper motion for a default judgment. The Defendant effectively waived its right to enforce the arbitration clause when it failed to answer or appear in response to the summons and complaint under circumstances where there was no reasonable excuse for such default.

Id. at 297, 717 N.Y.S.2d at 863.

Similarly, in *Woodruff v. Spence*, 76 Wash. App. 207, 883 P.2d 936 (1994), the defendant argued that the trial court erred in

granting a default judgment to the plaintiff and in denying his motion to stay the judicial proceedings pending arbitration. Although the appellate court ultimately remanded the case to the trial court for an evidentiary hearing, the court stated: "Whether [the defendant] knowingly waived his right to arbitration depends on whether he had notice of the action against him prior to entry of the default judgment." *Id.* at 211, 883 P.2d at 938. We find these holdings persuasive on the issue presented in this case.

Here, UAP had thirty days after service in which to file its answer or other defensive pleading. UAP's agent was served with notice of Appellees' suit on April 20, 2000. Accordingly, it had until May 22, 2000, to file an answer.[1] UAP did not file an answer in the suit, timely or otherwise. In fact, UAP did not even attempt to make an appearance in the suit until August 16, 2000, following its receipt of Appellees' motion for default judgment. Its motion for arbitration was not filed until more than a week later, on August 25, 2000.

The trial court found that UAP had been properly served with a summons and complaint and that it had failed to timely plead or otherwise defend the suit. UAP does not dispute that service was properly completed. Thus, because service was completed and UAP failed to timely assert its right to arbitrate, it effectively waived or defaulted on that right. We reject UAP's suggestion that the right of arbitration exists regardless of whether it is timely asserted. The right to seek arbitration is a defense to civil litigation. Like any other defense, it may be waived by failing to timely assert it under the rules of civil procedure.

Accordingly, under the unique circumstances of this case, an interlocutory appeal will not lie. Rather, the only appealable issue in this case is whether the trial court abused its discretion in granting the default judgment. As stated above, however, this issue is not properly before us, because the default judgment, which reserved the issue of damages, is not a final order under Rule 54(b). We thus grant Appellees' motion to dismiss this appeal.

IMBER, J., not participating.

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[1] May 20, 2000, fell on a Saturday; thus, UAP had until the following Monday, May 22, 2000, to file its answer.

Mike WOODALL and Mike Woodall Auto Sales, Inc. *v.* CHUCK DORY AUTO SALES, INC.

01-659 61 S.W.3d 835

Supreme Court of Arkansas
Opinion delivered December 13, 2001

Eichenbaum, Liles & Heister, P.A., by: *Peter B. Heister*, for appellant.

Dover & Dixon, P.A., by: *M. Darren O'Quinn*, for appellee.

ROBERT L. BROWN, Justice. Appellants Mike Woodall and Mike Woodall Auto Sales, Inc. (Woodall), appeal from a judgment which memorializes a directed verdict in favor of appellee Chuck Dory Auto Sales, Inc. (Dory), and awards Dory damages for a counterclaim in the amount of $102,230. Woodall's one point on appeal concerns whether the circuit judge erred in granting a directed verdict in favor of Dory, when the loans at issue carried with them a usurious interest rate. We reverse the judgment and remand for further proceedings.

On December 15, 1998, Woodall filed a complaint, which was followed by an amended complaint in this matter, and asserted that during the years 1995, 1996, and 1997, Dory made short term loans to him "virtually every business day" which ranged from $50,000 to $125,000 per day in exchange for car titles. The term of each loan, he alleged, was typically one business day. Dory charged him interest in the amount of $75.00 per title, and the typical interest paid per day ranged from $375 to $800. These loans, he contended, violated Article 19, § 13 of the Arkansas Constitution in that the interest assessed exceeded the rate of five percent above the Federal Discount Rate at the time of the contracts. Thus, he concluded, the loans were void with respect to unpaid interest, and he was entitled to twice the interest paid on the usurious loans.

Dory answered and pled the affirmative defenses of comparative fault, estoppel, laches, payment, release, set-off, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. He also filed a counterclaim for judgment for three checks which Woodall made payable to him but which were returned for insufficient funds. The three checks totaled $102,230. Dory claimed twice their value, or $204,460.

On February 2, 2001, the circuit judge held a bench trial on the matter and heard testimony from Woodall and his wife, Renae Woodall. An employee of Regions Bank, Ms. Karen Howell, who was a defense witness, was taken out of turn and testified to the amount of the Woodall checks returned for insufficient funds. At the close of Woodall's case, Dory moved the judge for a directed

verdict on grounds that Woodall had not made a case for usury, that the $75 fee per title was not interest, and that the transactions were sales.[1] The circuit judge ruled:

> It will be the ruling of the Court that both of these parties were businessmen. They were dealing at arms length, one with the other. They knew that there was no title or transfers — transfer of titles or possessions; there was no floor plan contract between them.
>
> And I understand it, there was no written agreement of any kind between them, no drafting agreement, no floor plan, no notes, no nothing except what I'm going to call, which one of you called in your briefs, a transaction fee, which these gentlemen agreed upon at the start of this and which they carried out till the very end of it was a transaction fee, starting with a hundred dollars, ending at $75 per vehicle. And I'm going to rule that that was not interest, that that was simply a charge that was made for the purpose of transacting business.

The judge further ruled on Dory's counterclaim, without objection by Woodall:

> Well, based upon that ruling, I think [Dory] would be entitled to [his] counterclaim of $102,230.
>
> It's just inconceivable to me, gentlemen, that these folks could go through three years transacting a total of, if my figures are correct, $62,550,464 worth of business with $357,700 in transaction fees being paid, and all at once when the defendant [sic] goes out of business he starts crying wait a minute, I've been charged too much. It's just — it's beyond me to think that these people did not know what they were doing. If there was something illegal, I think they even condoned it. But I don't at this point think that there was anything wrong with this.

Judgment was entered on February 21, 2001.

Woodall urges, as his sole point on appeal, that the circuit judge erred in finding that the $75 charge per title did not constitute interest and in dismissing his complaint. We agree.

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[1] Ark. R. Civ. P. 50(a) provides that in a nonjury case, a party moves to dismiss rather than for a directed verdict. Accordingly, for the balance of the opinion, we will refer to the motion as one for dismissal.

The standard of review, when the grant of a motion for directed verdict or motion to dismiss is involved, is important to the resolution of this case. We have previously set forth that standard:

> In determining whether a directed verdict should have been granted, we review the evidence in the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Lytle v. Wal-Mart Stores, Inc.,* 309 Ark. 139, 827 S.W.2d 652 (1992). A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Mankey v. Wal-Mart Stores, Inc.,* 314 Ark. 14, 858 S.W.2d 85 (1993). Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Howard v. Hicks,* 304 Ark. 112, 800 S.W.2d 706 (1990).

Morehart v. Dillard Dep't Stores, 322 Ark. 290, 292, 908 S.W.2d 331, 333 (1995).

We further have said that a trial court's duty is to review a motion for directed verdict or dismissal at the conclusion of a plaintiff's case by deciding whether, if it were a jury trial, the evidence would be sufficient to present to the jury. *See Swink v. Giffin*, 333 Ark. 400, 970 S.W.2d 207 (1998). In making that determination, the trial court does not exercise fact-finding powers that involve determining questions of credibility. *See id*; *Neely v. Jones*, 234 Ark. 812, 354 S.W.2d 726 (1962).

In the case at hand, Woodall and his wife, Renae Woodall, described their standard way of doing business with Dory. According to the Woodalls, each afternoon Renae Woodall would place four to eight certificates of title for vehicles in separate envelopes with the vehicle's make, model, and year marked on the front of the envelope and print a computer sheet showing the value of each vehicle. Assignments of the certificates of title were not completed, and possession of the vehicles did not change hands. No other documentation was included in any of the envelopes. The envelopes and sheet were delivered to Dory by a driver, at which time Dory would write a check payable to Woodall for the total value of those vehicles and send it back to Woodall by means of the same driver. Woodall would deposit Dory's check. The next morning, Woodall would repay what he described as a loan to Dory, together with a transaction fee of $75 per vehicle which he described as interest. Dory then returned the envelopes to Woodall. Thus,

Woodall maintains that a case for usurious interest on the loans was made.

Dory counters Woodall's case in his brief before this court by arguing that the circuit judge made a credibility call and did not believe Woodall. He points out that Woodall was a convicted felon and had made the comment in a previous deposition that he was "buying back the titles [he] had sold [to Dory,]" which evidenced that sales, not loans, had taken place. Dory underscores that he paid the fair market value for these vehicles on a daily basis, got the certificates of title, and was paid a transaction fee for his trouble.

There are three problems with the position Dory has taken in this case. First, the circuit judge's own words do not reveal that he decided this case based on the credibility of the parties. Secondly, even if the judge had, we have held that such a consideration of credibility is not appropriate in deciding a motion to dismiss at the close of the plaintiff's case. *See Swink v. Giffin, supra.* And, thirdly, Dory never testified as to why these transactions were sales and not loans.

We turn then to our caselaw for a definition of what constitutes interest. In *Arkansas Sav. & Loan Ass'n v. Mack Trucks of Arkansas, Inc.*, 263 Ark. 264, 566 S.W.2d 128 (1978), we examined whether a fee deemed a "service charge" was actually interest. In doing so, we relied on our prior decision of *Sosebee v. Boswell*, 242 Ark. 396, 414 S.W.2d 380 (1967), in which we had previously set forth two principles for determining when additional charges are interest: (1) "any profit exacted by the lender must be treated as interest if it depends upon a contingency not within the control of the debtor[,]" and (2) "the moneylender cannot impose upon the borrower charges that in fact constitute the lender's overhead expenses or costs of doing business[.]" *Arkansas Sav. & Loan Ass'n*, 263 Ark. at 267-68, 566 S.W.2d at 130 (quoting *Sosebee v. Boswell, supra*). Additionally, this court has recognized the following definition of interest:

> The compensation which is paid by the borrower of money to the lender for its use, and generally, by a debtor to his creditor in recompense for his detention of the debt.

Winston v. Personal Fin. Co. of Pine Bluff, 220 Ark. 580, 585, 249 S.W.2d 315, 318 (1952) (quoting *Bouvier's Law Dictionary*).

Woodall testified that the $75 charge attached to each certificate of title was a fee paid to Dory for the use of the money.

This testimony plus the daily practice of exchanging money between the two men constituted substantial evidence that the $75 fee was a "cost of doing business" or "compensation paid to the lender for the use of the money." Accordingly, based on the evidence before the circuit judge when the motion to dismiss was made, we are convinced that there was substantial evidence the $75 charge was interest. Moreover, because the circuit judge dismissed Woodall's complaint before Dory presented his case, we are not privy to what Dory's testimony might have been regarding why these transactions were sales rather than loans.

On the surface, at least, the circuit judge concluded that Woodall and Dory were businessmen dealing at arm's length who had established a process for doing business and that only when matters began to go awry for Woodall did he raise the usury accusation. That may be, but this state's policy against usury as set out in our constitution is mandatory and provides no exception for knowledgeable businessmen. The standard is whether Woodall made a case supported by substantial evidence, when the proof is viewed in the light most favorable to him and that proof is given its highest probative value. We cannot say that he did not. Nor can we say that when the motion to dismiss was made, fair-minded people would all have reached the same conclusion against Woodall. That, of course, is the test for reversal. *See Morehart v. Dillard Dep't Stores, supra.* Accordingly, we reverse the judgment and remand the case for further proceedings, including a new trial if necessary.

We further reverse and remand the judgment in Dory's favor for the checks returned for insufficient funds in the amount of $102,230. At this stage, we cannot tell whether that amount includes any of the $75 transaction fees. That issue needs to be resolved on remand.

Reversed and remanded.

IMBER, J., not participating.

ARNOLD, C.J., dissents.

W.H. "DUB" ARNOLD, Chief Justice, dissenting. I agree with the majority that this Court has, indeed, held that consideration by the trial judge of the credibility of the parties is not appropriate in deciding a motion for directed verdict or to dismiss at the close of the plaintiff's case. *See Swink v. Giffin*, 333 Ark. 400, 970 S.W.2d 207 (1998). However, this limitation on the trial judge to be able to consider *everything*, including credibility, when the

trial is a *bench* trial, is disconcerting to me, not to mention unrealistic. When the judge is to determine whether or not the plaintiff has met his burden of proof in a bench trial, the trial judge should be able to assess all things, including credibility. I am bothered by this restriction on the trial court's consideration.

I therefore must respectfully dissent.

Roger Allen HAMMON *v.* STATE of Arkansas;
Michael Jackson *v.* State of Arkansas;
William Eugene Langley *v.* State of Arkansas

CR 00-1259; CR 00-1383; CR 00-1275 65 S.W.3d 853

Supreme Court of Arkansas
Opinion delivered December 13, 2001
[Amended and Substituted Opinion delivered January 24, 2002]

Dave Wisdom Harrod, for appellant Roger Allen Hammon.

Robert C. Marquette, Chief Public Defender, for appellant William Eugene Langley.

Daniel G. Ritchey, for appellant Michael Jackson.

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

ANNABELLE CLINTON IMBER, Justice. Dave Wisdom Harrod, Robert C. Marquette, and Daniel G. Ritchey have each filed motions to withdraw as counsel in three separate appeals from circuit court orders denying petitions for postconviction relief under Ark. R. Crim. P. 37. The three motions are treated as a case in order to resolve the construction of Rule 16 of the Arkansas Rules of Appellate Procedure—Criminal in relation to this court's prior case law holding there is no constitutional right to appointment of counsel in state postconviction proceedings. We now hold that, when this court allows court-appointed counsel to withdraw in an appeal of a denial of postconviction relief for sufficient cause shown, the postconviction petitioner is not automatically entitled to the appointment of new counsel. This court may, however, exercise its discretion and appoint counsel for a Rule 37 appellant. Mr. Harrod's motion to withdraw is moot and, therefore, must be denied. Mr. Marquette's motion to withdraw is granted for sufficient cause shown, and we appoint Mr. Charles Kester to represent Mr. Langley in his appeal from an order denying postconviction relief. Mr. Ritchey's motion to withdraw is denied, and his motion to proceed as court-appointed counsel is granted.

I. Hammon v. State

The first of the three combined motions to withdraw is in the case of *Hammon v. State*, CR 00-1259. Roger Allen Hammon was convicted of capital murder and sentenced to life imprisonment

without parole. We affirmed the judgment. *Hammon v. State*, 338 Ark. 733, 2 S.W.3d 50 (1999). Mr. Hammon filed a Rule 37 petition *pro se*, and the circuit court appointed Dave Wisdom Harrod, the public defender for Cleburne County, as counsel for Mr. Hammon in the Rule 37 proceeding. Mr. Harrod represented Mr. Hammon at a hearing on the petition for postconviction relief in White County Circuit Court. On September 14, 2000, the circuit court denied the Rule 37 petition. About one week later, Mr. Harrod terminated his employment with the State Public Defender's Office. On September 26, 2000, Mr. Hammon filed a *pro se* notice of appeal from the denial of his petition for postconviction relief, and the record was lodged in this court on October 31, 2000. Shortly thereafter, Mr. Harrod filed a motion to withdraw as counsel and requested the substitution of the new public defender as attorney of record for Mr. Hammon. We ruled that Mr. Harrod's motion to withdraw should be briefed and submitted as a case.

On February 23, 2001, Mr. Harrod filed an amended motion to withdraw. We denied Mr. Harrod's amended motion to withdraw on March 15, 2001, and allowed him an extension of ninety days in which to file a brief on Mr. Hammon's behalf. On June 20, 2001, Mr. Harrod filed a brief asserting that any appeal in the case would be wholly without merit and asking to be allowed to withdraw as counsel pursuant to Ark. Sup. Ct. R. 4-3(j)(1) (2001). Following Mr. Harrod's filing of the motion and brief, Mr. Hammon filed *pro se* points for reversal.

Mr. Harrod's original motion to withdraw as counsel for Mr. Hammon is moot because Mr. Harrod has already filed an abstract and brief on Mr. Hammon's behalf pursuant to *Anders v. California*, 386 U.S. 738 (1967) and Ark. Sup. Ct. R. 4-3(j) (2001). Accordingly, we must deny Mr. Harrod's original motion to withdraw as attorney-of-record.

II. Langley v. State

The second motion to withdraw filed in the case of *Langley v. State*, CR 00-1275, presents us with similar issues and is justiciable. Robert C. Marquette, a full-time, state-salaried public defender, was appointed by the Crawford County Circuit Court to represent William Eugene Langley in his Rule 37 proceeding. The circuit court conducted a hearing and denied the petition. Mr. Marquette timely filed a notice of appeal from the denial of postconviction relief. The record was lodged with our clerk on November 6, 2000.

On November 13, 2000, Mr. Marquette filed a motion to withdraw as attorney for Mr. Langley.

The question before this court is whether Mr. Marquette should be allowed to withdraw from representing Mr. Langley in the appeal from the trial court's denial of his request for postconviction relief. Arkansas case law indicates that, once an attorney represents an appellant in a matter of postconviction relief, the attorney is obligated to continue representing the appellant until relieved by the appropriate court. *See Sanders v. State*, 329 Ark. 363, 952 S.W.2d 133 (1997) (*per curiam*); *Miller v. State*, 299 Ark. 548, 775 S.W.2d 79 (1989) (*per curiam*). After the notice of appeal has been filed, this court has exclusive jurisdiction to relieve counsel. Rule 16 of the Rules of Appellate Procedure—Criminal states:

> Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause. After the notice of appeal of a judgment of conviction has been filed, the Supreme Court shall have exclusive jurisdiction to relieve counsel and appoint new counsel. If court appointed counsel is permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause, new counsel shall be appointed promptly by the court exercising jurisdiction over the matter of counsel's withdrawal.

Ark. R. App. P.—Crim. 16 (2001).

Pursuant to Rule 16, we will allow withdrawal of counsel "in the interest of justice or for other sufficient cause." Mr. Marquette requests withdrawal on the basis that he is a full-time, state-salaried public defender appointed to represent Mr. Langley. He points out that this court has held that full-time, state-salaried public defenders are not entitled to receive additional compensation from the state for their services throughout any appeal to the Arkansas Supreme Court. *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 484 (2000). We have also allowed a public defender to withdraw from representation of a criminal defendant on direct appeal where the attorney was ineligible for compensation by this court pursuant to *Rushing*. *Tester v. State*, 341 Ark. 281, 16 S.W.3d 227 (2000). The attorneys in both *Rushing* and *Tester* were allowed to withdraw on direct appeal, and new attorneys were appointed to represent the defendants.

Mr. Marquette seeks to withdraw in an appeal from the denial of postconviction relief. It is clear in *Rushing* and *Tester* that we considered the fact that the attorneys would not be paid for their services on direct appeal as sufficient cause to entitle them to withdraw. The same justification should apply to appeals from orders denying petitions for postconviction relief under Rule 37. As Mr. Marquette is acting in his capacity as a full-time, state-salaried public defender, he is prohibited from receiving "any funds . . . or other thing of monetary value, directly or indirectly, for the representation of an indigent person pursuant to court appointment, except the compensation authorized by law." Ark. Code Ann. § 16-87-214 (Supp. 2001). The legislature expressly subjected the Public Defender Commission to the Regular Salary Procedures and Restrictions Act. *See* Act 1379 of 1999, § 1; Ark. Code Ann. §§ 19-4-1601—1615 (Repl. 1998 and Supp. 2001).[1] As of November 13, 2000, when Mr. Marquette filed his motion to withdraw, "this Act, in essence, prohibit[ed] the public defender from receiving compensation from the State in an amount greater than that established by the General Assembly as the maximum annual salary for the employee." *Rushing v. State*, 340 Ark. at 86, 8 S.W.3d at 490. Thus, Mr. Marquette could not be compensated by this court for any work on the appeal. Under Rule 16, Mr. Marquette must continue to represent Mr. Langley on appeal of the denial of his request for postconviction relief until this court has relieved him as counsel. Pursuant to our precedent in *Rushing* and *Tester*, Mr. Marquette has shown sufficient cause to be relieved from representation of Mr. Langley. His motion to withdraw is hereby granted.

Mr. Langley has now filed a *pro se* motion for appointment of counsel and motion for extension of time to file his brief. The question then becomes whether this court must appoint new counsel to replace Mr. Marquette. Both the United States Supreme Court and this court have held that there is no constitutional right to an attorney in state postconviction proceedings. *Coleman v. Thompson*, 501 U.S. 722 (1991); *O'Brien v. State*, 339 Ark. 138, 3 S.W.3d 332 (1999) (*per curiam*); *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997). Similarly, this court has held that the right to counsel ends in Arkansas after the direct appeal of the original criminal trial is completed, and the State is not obligated to provide

[1] Act 1370 of 2001 amended Ark. Code Ann. § 19-4-1604 to provide that "[p]ersons employed as full-time public defenders who are not provided a state-funded secretary may also seek compensation for appellate work from the Arkansas Supreme Court or the Arkansas Court of Appeals." This amendment contains no clause allowing retroactive application.

counsel in postconviction proceedings. *Fretwell v. State*, 290 Ark. 221, 718 S.W.2d 109 (1986) (*per curiam*). *See also Gipson v. State*, 343 Ark. 44, 31 S.W.3d 834 (2000) (*per curiam*). Our reasoning has been that a postconviction proceeding is civil in nature and, thus, there is no constitutional right to appointment of counsel as part of a criminal proceeding. *Fretwell v. State, supra.*

Though the last sentence of Rule 16 requires new counsel to be appointed promptly by the court when court-appointed counsel is permitted to withdraw, that language was not added to the rule until January 13, 2000.[2] Prior to our adoption of the additional language, this court held that Rule 16 applied to postconviction appeals as well as direct appeals from judgments of conviction. *Thomas v. State*, 335 Ark. 262, 983 S.W.2d 122 (1998) (*per curiam*); *Sanders v. State*, 329 Ark. 363, 952 S.W.2d 133 (1997) (*per curiam*); *Miller v. State*, 299 Ark. 548, 775 S.W.2d 79 (1989) (*per curiam*). However, we have never held that the new language adopted by this court in the 2000 amendment to Rule 16 applies to postconviction appeals. While we clearly have exclusive jurisdiction under Rule 16 to relieve counsel after the notice of appeal in a postconviction proceeding has been filed, the amendment to Rule 16 requiring the prompt appointment of new counsel applies only to direct appeals and not to postconviction proceedings, as there is no constitutional right to counsel in state postconviction proceedings.

Nonetheless, we have the discretion to appoint attorneys for indigent appellants in Rule 37 cases. Rule 37.3(b) of the Arkansas Rules of Criminal Procedure states:

> If the original petition, or a motion for appointment of counsel should allege that the petitioner is unable to pay the cost of the proceedings and to employ counsel, and if the court is satisfied that the allegation is true, the court *may at its discretion* appoint counsel for the petitioner for any hearing held in the circuit court. If a petition on which the petitioner was represented by counsel is denied, counsel shall continue to represent the petitioner for an appeal to the Supreme Court, unless relieved as counsel by the circuit court or the Supreme Court. If no hearing was held or the petitioner proceeded *pro se* at the hearing, the circuit court may at

[2] The Reporter's Notes to Rule 16 indicate that the last sentence of the Rule was added by a *Per Curiam* amendment on January 13, 2000, in order "to require the prompt appointment of substitute appellate counsel when the court permits the withdrawal of counsel."

> its discretion appoint counsel for an appeal upon proper motion by the petitioner.

Ark. R. Crim. P. 37.3(b) (emphasis added).[3] Likewise, this court may exercise its discretion and appoint counsel upon proper motion by the petitioner. Mr. Langley has made such a motion to this court. Pursuant to Act 169 of 2001, the General Assembly appropriated funds to the Arkansas Supreme Court for the payment of "Court Appointed Attorneys." As funds are available to compensate an attorney appointed by this court to represent Mr. Langley, we hereby appoint Mr. Charles Kester to represent Mr. Langley in his appeal of the order denying him postconviction relief. We grant Mr. Langley an extension of 60 days in which to file his brief, making his brief due on or before March 25, 2002.

III. Jackson v. State

The third and final motion to withdraw was filed in the case of *Jackson v. State*, CR 00-1383. Michael Jackson was convicted of First Degree Battery and sentenced to 240 months in the Arkansas Department of Correction. Following a timely appeal, the Arkansas Court of Appeals affirmed his conviction. *Jackson v. State*, CA CR 99-325 (Ark. App. November 3, 1999). Mr. Jackson filed a Rule 37 petition *pro se*. The circuit court appointed Daniel G. Ritchey to represent Mr. Jackson in the Rule 37 proceeding. The court held a hearing and denied Mr. Jackson's petition. Mr. Ritchey filed a notice of appeal at Mr. Jackson's request and, subsequently, filed a motion to withdraw in this court. In his motion, Mr. Ritchey asks, in the alternative, for authority to proceed with the appeal as court-appointed counsel. He further petitions for a writ of certiorari to complete the record. In the event alternative relief is granted, he

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[3] We note that Ark. R. Crim. P. 37.5(b)(1)(A) provides that, upon this court's affirmance of a sentence of death, the circuit court that imposed the sentence of death shall conduct a hearing to consider the appointment of an attorney to represent the person in postconviction proceedings. If the person rejects the appointment of an attorney, the waiver must be made in open court on the record. Ark. R. Crim. P. 37.5(b)(2). If the circuit court determines that the person is indigent and that he either accepts the appointment of an attorney or is unable to make a competent decision whether to accept or reject an attorney, the circuit court must issue written findings to that effect and enter a written order appointing an attorney to represent the person. Ark. R. Crim. P. 37.5(b)(2). The appointment of an attorney under Rule 37.5 remains effective through an appeal to the Supreme Court. Ark. R. Crim. P. 37.5(c). All compensation and reasonable expenses authorized by the courts are to be paid pursuant to Ark. Code Ann. § 16-91-202(f), or as otherwise provided by law. Ark. R. Crim. P. 37.5(j).

requests a waiver of the requirement that an affidavit of indigency be filed in order to proceed in forma pauperis or an extension of time for filing the affidavit due to Mr. Jackson's incarceration. In addition, Mr. Ritchey requests an extension of time to file the record.

As previously stated, there is no constitutional right to an appointed attorney in state postconviction proceedings. However, Mr. Ritchey filed a notice of appeal on Mr. Jackson's behalf and is obligated to continue to represent Mr. Jackson under Rule 16 of the Rules of Appellate Procedure—Criminal unless this court relieves him as counsel. In his Supplemental Motion to Withdraw as Attorney-of-Record, Mr. Ritchey states that he has received no compensation for court-appointed representation of Mr. Jackson to date and has no means to obtain compensation for representation from Mr. Jackson on his postconviction proceeding. Counsel asserts that he should not be required to continue to represent Mr. Jackson without compensation. Mr. Ritchey makes three additional requests on behalf of Mr. Jackson: (1) motion to waive the requirement that an affidavit of indigency be filed in order to proceed in forma pauperis or, in the alternative, motion for an extension of time to file such an affidavit; (2) petition for a writ of certiorari to complete the record; and (3) motion for an extension of time to file the record.

We note first that the notice of appeal in this case was filed on September 19, 2000, and Mr. Ritchey tendered a partial record certified by the clerk of the trial court on November 28, 2000. Because the time for lodging a properly certified record had not expired at the time Mr. Ritchey tendered the partial record in this case, we direct the clerk to file said record. *See* Ark. R. App. P.—Civ. 5.

[redacted] We now appoint Mr. Ritchey to continue his representation of Mr. Jackson as court-appointed counsel. Pursuant to Act 169 of 2001, Mr. Ritchey will be entitled to compensation from this court for his services on appeal. We grant the motion for extension of time to file an affidavit of indigency, which affidavit must be filed in this court on or before February 18, 2002. Upon the filing of such affidavit, we direct the clerk to issue a writ of certiorari to the circuit clerk and court reporter to complete the record within thirty days of the issuance of the writ. Likewise, we grant an extension of time to file the complete record. The deadline for filing the complete record shall be no later than thirty days after the issuance of the writ of certiorari. Mr. Ritchey, as the attorney-of-record, is hereby directed to proceed accordingly.

Motion to withdraw as attorney-of-record denied in CR 00-1259; Motion to withdraw as attorney-of-record granted and appointment of new counsel granted in CR 00-1275; In CR 00-1383, motion to withdraw as attorney-of-record denied, motion to proceed as court-appointed counsel granted, motion for extension of time to file affidavit of indigency granted, petition for writ of certiorari to complete record granted upon timely filing of affidavit of indigency, and motion for extension of time to file the record granted.

Paul SMITH *v.* STATE of Arkansas

CR 01-440 61 S.W.3d 168

Supreme Court of Arkansas
Opinion delivered December 13, 2001

William R. Simpson, Jr., Public Defender; *Steve Abed*, Deputy Public Defender; by: *Clint Miller*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Katherine Adams*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Justice. Paul Smith appeals his conviction for the kidnapping of Marcus Thomas and Kayla Goodwin on the basis of sufficiency of the evidence. In this same trial, Smith was convicted of the first-degree murder of Emma Goodman. He takes no appeal from that conviction. On this appeal, we have jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(a)(2) as a case in which the penalty is life imprisonment. Because Smith failed to renew his directed-verdict motion after the State offered rebuttal evidence, Smith's appeal may not be heard. This court has carried out a review under Rule 4-3(h) and finds no errors prejudicial to the appellant. The State cross-appeals asserting it was deprived of its tenth peremptory challenge. Its appeal, however, was not filed until more than the permitted thirty days and, as such, is untimely. Direct appeal affirmed. Cross-appeal dismissed.

Facts

Emma Goodman was killed by strangulation and multiple blunt-force trauma sometime during the night of May 1-2, 1998. Paul Smith was charged and convicted. Smith and Goodman had been in a relationship and living together when Goodman broke it off after an argument and made Smith leave the house.

Goodman's eleven-year-old grandson Marcus Thomas lived with her. He testified that Smith had been dating his grandmother, and that on the day before the murder, he saw Smith ask Goodman for keys, but his request was refused. Marcus further testified that before leaving that day, Smith pushed Goodman. On the night of the murder, Marcus and his three-year-old sister Kayla went to sleep on the couch in a dining area. During the night, a noise woke Marcus up. He went to an aunt's bedroom, turned on the light, and found Smith there choking his grandmother. When Smith saw Marcus he stopped, but then commenced hitting Goodman in the face. Goodman was pleading with him to stop, which he apparently

did at that time. Smith then went outside to get something. Goodman closed and locked the door, and would not let Smith back in. Smith regained entry. It appears that ultimately, Goodman may have let Smith back in the house; however, there was evidence of forcible entry at the front door.

By this point, Goodman was holding Marcus and Kayla in her lap, and Smith threatened to cut her with a pocket knife if she did not let the children go. She did, and Smith then got her to the floor and began hitting her in the face with a doorknob he tore from a door in the kitchen. Marcus then testified that Smith dragged Goodman up the stairs by her hair, but that they returned downstairs thereafter. The autopsy substantiated injury beneath the scalp consistent with Marcus's account. Marcus testified further that his grandmother told him to call the police if Smith took her back upstairs, but he could not because the wires were cut. At this point, Marcus and Kayla went into a bedroom, and Smith locked them in. After that, Marcus heard bumping noises upstairs and then nothing. It became quiet, and they fell asleep. The next morning, Marcus jimmied his way out of the bedroom with a knife he found under the bed. He and Kayla found Goodman on a couch. They tried to wake her up, but could not. When an aunt arrived, she went to the service station and called 911. Marcus testified that the phones had been working the day before, and he did not know who had pulled the phone wire out of the wall.

Cindy Robinson, Goodman's niece, testified that after the murder she went to her mother's house, which was next to Smith's home. Smith was in the yard washing his truck. Robinson spoke with her mother, Goodman's twin sister, and they decided to go over to Goodman's house. On their way out, Smith tried to talk to them, but they refused. Robinson testified that Smith was saying, "That's why I did what I did." Arresting officers noted fresh wounds on Smith's hands. Bloody towels and cloths were retrieved from Smith's truck, and blood was found on Smith's shoes. Additionally, blood-stained articles and blood were also found at Goodman's residence. The autopsy showed Goodman was killed by strangulation and blunt-force trauma. Smith was convicted of first-degree murder and two counts of kidnapping.

Sufficiency of the Evidence

Smith asserts there was insufficient evidence to support his conviction for the kidnapping of Marcus and Kayla. However,

Smith states in his brief that after the State presented rebuttal evidence, "defense counsel did not renew his earlier directed verdict motions regarding the kidnapping charges." A review of the record confirms Smith did not move for a directed verdict after the State's rebuttal evidence.

The issue of failure to move for a directed verdict after the State puts on rebuttal evidence was discussed in *King v. State*, 338 Ark. 591, 999 S.W.2d 183 (1999). Therein we noted our procedural rules require that a motion for a directed verdict be brought at the "conclusion of the evidence presented by the prosecution and again at the close of the case. . . ." Ark. R. Crim. P. 33.1. Therein we also stated, "Close of the case means close of the whole case, in other words, after the last piece of evidence has been received." *King, supra.* This court stated in *Rankin v. State,* 329 Ark. 379, 386 948 S.W.2d 397 (1997), that:

> Even if a defendant renews his motion at the close of his case-in-chief, the requirement of the rule to renew the motion at the "close of the case" obligates the defendant to renew the motion again at the close of any rebuttal case that the State may present in order to preserve the sufficiency issue for appeal.

See also, Heard v. State, 322 Ark. 553, 910 S.W.2d 663 (1995) [overruled on other grounds in *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998)]; *Christian v. State*, 318 Ark. 813, 889 S.W.2d 717 (1994).

This court has repeatedly held that in order to preserve for appeal the issue of the sufficiency of the evidence in a criminal case, the appellant must move for a directed verdict both at the close of the State's case and at the close of the whole case. *Hayes v. State*, 312 Ark. 349, 849 S.W.2d 501 (1993); *Collins v. State*, 308 Ark. 536, 826 S.W.2d 231 (1992); *DeWitt v. State*, 306 Ark. 559, 815 S.W.2d 942 (1991). *See also, Thomas v. State,* 315 Ark. 504, 868 S.W.2d 483 (1994).

Smith asserts that the rebuttal evidence only dealt with his argument of diminished capacity and a witness who intended to provide evidence that Smith's motive in the murder was jealousy. Thus, Smith argues that all the pertinent evidence on the issue of kidnapping had already been introduced when he last moved for directed verdict. On this basis, he argues he is in compliance with Ark. R. Crim. P. 33.1, and the analysis of *King, supra,* is not applicable. We first note that the analysis under *King, supra,* requires

that the motion must be renewed at the close of "any" rebuttal case the State presents. Additionally, under the instructions on the kidnapping charge, the jury was required to determine, among other things, whether the "conduct or a result thereof" was "the conscious object of" Smith. The jury may have been influenced by the rebuttal testimony on this issue and others. We hold Smith failed to preserve the question of sufficiency of the evidence by failing to move for a directed verdict after the State's rebuttal testimony. *King, supra.*

Cross-Appeal

The State cross-appealed alleging the trial court erred when it refused to allow the State to use its tenth peremptory challenge. The State indicates, however, that its cross-appeal may be untimely under *Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001), because the notice of appeal was not filed within thirty days of the entry of judgment. The State asks that this court apply *Byndom* prospectively because the application of rules governing a timely cross-appeal was unclear until the decision in *Byndom*. The notices of appeal in the present case were filed before *Byndom* was decided. The State cites to *Oliver v. State*, 323 Ark. 743, 918 S.W.2d 690 (1996) and *Aka v. Jefferson Hosp. Assoc.*, 344 Ark. 627, 42 S.W.3d 508 (2001), for the proposition that because the state of the law was unclear, any holding thereon should be prospective only. We note that both of these decisions speak to situations where there is conflicting case law or, in other words, older case law upon which the parties may have relied. The State offers no such case law. Rather, the argument by the State is that the law was not clear, presumably because Rule 3 does not refer specifically to cross-appeals. However, as this court stated in *Byndom,* Rule 3 refers to appeals, not direct appeals, and contrary to the State's argument in *Byndom*, there is no authority for the State to bring a cross-appeal other than under Rule 3.

In *Byndom*, this court addressed the issue of a cross-appeal by the State filed more than thirty days after the judgment was entered. This court held that the State had thirty days within which to file its notice of cross-appeal. Rule 3(b) provides that "the prosecuting attorney shall file a notice of appeal within thirty (30) days after entry of a final order by the trial judge." The word "shall" is mandatory. *Middelton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001). The State had thirty days from the date of the entry of the judgment to file its notice of appeal, and it did not do so. This court

cannot reach the issue of the peremptory challenge because the notice of cross-appeal was not timely filed. *Byndom, supra.* Therefore, the State's cross-appeal was untimely, and this court will not consider it.

Arkansas Supreme Court Rule 4-3(h)

The transcript of the record in this case has been reviewed pursuant to Rule 4-3(h). Rule 4-3(h) requires, that in cases of sentences of life imprisonment or death, we review all prejudicial errors in accordance with Ark. Code Ann. § 16-91-113(a) (1987). None have been found.

Direct appeal affirmed.

Cross-appeal dismissed.

IMBER, J., not participating.

Steven ABSHURE *v.* STATE of Arkansas

CR 01-925 61 S.W.3d 842

Supreme Court of Arkansas
Opinion delivered December 13, 2001

Edgar R. Thompson, for appellant.

No response.

PER CURIAM. Appellant Steven Abshure, by and through his attorney, Edgar R. Thompson, has filed a petition for writ of certiorari to complete the record for appeal. Appellant was convicted of several felony drug offenses and sentenced to a total of twenty-five years' imprisonment. The judgment was entered on April 6, 2001. Appellant timely filed a *pro se* notice of appeal. Mr. Thompson, who was appointed to represent Appellant at trial, was apparently unaware of Appellant's actions. As a result, the transcript was not timely lodged with this court's clerk.

Appellant subsequently filed a *pro se* motion for rule on the clerk. We granted the motion in an unpublished *per curiam* opinion. *See Abshure v. State*, CR 01-925, (Ark. October 25, 2001). We further directed Mr. Thompson, who remained the attorney of record, to file within thirty days a petition for writ of certiorari to complete the record for appeal. Mr. Thompson timely filed this petition on November 21, 2001. Accordingly, we grant the petition and direct the court reporter for the Lonoke County Circuit Court, First Division, to complete the transcript so that it may be promptly filed with this court's clerk.

Petition granted.

IMBER, J., not participating.

ARKANSAS COUNTY *v.* DESHA COUNTY

01-1085 61 S.W.3d 840

Supreme Court of Arkansas
Opinion delivered December 13, 2001

No response.

Rose Law Firm, by: *Herbert C. Rule, III* and *Stephen N. Joiner*, for appellee/petitioner.

PER CURIAM. Appellee, Desha County, has filed a petition for a writ of *certiorari* to complete the record pursuant to Rule 3-5 of the Rules of the Supreme Court. Appellee alleges that certain designated items are omitted from the transcript in this case. Specifically, appellee's petition states that the trial exhibits were not included within the record. Appellee requests that we require the clerk of the trial court to transmit all standard-size trial exhibits to our court. Rule 3-1(a) of the Rules of the Supreme Court provides that the record should include "exhibits." Accordingly, we grant appellee's request and order the clerk of the trial court to transmit the trial exhibits to this court.

Appellee also argues that various over-sized trial exhibits should have been included within the record. Rule 3-1(j) of the Rules of the Supreme Court states that "documents of unusual bulk or weight" may be filed with our court upon direction of the "party" or "the clerk of the court." Appellee contends that "the trial court's transcript and the appellant's abstract of the testimony will be impossible to follow unless these exhibits are part of the record." Because these exhibits may be vital to our consideration of this case, we direct the clerk of the trial court to transmit these exhibits to this court.[1]

Finally, appellee contends that appellant should bear the costs associated with supplementing the record. Pursuant to Rule 4-2 of the Rules of the Supreme Court, the proper time to assess costs to appellant for failure to properly abstract the case is after we take the case under consideration. Accordingly, we decline to assess any costs associated with supplementing the record at this time.

We grant the appellee's petition and direct that a writ of *certiorari* be issued to the clerk of the trial court to complete the

[1] We note that appellee does not think that it is necessary for the clerk of the trial court to transmit exhibit number forty-three to this court for our review during our consideration of this case. Because exhibit number forty-three is a cross-section of a persimmon tree, we agree with appellee and order the clerk of the trial court to retain possession of this over-sized exhibit.

record within thirty days and deliver it as soon as completed pursuant to Rule 3-5(b) of the Rules of the Supreme Court.[2]

Petition granted.

IMBER and HANNAH, JJ., not participating.

Teresa BALLARD, Kenisha Bryant, and Cheryl King *v.* The CLARK COUNTY, Arkansas, CIRCUIT COURT

01-1268 61 S.W.3d 175

Supreme Court of Arkansas
Opinion delivered December 13, 2001

[2] Because the oversized exhibits are irreplaceable, they should be hand-delivered to the clerk of this court.

The Nixon Law Firm, by: *David G. Nixon* and *Paige E. Young*, for appellant.

No response.

PER CURIAM. Petitioners Teresa Ballard, Kenisha Bryant, and Cheryl King petition this court for a writ of prohibition to prevent the Clark County Circuit Court from ruling on a

motion to strike their notice of appeal. We grant the motion to expedite consideration of this matter, and we grant the petition for writ of prohibition, and order that the writ be issued.

Petitioners were potential members of a class action lawsuit against Advance America, a check-cashing establishment. *See Garrett v. Advance America, Cash Advance Centers of Arkansas, Inc.*, No. CIV-99-152 (Clark County, Arkansas). On July 18, 2001, the circuit court approved a settlement agreement between Advance America and the class representatives. Petitioners disapproved of this settlement agreement, and their disapproval has spawned several appeals.

Petitioners first filed a motion to intervene as separate parties in the class action, after the settlement was struck. The circuit court denied this motion. The petitioners filed their first notice of appeal from this denial on August 10, 2001. This appeal was docketed as CA 01-1218. Petitioners lodged a partial record in connection with this appeal.

Also on August 10, 2001, Petitioners filed a second notice of appeal, appealing the circuit court's order approving the settlement agreement. This appeal was docketed as CA 01-1190. On November 2, 2001, petitioners lodged a complete record of proceedings with this court for this second appeal.

In response to the two notices of appeal filed on August 10, 2001, the class representatives filed a motion to post *supersedeas* bond. The circuit court ordered a hearing on the matter for September 5, 2001, and on September 11, 2001, the circuit court granted the motion to post bond and ordered the petitioners to post the bond in the amount of $750,000. On September 20, 2001, petitioners filed a third notice of appeal seeking appellate review of the bond requirement. This appeal is docketed as CA 01-1182. Petitioners lodged a partial record for this third appeal.

On October 3, 2001, the class representatives filed a motion to strike the September 20, 2001 notice of appeal in CA 01-1182, which dealt with the appeal of the order to post a *supersedeas* bond. On November 2, 2001, the class representatives filed a motion to show cause why the petitioners should not be held in contempt for failing to comply with the circuit court's order to post bond. The motion to strike and the contempt issue were set for hearing in the trial court on December 10, 2001. On December 5, 2001, the December 10, 2001 hearing was temporarily stayed by this court.

On November 13, 2001, the petitioners filed a petition for writ of prohibition to bar the circuit court from requiring a *supersedeas* bond. This petition was docketed as 01-1251. Three days later, on November 16, 2001, the petitioners filed a second petition for writ of prohibition to bar the circuit court from striking their notice of appeal. This petition was docketed as 01-1268. No response has been filed to this petition. It is this November 16, 2001 petition for writ of prohibition that this *per curiam* opinion addresses.

The petition for writ of prohibition in 01-1268 asserts that the circuit court is wholly without jurisdiction to decide the motion to strike the notice of appeal. The standards governing issuance of writs of prohibition have been often stated by this court. A writ of prohibition is issued by this court to prevent or prohibit the lower court from acting wholly without jurisdiction. *Arkansas Democrat-Gazette v. Zimmerman*, 341 Ark. 771, 20 S.W.3d 301 (2000); *Raines v. State*, 335 Ark. 376, 980 S.W.2d 269 (1998); *Young v. Smith*, 331 Ark. 525, 964 S.W.2d 784 (1998). 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. *Young v. Smith, supra*; *Tatro v. Langston*, 328 Ark. 548, 944 S.W.2d 118 (1997). We have stated that a writ of prohibition is never issued to prohibit an inferior court from erroneously exercising its jurisdiction. *Young v. Smith, supra*; *Dougan v. Gray*, 318 Ark. 6, 884 S.W.2d 239 (1994); *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993). Prohibition lies to the circuit court and not to the individual judge. *Crump v. Ford*, 346 Ark. 156, 55 S.W.3d 295 (2001) (*per curiam*); *Ford v. Wilson*, 327 Ark. 243, 939 S.W.2d 258 (1997).

Three records have been filed in connection with petitioners' various appeals: (1) a complete record for the appeal from the approved settlement (CA 01-1190); (2) a partial record for the appeal from the denial of the motion to intervene (CA 01-1218); and (3) a partial record for the appeal-bond requirement (CA 01-1182).[1] A trial court ceases to have jurisdiction over a case when the record is filed and the case is docketed in the appellate court. *McElroy v. American Medical Int'l, Inc.*, 297 Ark. 527, 763 S.W.2d 89 (1989) (citing *Venhaus v. Pulaski County Quorum Court*, 291 Ark. 558, 726 S.W.2d 668 (1987); *Brady v. Alken, Inc.*, 273 Ark. 147, 617

[1] On December 4, 2001, the court of appeals certified these three appeals to the supreme court.

S.W.2d 358 (1981); *Estes v. Masner*, 244 Ark. 797, 427 S.W.2d 161 (1968)).

Three records have now been filed with the Supreme Court Clerk in appeals relating to this class-action settlement, including CA 01-1182 dealing with the appeal from the order to post a *supersedeas* bond. The record in CA 01-1190 was a complete record of proceedings in the circuit court regarding the approval of the settlement. The partial record in CA 01-1182 supplements the record in CA 01-1190 and includes motions to require a bond and responses and the circuit court's order requiring a bond. The record filed in 01-1268 for the writ of prohibition includes the petition for writ of prohibition with the attached motion to strike the appeal, the response, and the brief in support of the petition. It, thus, appears that the circuit court is wholly without jurisdiction to strike the notice of appeal in CA 01-1182 because of the filing of the necessary records for the appeal of this matter and the docketing of the appeal. The circuit court, accordingly, is wholly without jurisdiction to act on the motion to strike.

We further note that this court has held that a trial court operates in excess of its authority when it dismisses an appeal to an appellate court. *See Venhaus v. Pulaski County Quorum Court*, 291 Ark. 558, 726 S.W.2d 668 (1987). In *Johnson v. Carpenter*, 290 Ark. 255, 718 S.W.2d 434 (1986), we held that a trial court may not act on a motion to dismiss appeal filed at the trial court level:

> We are troubled by the apparent misunderstanding to the effect that trial judges may dismiss appeals. While we give the trial court the authority to extend the time for docketing the record with us or with the court of appeals, our rules of appellate procedure do not confer on the trial court the power to dismiss appeals. Those rules, as we said of the comparable statutes in *Davis v. Ralston Purina Co.*, [248 Ark. 14, 449 S.W.2d 709 (1970)] and again about the rules in *Brady v. Alken*, [273 Ark. 147, 617 S.W.2d 358 (1981)], are for *this court* to apply.

Johnson, 290 Ark. at 259-60, 718 S.W.2d at 437 (emphasis in original). *See also Stahl v. State*, 328 Ark. 106, 940 S.W.2d 880 (1997); *McElroy v. American Medical Int'l, Inc.*, 297 Ark. 527, 763 S.W.2d 89 (1989). In *Stahl*, we treated a petition for writ of prohibition as a petition for writ of certiorari and granted the writ, thus preventing the circuit court from striking the notice of appeal.

Petitioners filed a motion to consolidate the record at the same time they filed the petition for writ of prohibition. This motion requests that the Supreme Court Clerk consolidate the petition record (01-1268) with the record on appeal concerning the *supersedeas* bond (CA 01-1182). The motion to consolidate is denied as moot, as we have decided by this opinion that the petition for a writ of prohibition should be granted.

Motion for expedited appeal; granted.

Motion to consolidate; moot.

Petition for writ of prohibition; writ issued.

IMBER, J., not participating.

Teresa BALLARD, Kenisha Bryant,
and Cheryl King *v.* The CLARK COUNTY,
Arkansas, CIRCUIT COURT

01-1251 61 S.W.3d 178

Supreme Court of Arkansas
Opinion delivered December 13, 2001

The Nixon Law Firm, by: *David G. Nixon* and *Paige E. Young*, for petitioners.

Morgan & Turner, by: *Todd Turner*, for respondent Circuit Court of Clark County, Arkansas.

Bowman and Brooke LLP, by: *Robert M. Buell* and *Charles K. Seyfarth*; and *Wright, Lindsey & Jennings LLP*, by: *Claire Shows Hancock*, for respondents Advance America, Cash Advance Centers of Arkansas, Inc.

PER CURIAM. Petitioners Teresa Ballard, Kenisha Bryant, and Cheryl King petition this court for a writ prohibiting Respondent Clark County Circuit Court from requiring Petitioners to post a *supersedeas* bond pending the outcome of an appeal filed by Petitioners. In support of their petition, Petitioners argue that the circuit court is without authority to order the posting of a

bond, as the Petitioners have not requested a stay of the proceedings pending the appeal. We reject this argument, and thus deny the petition.

The present petition arises from an appeal by the Petitioners of the circuit court's approval of a class-action settlement in a case styled *Garrett v. Advance America*, No. CIV 99-152. A detailed summary of the facts underlying this matter is set forth in *Ballard v. Clark County Circuit Court*, 347 Ark. 286, 61 S.W.3d 175 (2001) (*per curiam*). For purposes of this petition, it is important to point out that Petitioners filed a timely notice of appeal from the circuit court's order approving the settlement. Thereafter, Phyllis Garrett, the named representative in the class-action lawsuit, filed a motion with the circuit court requesting that Petitioners be required to post a bond pending appeal. The circuit court granted the motion and ordered Petitioners to post a bond in the amount of $750,000. Petitioners have not complied with the circuit court's order and now petition this court for a writ of prohibition.

At the outset, we note that this petition is styled "Petition for Writ of Prohibition or Certiorari." This court will issue a writ of prohibition to prevent or prohibit a trial court from acting wholly without jurisdiction. *See Arkansas Democrat-Gazette v. Zimmerman*, 341 Ark. 771, 20 S.W.3d 301 (2000) (citing *Raines v. State*, 335 Ark. 376, 980 S.W.2d 269 (1998)). Prohibition prevents an action from occurring. *Id.* This court has routinely held that a writ of prohibition will not lie for actions already taken. *May Constr. Co., Inc. v. Thompson*, 341 Ark. 879, 20 S.W.3d 345 (2000); *Oliver v. Pulaski County Circuit Court*, 340 Ark. 681, 13 S.W.3d 156 (2000). Thus, prohibition is not appropriate in this situation, as the circuit court has already ordered Petitioners to post a *supersedeas* bond.

A writ of certiorari, on the other hand, is appropriate when it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion by the trial judge, and there is no other adequate remedy. *Arnold v. Spears*, 343 Ark. 517, 36 S.W.3d 346 (2001); *Zimmerman*, 341 Ark. 771, 20 S.W.3d 301. It is well settled that certiorari will not be used to look beyond the face of the record to ascertain the actual merits of the controversy, or to control discretion, or to review a finding of facts, or to reverse a trial court's discretionary authority. *Id.* (citing *Juvenile H. v. Crabtree*, 310 Ark. 208, 833 S.W.2d 766 (1992)). This court, however, has the discretion to treat a petition for writ of prohibition as if it were properly filed as a petition for a writ of certiorari. *Id.*

Petitioners' allegation that the circuit court is wholly without jurisdiction to order them to post a *supersedeas* bond is insufficient to warrant the issuance of a writ of certiorari. Under Ark. R. App. P.—Civ. 8(b), the clerk of the court which rendered the order being appealed from is the proper party to issue a *supersedeas*, unless the record has been lodged with the appellate court. In this case, the circuit court issued the order requiring Petitioners to post the bond on September 5, 2001. At that time, the trial court was still vested with jurisdiction over the matter, as Petitioners did not lodge the record with the clerk of this court until November 2, 2001. Thus, it is not apparent on the face of the record now before us that the circuit court's order requiring a *supersedeas* bond was a manifest abuse of discretion. Accordingly, we deny the writ.

Along with this petition, Petitioners filed a motion to consolidate the record filed with this petition with the record filed in the pending appeal of this matter. It is unnecessary to address this issue, as it is rendered moot by our denial of the writ.

Writ denied.

IMBER, J., not participating.

Shawn DWILLS *v.* STATE of Arkansas

CR 01-1289 62 S.W.3d 359

Supreme Court of Arkansas
Opinion delivered December 13, 2001

Thurman Ragar, Jr., for appellant.

No response.

PER CURIAM. Appellant Shawn Dwills has filed a motion for rule on the clerk. The motion reflects that the judgment and commitment order was filed on April 23, 2001, and that the notice of appeal was timely filed on April 27, 2001. An amended judgment and commitment order was filed on April 30, 2001. An order extending the time to lodge the record on appeal was entered on July 30, 2001, more than ninety days after the first notice of appeal was filed. The transcript was not tendered until November 19, 2001.

Under Ark. R. App. P.—Civ. 5(a), the record on appeal must be filed with this court's clerk within ninety days from the filing of the first notice of appeal. The time for filing the record may be extended, provided that an order of extension is issued within the original ninety-day period. *See* Ark. R. App. P.—Civ. 5(b). An order of extension was entered in this case, but it was not timely under Rule 5(b).

Appellant's attorney, Thurman Ragar Jr., admits responsibility for miscalculating the time to file the record on appeal. 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*).

IMBER, J., not participating.

Obdulio Martinez ESCANDON *v.* STATE of Arkansas

CR 01-1249 61 S.W.3d 843

Supreme Court of Arkansas
Opinion delivered December 13, 2001

[redacted]

Charles E. Ellis, for appellant.

No response.

PER CURIAM. Appellant Obdulio Martinez Escandon, by and through his attorney, Charles E. Ellis, has petitioned this court for a writ of certiorari to complete the record for his appeal. Appellant was convicted of first-degree murder in Mississippi County and was sentenced to forty years' imprisonment. On May 4, 2001, Appellant timely filed a notice of appeal and

requested a copy of the transcript from the court reporter. A subsequent extension of time to prepare the transcript was granted by the trial court on July 10, 2001. To date, the transcript has not been completed. Appellant now seeks a writ of certiorari directing the court reporter to immediately produce the transcript.

The court reporter who transcribed the proceedings in this case is Nila Keels. This court has already addressed, in two previous opinions, the fact that Ms. Keels is not a certified or licensed court reporter in this state. *See George v. State*, 346 Ark. 22, 53 S.W.3d 526 (2001) (*per curiam*); *Mitchell v. State*, 345 Ark. 359, 45 S.W.3d 846 (2001) (*per curiam*). Because this is a criminal case, however, we grant the writ. We direct the Honorable Judge Victor Hill, of the Mississippi County Circuit Court, Chickasawba District, to supervise Ms. Keels's completion of the record and to take whatever action necessary to secure a prompt certification of a complete record for appeal.

We further direct the Supreme Court Clerk to accept the transcript in this case, despite the fact that Ms. Keels is not a licensed or certified court reporter, provided that the attorneys of record in this case certify to our clerk, by affidavit, that the transcript is a true, accurate, and complete record of the proceedings.

Petition granted.

IMBER, J., not participating.

James Dennis HUDSPETH;
Johnny "Red" Hudspeth *v.* STATE of Arkansas

CR 01-1222 61 S.W.3d 842

Supreme Court of Arkansas
Opinion delivered December 13, 2001

David P. Henry, for appellant.

No response.

PER CURIAM. Appellants James Dennis Hudspeth and Johnny "Red" Hudspeth, by and through their attorney, have filed a motion for rule on clerk. Appellants' attorney, David P. Henry, states in the motion that the record was tendered late due to an illness he suffered, which he maintains constitutes excusable neglect and unavoidable casualty, thereby entitling appellants to have the record filed and the case docketed by the Clerk.

We find that the attendant circumstances do not constitute excusable neglect or unavoidable casualty; however, as the error is admittedly made by an attorney for a criminal defendant, we find 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.

IMBER, J., not participating.

Darwin SHIELDS *v.* STATE of Arkansas

CR 01-288 61 S.W.3d 841

Supreme Court of Arkansas
Opinion delivered December 13, 2001

Gregory E. Bryant, for appellant.

No response.

PER CURIAM. Appellant Darwin Shields, by and through his attorney, Gregory E. Bryant, has filed a motion for an extension of time to file Appellant's brief. The brief in this case was originally due on April 23, 2001, but only after the Supreme Court Clerk's office granted Bryant six extensions of time to file the brief, was it finally filed on July 31, 2001. The brief filed on July 31 did not contain an addendum, but the clerk's office allowed Bryant to correct this error. The Attorney General's office then filed a motion requesting that Bryant be ordered to comply with Ark. Sup. Ct. R. 4-3(h). This court granted the motion and ordered Bryant to submit a revised brief by November 3, 2001. Bryant then filed a revised brief on November 5, but again the brief contained no addendum.[1] The clerk's office refused to file the brief and sent Bryant a letter stating its reasons for refusing the brief. This motion followed.

In the pending motion, Mr. Bryant accepts full responsibility for having failed to timely file Appellant's brief. We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See Johnson v. State*, 337 Ark. 609, 990 S.W.2d 553 (1999) (*per curiam*); *Davis v. State*, 335 Ark. 136, 983 S.W.2d 122 (1998) (*per curiam*).

[1] November 3 fell on a Saturday, thus the actual deadline for filing the brief was extended until November 5.

We also refer Mr. Bryant to the Committee on Professional Conduct in connection with his repeated failures to comply with this court's rules governing the preparation and filing of briefs.

Motion granted.

BROWN and IMBER, JJ., not participating.

Joyce BOND *v.* LAVACA SCHOOL DISTRICT

01-303 64 S.W.3d 249

Supreme Court of Arkansas
Opinion delivered December 20, 2001
[Petition for rehearing denied January 24, 2002.*]

* GLAZE and HANNAH, JJ., would grant.

[redacted]

Mitchell, Blackstock, Barnes, Wagoner & Ivers, by: *Clayton Blackstock* and *Mark Burnette*, for appellant.

Thompson & Llewellyn, P.A., by: *James M. Llewellyn, Jr.*, for appellee.

W.H. "DUB" ARNOLD, Chief Justice. Joyce Bond appealed from the order of summary judgment entered in favor of her employer, appellee Lavaca School District. The Arkansas Court of Appeals reversed the trial court and remanded the case. Appellee petitioned this Court for review; petition was granted. We now affirm the trial court, thereby reversing the court of appeals' decision.

The facts of the case are as follows. Appellant is employed by appellee in two capacities. She teaches in certified areas as defined by the school's administration. She also serves as appellee's Chapter One Coordinator, an administrative position involving eighteen different major duties, but the primary function is to "insure adherence to and compliance of the regulations and guidelines set by the Federal and State government" for the Chapter One program. Appellant's teaching contract runs from July 1 through June 30, states that the grade or subject to be taught is "Chapter I Lab," requires her to teach in certified areas as assigned by administration and any other reasonable and relevant duties as assigned by the principal, indicates that her salary will be paid in twelve installments, and provides that the length of her term of employment is 205 days. The salary schedule attached to her annual contract states that "[e]xtended contracts will result in an increase of .005 per day

for each day beyond one hundred [and] eighty five days." The salary schedule also indicates that certain duties performed by certified personnel will be compensated at a specified rate. However, the salary schedule does not include a special rate of compensation for the Chapter One Coordinator position, a position that is not certified.

On June 22, 1998, appellant filed a complaint in Sebastian County Circuit Court, alleging that for the school years 1993-94, 1994-95, 1995-96, 1996-97, and 1997-98, appellee failed to pay her as required under Ark. Code Ann. § 6-17-807 (Repl. 1999) and § 6-17-204(b)(2) (Repl. 1999). Appellant subsequently amended her complaint to include the years 1998-99 and any time through trial. Specifically, appellant alleged that the Chapter One Coordinator position requires her to work the equivalent of twenty additional days beyond the 185-day standard school year, but that appellee did not pay her proportionately for additional days worked based on her daily rate for the regular school year as required under § 6-17-807. She also alleged that appellee violated § 6-17-204(b) by failing to include the Chapter One Coordinator position on its salary schedule and by failing to pay her for additional duties performed.

Appellant and appellee filed competing motions for summary judgment. Appellee asserted that appellant's action was barred by the Teacher Fair Dismissal Act under Ark. Code Ann. §§ 6-17-1506 and -1510 (Supp. 1999). Appellee also argued that § 6-17-807 only applied when additional days are added to a teacher's contract from one year to the next, which was not the case here; it maintained that it complied with § 6-17-204(b)(2); and it asserted that appellant waived any complaints she had under her contract when she renewed her contract each year without complaint. In her motion for summary judgment, appellant raised the same arguments as alleged in her complaint, specifically disputed appellee's waiver argument, and denied that the statute of limitations found in the Teacher Fair Dismissal Act precluded her complaint because this case did not involve nonrenewal of a contract or dismissal.

The trial court found that appellee had not violated the above statutes because the salary schedule provided for an additional increment for days worked beyond the regular school year. The court granted appellee's motion for summary judgment. It is from this order that the instant appeal now comes. We affirm.

I. Standard of Review

On a petition for review, this Court reviews the case as if the appeal had originally been filed in this Court. *Thompson v. State*, 342 Ark. 365, 28 S.W.3d 290 (2000); *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999); *State v. Brunson*, 327 Ark. 567, 570, 940 S.W.2d 440 (1997); *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997). 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. *Dodson v. Taylor*, 346 Ark. 443, 57 S.W.3d 710 (2001); *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). 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 the motion leave a material fact unanswered. *Id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

II. Compensation Rate

The crux of this case is whether appellant was compensated fairly according to her contract. It is undisputed that appellant contracted to work 205 days and was compensated for 205 days; the question is whether the number of days appellant worked in excess of the 185-day standard school year (*i.e.*, twenty days) should have been compensated on a daily-rate-of-pay basis as defined by § 16-17-807 or on a fixed .005 times her base salary per day for each day beyond 185 days, as specified in her contract pursuant to the supplemental salary schedule prescribed by Ark. Code Ann. § 6-17-204.

The first issue is whether the trial court erred in ruling as a matter of law that appellant's contract did not violate Ark. Code Ann. § 6-17-807, which governs teachers' compensation for days worked in addition to the regular school year. This statute provides:

> If additional days are *added to a teacher's contract* or if the teacher is required to work more days *than provided for under the teacher's contract*, then the teacher's pay under the contract shall be increased proportionately so that the teacher will receive pay for each day added to the contract or each additional day the teacher is required to work at no less than the daily rate paid to the teacher under the teacher's contract.

[Emphasis added.]

Appellant argues that the statute mandates that if additional days are added to a teacher's contract, then the teacher is entitled to be paid the same for each extra day worked as she was paid for each day worked during the standard portion of the contract. She asserts that because she worked the equivalent of twenty extra days in her capacity as the Chapter One Coordinator, she is entitled to compensation for those extra days based on her daily rate of pay instead of the lower rate specified under her contract. Thus, she asserts that her contract violates the statute because she works additional days beyond the normal school year; the provision in the supplemental salary schedule that calculates her daily rate of pay using a multiplier of .005 times her base salary for each additional day worked past the 185th day compensates her at less than her daily rate of pay. That is, for the first 185 days of her contract, her daily rate is calculated by dividing her base salary by 185. However, using the .005 multiplier, she will be paid less for each additional day worked past the 185th day than she earned during the first 185 days of her contract. Thus, she maintains that she is being paid less than her daily rate, which violates the express terms of § 6-17-807. We disagree and find no violation of § 6-17-807.

[redacted] There are no prior cases interpreting this statute. The basic rule of statutory construction is to give effect to the intent of the legislature, and when a statute is clear, it is given its plain meaning; the legislative intent is gathered from the plain meaning of the language used. *See Hercules, Inc. v. Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995). The emergency clause in section 4 of Act 712 of 1989, which enacted § 6-17-807, states in part, "the school districts are . . . increasing teacher contract days from one school year to the next with no guarantee to the teacher of a daily pro rata increase in pay based on the salary schedule . . . for the next year." This statute was passed in response to the school districts' practice of adding days to the teachers' contracts from one year to the next without a proportional increase in pay. Clearly, the instant case is

not one whereby the school board increased the number of working days from one contract to the next, nor is appellant required to work more days than is required under her contract. As such, we hold that the trial court did not err as a matter of law when it held that appellant's contract did not violate § 6-17-807.

We also hold that the school's supplemental salary schedule, which is incorporated into appellant's contract and which compensates appellant for extra days at a rate less than her daily rate of pay, likewise, does not violate § 6-17-807 and does comply with Arkansas law. The applicable statute provides that "[a] school district shall adopt, in accordance with this subchapter, a supplement to the salary schedule for those certified staff employed longer than the period covered by the salary schedule *and for duties in addition to certified employees' regular teachers assignments.*" Ark. Code Ann. § 6-17-204(c)(2) (emphasis added). Appellant argues that appellee violated this statute because its supplemental salary schedule does not provide special remuneration for all of the additional duties performed by certified personnel, and specifically does not include special remuneration for the Chapter One Coordinator position.

The salary schedule defines the base salary for a teacher with a Masters or Specialist Degree and states that the schedule is based on a 185-day contract year. The schedule further states that extended contracts will "result in an increase of .005 per day for each day beyond" 185 days. The schedule specifically lists the compensation rates for the following positions: superintendent, high school principal, elementary principal, head coach, counselor, band director, assistant coach, athletic director, annual sponsor, Gifted and Talented coordinator, cheerleader sponsor, specialist degree, sound system, quiz bowl, dean of students, and assistant band director.

Although the Chapter One Coordinator position, which is a non-certified, administrative position, is not specifically included in the list provided in this section, the statute certainly does not require that certified staff work in positions requiring certified personnel in order to receive remuneration under the supplemental salary schedule for extra work performed. Moreover, a plain reading of the statute compels us to conclude that it guarantees remuneration to certified personnel for those job duties performed *in addition to their duties as a certified teacher*, regardless of whether those duties are required to be performed by *certified* personnel.

It is undisputed that appellant is a certified employee and that her duties as Chapter One Coordinator are performed *in addition* to her regular teaching assignments. It is further undisputed that appellant was provided remuneration for performing those extra duties; the *rate* of remuneration was, however, calculated using the .005 multiplier, rather than the daily rate of pay. We find no violation of either § 6-17-807 or § 6-17-204 and hold that, when read in harmony together, appellee complied with both statutes by remunerating appellant pursuant to her contract for the 185 days she performed her duties as a certified teacher during the standard school year *and* by paying her the .005-rate supplemental salary for the job duties she performed in addition to her duties as a certified teacher as a Chapter One Coordinator, a position requiring no certification.

Affirmed. Arkansas Court of Appeals reversed.

GLAZE and HANNAH, JJ., dissent.

IMBER, J., not participating.

JIM HANNAH, Justice, dissenting. I must respectfully dissent. I cannot agree with the majority's analysis of Ark. Code Ann. § 6-17-807. 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. *Western Carroll Cty. Amb. Dist. v. Johnson*, 345 Ark. 95, 44 S.W.2d3d 284 (2001). The language of the statute at issue states, "if additional days are added to a teacher's contract or if the teacher is required to work more days than provided for under the teacher's contract. . . ." The use of the disjunctive "or" indicates that the statute is aimed at two alternative situations. *Clemmons v. Office of Child Spt. Enforce.*, 345 Ark. 330, 47 S.W.3d 227 (2001). The statute applies where days are added to a contract and also where a teacher is required to work additional days. Thus, it applies where a teacher is required to work additional days. The word "work" is not defined. Its ordinary meaning in this context would simply be work required of the teacher by the district. There is nothing here that limits the work to work where certification is required. To reach the conclusion found by the majority, one must add meaning to the words in the statute that simply is not there. In construing the statute, leaving no word void, superfluous, or insignificant, and giving meaning and effect to every word in the statute, one must conclude the word "work" merely refers to any labor required of the teacher by the district, whether that work is work requiring certification or not. If

the Legislature had intended to have said "to teach" rather than "to work," it would have done so.

Bond contracted to teach in certified areas for the 185-day standard year and to serve as Lavaca School District's Chapter One Coordinator, a job that does not require teacher certification. Bond contracted to be paid for the position of Chapter One Coordinator by being paid twenty days in addition to the 185 days at the rate of .0005 times her base salary per day, which is less than her contracted certified teacher's pay. Arkansas Code Annotated § 6-17-807(a) states:

> [I]f the teacher is required to work more days than provided for under the teacher's contract, then the teacher's pay under the contract shall be increased proportionately so that the teacher will receive pay for each day added to the contract or each additional day the teacher is required to work at no less than the daily rate paid to the teacher under the teacher's contract.

In this case, Bond was required to work twenty days in addition to the 185 days under the standard contract, and she should be paid at the same rate she is paid as a certified teacher under her contract.

For the above reasons, I respectfully dissent.

GLAZE, J., joins in this dissent.

James BROWN *v.* STATE of Arkansas

CR 01-788 65 S.W.3d 394

Supreme Court of Arkansas
Opinion delivered December 20, 2001

[redacted]

B. Kenneth Johnson, for appellant.

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

ROBERT L. BROWN, Justice. Appellant James Brown was convicted by a jury of one count of second-degree battery, a Class D felony, and two counts of terroristic act, one a Class B felony and the other a Class Y felony. He was sentenced to the statutory minimum of ten years in prison for the Class Y terroristic act conviction and a fine of $1.00 for the Class B and Class D felony convictions. He appeals, raising several points: (1) there was insufficient evidence introduced to prove serious physical injury; (2) a judgment of conviction for both second-degree battery and terroristic act violated Arkansas law and the Double Jeopardy Clause of the United States Constitution; and (3) the circuit court erred in denying his mistrial motion. None of these points requires reversal of his conviction, and we affirm.

During the time period relevant to this appeal, Brown lived in Pine Bluff and was an employee of International Paper, as was his wife Shirley Brown. They had two children. Brown and his wife had been married since 1990. In 1995, Brown was diagnosed with colon cancer. After surgery, he took a year-long leave of absence from his job at International Paper and received intensive treatment for the cancer. During this period, he tried twice to return to work, but both times, he was physically unable to do so. During the period from 1995 to 1997, Brown suffered from extreme distress and anxiety about his health, his job, and his marriage. He sought counseling to aid him in handling the psychological impact of his illness. By July of 1997, he was in better health, and he returned to his job. Upon returning to his job in 1997, Brown learned that his wife had been having an affair with another International Paper employee, Kenneth White. He confronted White about the situation and told him to stay away from his wife. After this incident, Brown and Shirley Brown separated.

On the morning of October 27, 1997, Brown drove his truck to a garbage dumpster to drop off some items. He had battery problems with the truck and was forced to walk home. As he walked toward his house, he noticed his wife leaving in her van. His trial testimony did not address the question of why she was at his

house when the two of them had apparently been separated for some time. He decided to follow her in his car and proceeded to follow her to Regional Park. He parked his car some distance away from her and watched her, suspecting she was meeting White. At trial, Shirley Brown testified that she had not planned in advance to meet White at the park. She stated that she had seen his vehicle in the park, and only then did she decide to drive into the park to talk to him. She pulled her van over and parked it, waiting for White to approach her.

White, meanwhile, drove through the park toward both Brown's and his wife's vehicles. Through a chain-link fence, Brown saw him approaching from roughly 200 to 250 yards away. While White was driving towards Brown, Brown got out of his car and removed his rifle from the trunk. He returned to the front seat of his vehicle, as White approached him slowly. At trial, Brown testified that while White was still in his vehicle and slowly driving toward him, White pulled a handgun and pointed it at him. White denied that he pulled a handgun but admitted that he had one in the front seat of his truck at the time.

At this point, by all accounts, Brown jumped out of his car and motioned for White to stop driving. White did not stop. Brown began firing shots at White. None of the shots hit him. At trial, White estimated that at least five shots were fired into his truck. White testified that he drove off rapidly to the Pine Bluff police station to report the ongoing incident. Brown, however, testified that White drove off slowly and continued to brandish his weapon throughout their encounter.

Pine Bluff police officers began arriving at the scene, as Brown and his wife had their confrontation. Shirley Brown pulled her vehicle out onto the park road as if to exit the park, and Brown began chasing her. They engaged in a high-speed chase for a short distance. Brown rammed his car into the back of his wife's van, at which time she flashed her lights at the approaching police officer, Officer Larry Plunkett, for assistance. At this point, Brown began shooting at the van from inside his car, shattering his own windshield. Nine bullets hit the van, and two wounded Shirley Brown in the buttocks.

Officer Plunkett began chasing Brown's vehicle and radioed for an ambulance because he feared that Shirley Brown had been injured. Brown immediately pulled over to the side of the park road, and Officer Plunkett arrested him without difficulty. In

searching Brown's vehicle, Officer Plunkett found the rifle along with two high-capacity ammunition clips and full-metal jacket, lead-ball bullets. Shirley Brown was taken to the hospital by emergency personnel. The two bullets pierced her small intestine. Part of her intestine was subsequently removed, and she spent nine days in the hospital. Thereafter, she was required to wear a colostomy for three months while her intestine healed.

On October 29, 1997, Brown was charged with two counts of terroristic act, one for his shots fired at his wife and the other for the shots fired at Kenneth White. Brown was also charged with first-degree battery for wounding Shirley Brown. That same day, the State moved the circuit court to commit Brown for a psychiatric evaluation, and the circuit court granted this motion. The psychiatric evaluator found Brown to be competent to stand trial but noted that he was under extreme emotional stress.

On March 30, 1999, Brown's case went to trial. At the trial, Shirley Brown testified that she and Brown, though now separated, resumed living together after the shooting incident, that Brown was a good father, and that he paid the medical bills that insurance did not cover. She testified further that she forgave Brown for the incident, that she felt that she bore some responsibility for it, and that she felt that at the time he was "stressed out" because of her infidelity and his poor health.

At the close of the State's case, Brown moved for a directed verdict on the first-degree battery charge and claimed that the State failed to prove a serious physical injury to his wife. The defense also moved to have the State elect which charge it wanted to pursue with regard to Shirley Brown, claiming that to allow the State to proceed with both would be violative of the Double Jeopardy Clause for two reasons: both charges arose out of a single course of conduct, and both charges have the same elements. The defense renewed its motion for directed verdict at the close of all the evidence. The circuit court denied both motions.

The jury convicted Brown of the terroristic-act charges: a Class Y felony with regard to the terroristic act in connection with Shirley Brown, and a Class B felony with regard to the terroristic act in connection with White. The jury also convicted Brown of the lesser included offense of second-degree battery, a Class D felony. Though Brown was sentenced to 10 years in prison for the Class Y terroristic act against his wife, the jury sentenced Brown to no fine and no time to serve for the Class B and Class D felonies.

The circuit court advised the jury that this was an impossibility under Arkansas sentencing guidelines. The jury then sentenced Brown to ten years and fined him $1.00 apiece for the Class B and Class D felony convictions.

The judgment of conviction was appealed to the court of appeals, and that court affirmed the conviction in a plurality decision. *See Brown v. State*, 74 Ark. App. 281, 47 S.W.3d 314 (2001). Brown petitioned for review, and this court granted that petition. He raises three arguments on review. We review the matter as if the appeal had originally been filed in this court. *Harshaw v. State*, 344 Ark. 129, 37 S.W.3d 753 (2001).

I. Sufficiency of the Evidence

Brown argues that the circuit court erred in failing to direct a verdict on the Class Y terroristic act charge and the first-degree battery charge due to the State's alleged failure to prove that Shirley Brown experienced a serious physical injury. The State responds that Brown was not convicted of first-degree battery but rather of second-degree battery, and because the motion for directed verdict did not address the elements of the lesser included offense, this issue is not preserved for purposes of this appeal. The State also asserts that as to the Class Y terroristic-act conviction, substantial evidence supported the proposition that Shirley Brown suffered a serious physical injury.

We address sufficiency-of-the-evidence questions first because if the judgment of conviction is not supported by substantial evidence, an appellant may not be tried again under the principle of double jeopardy. *Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001). The two convictions will be discussed separately.

a. Battery conviction.

Arkansas Rule of Criminal Procedure 33.1(a) requires that a motion for directed verdict "shall state the specific grounds therefor." In interpreting this rule, we have held that to preserve the issue of sufficiency of the evidence to support a conviction of a lesser included offense, a defendant's motion for directed verdict must address the elements of the lesser included offense. *Moore v. State*, 330 Ark. 514, 954 S.W.2d 932 (1997) (citing *Webb v. State*, 328 Ark. 12, 941 S.W.2d 417 (1997); *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996)). In *Walker v. State*, 318 Ark. 107, 883

S.W.2d 831 (1994), this court discussed the rationale behind these holdings:

> Other practical reasons have caused us to require that the grounds for the motion be specified. In multiple-count cases, which mandate different degrees of culpability for the lesser included offenses, it is easy for an element of one of the counts for lesser included offenses to be overlooked. Since a general motion for a directed verdict does not specify the missing element, the trial court is not apprised of the proof that was overlooked. As a result, the trial court is not made aware of the deficiency.

Walker, 318 Ark. at 108, 883 S.W.2d at 832 (citing *Sanders v. State*, 310 Ark. 510, 383 S.W.2d 359 (1992)). Thus, this court has made it clear that a defendant, in making his motions for directed verdict, must anticipate an instruction on lesser included offenses and specifically address the elements of that lesser included offense on which he wishes to challenge the State's proof in his motion.

At trial, Brown moved for directed verdict specifically as to first-degree battery on the theory that the State failed to prove serious physical injury to Shirley Brown. Brown did not argue any aspect of second- or third-degree battery. Accordingly, Brown waived his opportunity to mount a challenge on appeal to the sufficiency of the evidence supporting his conviction for second-degree battery, and this issue is not preserved for our review.

b. Terroristic act.

Brown's challenge to the sufficiency of the State's evidence supporting the terroristic-act conviction is preserved. Brown argued at trial that the State failed to prove by substantial evidence that Brown caused his wife "serious physical injury." The phrase "serious physical injury" is statutorily defined:

> "Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ[.]

Ark. Code Ann. § 5-1-102(19) (Repl. 1997). *See also Harmon v. State,*, 340 Ark. 18, 8 S.W.3d 472 (2000); *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999). Whether a victim has suffered serious physical injury is an issue for the jury to decide. *Bangs v. State, supra* (citing *Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991)).

The cases interpreting this definition in the context of sufficiency challenges illustrate the degree of evidence necessary to sustain a finding of serious physical injury. In *Harmon, supra,* this court affirmed a conviction where the offense was based on serious physical injury and noted that the victim had spent three days in intensive care; had suffered a long-term loss of taste, smell, and memory; and had to undergo facial plastic surgery. Likewise, in *Bangs, supra,* we affirmed a jury's finding of serious physical injury where the victim suffered bruises on her forehead and face, two lacerations on her scalp which required staples, and numerous blunt-object injuries to her neck and the back of her head.

This court has also considered whether gunshot wounds constituted serious physical injury on several occasions. In *Witherspoon v. State,* 319 Ark. 313, 891 S.W.2d 371 (1995), the victim was hospitalized for two days, and a bullet remained lodged in his hip. The victim also suffered superficial graze wounds to his hand and thumb. The shot to the hip narrowly missed his bones and arteries. This court held these wounds to be sufficient evidence of serious physical injury to sustain the conviction. In *Henderson v. State,* 291 Ark. 138, 722 S.W.2d 842 (1987), this court upheld a jury's finding of serious physical injury by a gunshot wound where the victim was shot two times in the feet and legs. The victim was hospitalized for one night and one day and could not return to work for a month.

Brown's argument is that under the statutory definition quoted above (§ 5-1-102(19)), he did not cause Shirley Brown a serious physical injury because she now has made a full recovery. We disagree. The facts indicate that she did in fact suffer a serious physical injury, regardless of her recovery. She was hospitalized for nine days and required surgery to remove a portion of her intestine. She had to wear a colostomy for three months. Clearly, Shirley Brown's injuries were far more severe than those at issue in either *Witherspoon* or *Henderson,* where we upheld a finding of serious physical injury. The circuit court's decision on this point is affirmed.

II. Double Jeopardy

Brown next contends that he was charged and convicted of both a terroristic act and second-degree battery in violation of his statutory and constitutional rights to be free from being twice put in jeopardy. During the trial, he argued to the circuit court at the close of the State's case and again at the close of all the evidence

that the State should be required to elect between the first-degree battery charge and the terroristic-act charge with regard to conduct relating to Shirley Brown. Now, on appeal, the jury having convicted him of second-degree battery instead of first, he posits three theories on how convictions for both second-degree battery and a terroristic act violate double jeopardy. The State's response is a procedural argument. It asserts that Brown failed to preserve this point for appeal by neglecting to be sufficiently specific in his motion for directed verdict.

We agree with the State that this issue is not preserved, but do so for a different reason. We believe that raising the issue of double jeopardy in a motion for directed verdict was premature since the motion at that stage of the proceedings could only relate to *charged* offenses. After the jury's verdicts on the various convictions were returned, Brown failed to make any motion whatsoever. Brown's issue on appeal clearly relates to multiple *convictions* for the same conduct and not to multiple *charges* for the same conduct, and our Criminal Code makes this distinction very clear:

> When the same conduct of the defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense.

Ark. Code Ann. § 5-1-110(a)(1) (Repl. 1997). Thus, a defendant cannot object to a double jeopardy violation until he has actually been convicted of the multiple offenses, because it is not a violation of double jeopardy under § 5-1-110(a)(1) for the State to charge and prosecute on multiple and overlapping charges. It was only after the jury returned guilty verdicts on both offenses that the circuit court would be required to determine whether convictions could be entered as to both based on the same conduct. *See* Ark. Code Ann. § 5-1-110(a)(1) (Repl. 1997); *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993) (citing *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981)).

Because Brown moved for a directed verdict based on double jeopardy before he was convicted of any offense, his motion was ineffective. Because he then failed to object after the jury convicted him of both charges, he waived his double jeopardy argument for purposes of appeal. We conclude that the circuit court committed no error as to double jeopardy, and we affirm the court on this point.

III. Mistrial

For his final point, Brown contends that the circuit court should have granted his motion for declaration of a mistrial because the jury was hopelessly confused during sentencing deliberations. The State maintains in response that there was no abuse of the circuit court's discretion in denying the motion for a mistrial.

During the jury's deliberations following the penalty phase of the trial, these events transpired. The circuit court received a series of notes from the jury, asking these questions:

> (1) "Do we have to sentence to years & fine or one of [sic] the other?"
>
> (2) "What is the minuim [sic] fine for the Class B & Class D?"
>
> (3) "Can he be sentenced on the Class Y felony, to probation or suspended sentence, or something less than 10 years?"
>
> (4) "What happens if we can not agree to time for the Class Y felony?"

These notes were answered by the judge in writing.[1] The jury then returned a verdict imposing no punishment whatsoever for the Class B terroristic act conviction or the Class D second-degree battery conviction. As to the Class Y felony, the jury did impose a sentence of ten years in accordance with sentencing requirements. The circuit court then reinstructed the jury that it had to impose some sentence within statutory minimums and maximums for Class B and Class D felonies and sent the jury back to deliberate further. The jury returned verdicts of $1.00 fines for the Class B and Class D felonies. Along with these verdicts, the jury returned a note unanimously recommending that the ten-year sentence for the Class Y felony, which they imposed during the first deliberations, be suspended. While the jury was deliberating after initially returning the illegal sentence and being reinstructed by the circuit court, defense counsel moved for a mistrial based on jury confusion, as evidenced by the four notes the jury had sent to the circuit court and by its failure to assess punishment for the Class B and Class D felonies. The circuit court denied this motion.

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[1] No issue is raised by the defendant regarding a violation of Ark. Code Ann. § 16-89-125(e) (1987), and we do not address that issue.

The declaration of a mistrial is an extreme remedy, which should only be granted when justice cannot be served by continuing the trial. *E.g., Cox v. State*, 345 Ark. 391, 47 S.W.3d 244 (2001); *Williams v. State*, 343 Ark. 591, 36 S.W.3d 324 (2001); *Woods v. State*, 342 Ark. 89, 27 S.W.3d 367 (2000). A mistrial should only be declared when the fundamental fairness of the trial itself has been manifestly affected. *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996) (citing *King v. State*, 317 Ark. 293, 877 S.W.2d 583 (1994)). Declaring a mistrial is proper only where the error is beyond repair and cannot be corrected by any curative relief. *Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998); *Kimble v. State*, 331 Ark. 155, 959 S.W.2d 43 (1998). The circuit court has wide discretion in granting or denying a motion for a mistrial, and this court will not disturb the court's decision absent an abuse of discretion or manifest prejudice to the movant. *See Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998); *King v. State, supra*; *Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994).

It appears clear to this court that the jury at first questioned whether it could suspend the ten-year sentence for the Class Y felony and later recommended a suspension. It then showed some reluctance to impose punishment for the Class B and Class D felonies. However, it does not necessarily follow that the jury was confused. The jury was first striving for a way to avoid sentencing Brown to a term of years for the Class Y felony or punishing Brown in any respect for the Class B and Class D felonies. But when the circuit court made it clear that the jury was under a statutory duty to do so, it complied. Under these circumstances, it cannot be said that refusing to grant a mistrial was an abuse of the trial court's discretion. The jury eventually did return valid sentences for the Class Y, Class B, and Class D felonies that followed the statutory guidelines. The circuit court is affirmed on this point.

Affirmed.

GLAZE, J., concurring.

IMBER, J., not participating.

ARKANSAS CONTRACTORS LICENSING BOARD *v.*
PEGASUS RENOVATION COMPANY

01-708 64 S.W.3d 241

Supreme Court of Arkansas
Opinion delivered December 20, 2001

[redacted]

Gregory L. Crow, for appellant.

Hartsfield, Almand & Grisham, P.L.L.C., by: *Larry J. Hartsfield*, for appellee.

JIM HANNAH, Justice. Appellant Arkansas Contractors Licensing Board (the Board) appeals the Saline County Circuit Court's decision to reverse the Board's decision to revoke Appellee Pegasus Renovation Company's (Pegasus) contractors license for a violation of Ark. Code Ann. § 17-25-308 (Repl. 1995), allowing revocation of a contractor's license for, among other things, "misconduct in the conduct of the contractor's business." Both parties agree that the facts are undisputed in this case.

During the mid-to-late Spring of 2000, Pegasus, a painting and drywall subcontractor, backed out of two projects, the Petit Jean Electric Cooperative project and the Farm Bureau Child Care Facility project, on which it was the lowest bidder, and breached a third contract already signed with general contractor Flynco, Inc. for the Carlton Bates Office/Warehouse expansion project. The three general contractors who relied on Pegasus's bids filed complaints with the Board. Flynco, Inc., the general contractor with whom Pegasus signed the contract, also filed suit against Pegasus for breach of contract.

After Flynco, Inc.'s complaint was filed, the Board issued an initial Notice of Hearing on June 21, 2000, regarding the Petit Jean Electric Cooperative project. An Amended Notice of Hearing and Notice of Continuance of Hearing was mailed to Pegasus on July 14, 2000, with the additional notice of the other two complaints on the Farm Bureau and Carlton Bates projects. The notices indicated that Pegasus was being cited for violating Ark. Code Ann. § 17-25-308 for "misconduct in the conduct of the contractor's business."

The hearing was held before the Board on August 11, 2000. The Board presented its evidence first, questioning Victor Smith of V.R. Smith and Sons, Inc., the general contractor hired to perform the Petit Jean Electric Cooperative project. Smith testified that his

company took bids from various subcontractors for painting and sheet rock work, with Pegasus entering the lowest bid. Smith used that bid in making his company's contract for the project, and prior to signing the final contract with Petit Jean Electric Cooperative, Smith confirmed Pegasus's bid with Pegasus's estimator. However, when Smith sent Pegasus the final contract to sign, Pegasus declined the job by letter and indicated that it would not take any calls from Smith regarding the matter. Smith hired the next lowest bidder, who entered a bid approximately $12,000 higher than Pegasus's bid. Pegasus's attorney did not cross-examine Smith.

The Board's second witness was Bill Mullinax, an investigator with the Board. Mullinax testified that after sending Smith's complaint to Pegasus, the Board received a response letter from Pegasus indicating that Pegasus had never signed a contract with Smith, and that the next lowest bidder's $12,000 bid was "a false statement." Mullinax also indicated that the second complaint came from Alessi Keyes Construction, the general contractor on the Farm Bureau project. Again, the evidence indicated that Pegasus submitted a bid and failed to follow through on signing the contract with the general contractor who relied on that bid for its final bid to Farm Bureau. Finally, Mullinax testified that a third complaint was filed by Flynco, Inc., regarding Pegasus's breach of contract on the Carlton Bates project.

Finally, the Board's attorney called J.W. Henderson, Pegasus's owner. Questioning verified that Henderson had sent the letters to the general contractors and that Henderson reneged on his low bid offers and on the contract with Flynco, Inc. Pegasus's attorney, Larry Hartsfield, did not cross-examine Henderson to develop any further information about Pegasus's failure to honor its bids and contract, nor did he call any other witnesses. However, at the close of evidence, Hartsfield argued to the Board that Ark. Code Ann. § 17-25-308 is unconstitutionally vague because the word "misconduct" does not have a legally recognized meaning, thus leaving the statute without a basis on which to judge the term. Hartsfield also argued that regarding the V.R. Smith and Alessi Keyes jobs, there was no legal basis to find misconduct if a bidder withdraws a bid prior to signing the final contract. Furthermore, Hartsfield argued that the term "gross" in the statute modifies, among other words, the word "misconduct" to raise the standard of proof.

After deliberations regarding whether failure to honor a bid rose to the level of misconduct and whether, *en masse*, these actions by Pegasus reached the level of misconduct, the Board voted three-

to-one to revoke Pegasus's contracting license for violation of the statute. In a decision entered on August 11, 2000, the Board found that Pegasus "failed and refused, without good cause, to perform the work on said projects." The Board found Pegasus guilty of misconduct in the conduct of its business, thus violating Ark. Code Ann. § 17-25-308. The Board did not rule on Pegasus's argument that the statute was void for vagueness for use of the term "misconduct."

Following this decision, Pegasus filed a Petition for Judicial Review in the Saline County Circuit Court pursuant to the Arkansas Administrative Procedure Act. The Board answered on September 13, 2000, and on October 31, 2000, the circuit court stayed the Board's revocation of Pegasus's license until the court made its final decision on the case. Pegasus filed its brief to the court on November 27, 2000, again arguing that Ark. Code Ann. § 17-25-308 is void for vagueness because of its use of the term "misconduct." Pegasus also argued that the statute is an unlawful delegation of legislative power, that the action of the Board was arbitrary and capricious given the facts before it, and that the penalty imposed was too harsh under the circumstances. The Board responded by brief on December 21, 2000, arguing that the statute is not unconstitutional wherein the Board is given the power of the State to act, and that the burden to prove whether the statute is unconstitutional is on Pegasus. The Board argues that the phrase "misconduct in the conduct of the contractor's business" is not vague, and cites various other administrative statutes providing for a similar phrase for administrative action. The Board also argued that its action was not arbitrary and capricious, and that the penalty imposed was valid. Pegasus replied on January 17, 2001.

The circuit court issued its decision on March 13, 2001, finding that the Board erred in revoking Pegasus's license. Specifically, the court found that Ark. Code Ann. § 17-25-305 lists qualifications of an applicant for an "original" or "renewal" license, and that the Board did not consider these eight factors in its decision. Furthermore, the court found that the Board did not address issues raised in the general contractors's complaints regarding Pegasus's "ability and willingness . . . to conserve the public health and safety of the citizens" of Arkansas, and that the grounds for revocation of these licenses with respect to misconduct means "misconduct inimicable to public health and safety issues." As such, the court found "[t]hat to the extent the Arkansas Contractors Licensing Board revoked the contractors license of Pegasus Renovation Company on grounds not relevant to public health and safety issues was

arbitrary and capricious." The court also specifically noted that it declined to rule on the constitutionality of the statute. The court then remanded the case to the Board for a determination consistent with the opinion. The Board appealed to this court instead on April 4, 2001.

We have outlined our standard of review of the decisions of administrative agencies on numerous occasions. In *Arkansas State Police Comm'n v. Smith*, 338 Ark. 354, 357, 994 S.W.2d 456 (1999), we stated:

> The standard of review in this area of the law is well-developed. The appellate court's review is directed not toward the circuit court, but toward the decision of the agency. That is so because administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies. *McQuay v. Arkansas State Bd. of Architects*, 337 Ark. 339, 989 S.W.2d 499 (1999); *Social Work Licensing Bd. v. Moncebaiz*, 332 Ark. 67, 962 S.W.2d 797 (1998); *Files v. Arkansas State Highway and Transp. Dep't*, 325 Ark. 291, 925 S.W.2d 404 (1996). Our review of administrative decisions is limited in scope. Such decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *McQuay, supra; In re Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1992).

These standards are consistent with the provisions of the Administrative Procedure Act, Ark. Code Ann. § 25-15-201—25-15-214 (Repl. 1996), which requires that the scope of appellate review under the Act be limited. According to the Act, it is not the role of the circuit courts or the appellate courts to conduct a *de novo* review of the record; rather, review is limited to ascertaining whether there is substantial evidence to support the agency's decision or whether the agency's decision runs afoul of one of the other criteria set out in section 25-15-212(h). *Arkansas State Racing Comm. v. Ward, Inc.*, 346 Ark. 371, 57 S.W.3d 198 (2001); *Arkansas Bd. of Exam'rs v. Carlson*, 334 Ark. 614, 976 S.W.2d 941 (1998). We review the entire record in making this determination. *Id.* We also note that in reviewing the record, the evidence is given its strongest probative force in favor of the agency's ruling. *Arkansas Health Servs. Agency v. Desiderata*, 331 Ark. 144, 958 S.W.2d 7 (1998). We have also held that between two fairly conflicting views, even if the reviewing court might have made a different choice, the board's choice must not be displaced. *Jackson v. Arkansas Racing Commission*, 343 Ark.

307, 34 S.W.3d 740 (2001) (citing *Northwest Sav. & Loan Ass'n v. Fayetteville Sav. & Loan Ass'n*, 262 Ark. 840, 847, 562 S.W.2d 40, 52 (1978)).

The relevant section of the Arkansas Administrative Procedure Act provides:

> (h) The court may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the agency's statutory authority;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error or law;
>
> (5) Not supported by substantial evidence of record; or
>
> (6) Arbitrary, capricious, or characterized by abuse of discretion.

Ark. Code Ann. § 25-15-212(h) (Repl. 1996). Administrative action may be viewed as arbitrary and capricious only when it is not supported by any rational basis. *Partlow v. Arkansas State Police Comm'n*, 271 Ark. 351, 609 S.W.2d 23 (1980).

On appeal, the Board argues that the circuit court erred in reversing the Board's decision to revoke Pegasus's contractors license. The Board argues that the circuit court erred in finding that it had acted in an arbitrary and capricious manner based on the court's reading that "misconduct" had to affect the "physical" "public health and safety" pursuant to Ark. Code Ann. § 17-25-305(a). Furthermore, the Board argues that even if the circuit court was correct in its interpretation of that statute, there was substantial evidence to support the Board's decision, and any determination by the circuit court that Pegasus's actions were not a threat to public health and safety was in error. Finally, the Board notes that it was in the best position to judge whether Pegasus's actions were "misconduct."

Pegasus responds that the circuit court did not err in finding that the Board had acted in an arbitrary and capricious manner, and that the word "misconduct" cannot withstand constitutional review because it is vague, thus rendering that statutory provision void. Pegasus for the first time on appeal also argues that the Board's acts were *ultra vires*, and that this court should adopt an additional standard on review, incorporating this standard. Furthermore, Pegasus argues that the circuit court's interpretation of Ark. Code Ann. § 17-25-305 was correct and that there was not substantial evidence in the record to support the Board's finding. Finally, Pegasus argues that the Board's decision was not motivated by its interest in protecting the public health and safety, but instead was motivated by its interest in protecting general contractors.

Despite the fact that both parties cite the standard of review and, presumably, understand that we only review the Board's decision rather than the circuit court's decision, both parties direct most of their arguments and brief space to a discussion of what the circuit court decided when reversing the Board's decision. This is completely incorrect, as our review is to the Board's decision rather than the circuit court's decision. *See Smith, supra.* The posture of this case on appeal is similar to that in *Smith.* In *Smith,* the State Police Commission ruled to terminate the employment of an Arkansas State Police Officer for violations of the code of conduct. On appeal to the circuit court from the Commission's decision, the circuit court reversed the Commission by finding that there was not substantial evidence to support the officer's termination. The circuit court also placed the officer on six-month suspension and directed that the officer be reinstated after the suspension was over. The Commission appealed to this court, and on review, we only looked to the Commission's decision to determine whether there was substantial evidence to uphold the Commission's decision and to decide whether the Commission's decision was arbitrary and capricious. We did not review the circuit court's decision or any findings or interpretations made by the circuit court.

This is important to note because the circuit court's decision in this case is based on statutory interpretation not included in or ruled upon in the Commission's decision. While the board members very briefly discussed the Board's duty to the public, there was no ruling on whether "misconduct" was connected to any statutory provision regarding the "public health and safety" as discussed by the circuit court. Rather, the Board found the following in its decision:

FINDINGS OF FACT

1. The Pegasus Renovation Company is a licensed contractor in the State of Arkansas.

2. The Pegasus Renovation Company entered bids on at least three separate projects and thereafter failed and refused, without good cause, to perform the work on said projects.

3. The Pegasus Renovation Company is guilty of misconduct in the conduct of the contractor's business in violation of Ark. Code Ann. § 17-25-308.

CONCLUSIONS OF LAW

The Pegasus Renovation Company is guilty of violating Section 17-25-308, "misconduct in the conduct of the contractor's business".

ORDER

1. The Board voted three to one with one abstention to revoke the license of The Pegasus Renovation Company.

Under the standard of review, we review this order and the entire record, giving the evidence its strongest probative force in favor of the agency's ruling, to ascertain whether there is substantial evidence to support the agency's decision or whether the agency's decision runs afoul of one of the other criteria set out in Ark. Code Ann. § 25-15-212(h). *Ward, Inc., supra*; *Carlson, supra.*; *Desiderata, supra.*

This case deals with the revocation of a contractor's license. Ark. Code Ann. § 17-25-308, entitled "Grounds for Revocation," is the statutory provision detailing the requirements for revocation of a contractor's license. This statute states:

> The board shall have the power to revoke the certificate of license of any contractor licensed under this chapter who is found guilty of any fraud or deceit in obtaining a license or for aiding or abetting any contractor or person to violate the provisions of this chapter or for gross negligence, incompetence, or misconduct in the conduct of the contractor's business.

Clearly, this statute lays out the only reasons the Board could revoke a contractor's license, and here the Board chose the last provision requiring "misconduct in the conduct of the contractor's business." "Misconduct" is not defined in the statutory provisions regarding contractor licensing. It also appears that this court has not defined the term in the context of revocation cases. However, "misconduct" is defined by *Black's Law Dictionary* as "a dereliction of duty; unlawful or improper behavior." *Black's Law Dictionary* 1013 (7th ed. 1999).[1]

While we do not review the circuit court's decision, for clarity's sake it should be noted that the circuit court referred to Ark. Code Ann. § 17-25-305 (Repl. 1995) to create a basis for reversal of the Board's decision. The circuit court determined that the Board should refer to the terms in this statute to determine whether a license should be revoked under Ark. Code Ann. § 17-25-308. The statute states in pertinent part:

> (a) The Contractors Licensing Board, in determining the qualifications of any applicant for an original license or any renewal license, shall, among other things, consider the following:
>
> (1) Experience;
>
> (2) Ability;
>
> (3) Character;
>
> (4) The manner of performance of previous contracts;
>
> (5) Financial condition;
>
> (6) Equipment;
>
> (7) Any other fact tending to show ability and willingness to conserve the public health and safety; and

[1] At the hearing before the Board, in briefs to the circuit court, and on appeal here, Pegasus attempts to argue that this statute is unconstitutional because it is vague, thus voiding the revocation statute. However, this argument is not preserved for review because Pegasus did not get a ruling on it from the Board, and, while it does not matter for our review, the circuit court specifically declined to rule on the issue of the constitutionality of the statute as well. It is well settled that to preserve arguments for appeal, even constitutional ones, the appellant must obtain a ruling below. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001); *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998). Accordingly, we must reject this argument without reaching the merits.

> (8) Default in complying with the provisions of this chapter or any other law of the state.

Ark. Code Ann. § 17-25-305(a). The clear language of the statute indicates that these elements should be used by the Board to decide when to issue an original license or renew a license. The statute does not state that they will be used to determine if "misconduct" has occurred when considering "revocation" of a license. Thus, by the plain language of the statute, it is clear that the circuit court erred in using these elements, particularly section (7), to determine that "misconduct" is determined by a contractor violating the "public health and safety." This statute and Ark. Code Ann. § 17-25-308 contain different provisions and requirements for different circumstances and should not be applied interchangeably.

As such, our standard of review requires us to only determine whether substantial evidence supports the Board's decision, and whether the decision is arbitrary, capricious, or characterized by an abuse of discretion. *McQuay, supra.* Substantial evidence is defined as:

> [V]alid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture. The challenging party has the burden of proving an absence of substantial evidence. To establish an absence of substantial evidence to support the decision the challenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. The question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made. It is the prerogative of the agency to believe or disbelieve any witness and to decide what weight to accord the evidence.

Smith, 338 Ark. at 362 (citations omitted). Pursuant to this definition, we cannot say that the Board erred in concluding that the conduct about which three general contractors complained amounted to "misconduct" under the revocation statute. The proof before the Board was undisputed. Pegasus failed to honor three bids, one of which was an actual contract, causing each general contractor to have to turn to another bidder at substantially higher cost. The letters written by Pegasus not only did not give any defendable reason for the failure to follow through on the bids, but failed in any way to attempt to work out an alternative option for resolution, particularly on the actual contract with Flynco, Inc. In

fact, Pegasus specifically stated in its letters to these general contractors that its decisions were "non-negotiable" and that it would "accept no calls" on the matters, thus eliminating any effective mode of communication to resolve the problems. Furthermore, at the hearing, the evidence offered by the Board's attorney went unchallenged by Pegasus, and Pegasus offered no evidence regarding any defense as to why it could not follow through on the bids or contract. Instead, the evidence only points to Pegasus's failure to honor its promises and contract or provide any defense for its failure to do so.

In *Smith, supra*, the court also outlined our rule regarding the determination of whether an administrative action is arbitrary and capricious. The court stated:

> Administrative action may be regarded as arbitrary and capricious where it is not supportable on any rational basis. *Partlow, supra.* To have an administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoning action, without consideration and with a disregard of the facts or circumstances of the case. *Partlow, supra.* We have stated that the requirement that administrative action not be arbitrary and capricious is less demanding than the requirement that it be supported by substantial evidence. *Beverly Enter.-Ark., Inc. v. Arkansas Health Servs.*, 308 Ark. 221, 824 S.W.2d 363 (1992). An action is not arbitrary and capricious simply because the reviewing court would act differently. *McQuay, supra.* Finally, we have held that once substantial evidence is found, it automatically follows that a decision cannot be classified as unreasonable or arbitrary. *Wright v. Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992).

Smith, 338 Ark. at 363. As noted, if we find that the Board's decision is supported by substantial evidence, then the decision cannot be arbitrary and capricious. Furthermore, the Board's decision is supported by a rational basis in that the Board is bound to regulate the profession, protecting not only the public at large, but even the general contractors who rely on these subcontractors for bids. A subcontractor who does not follow through, without a defendable reason, with the bids it makes can cause a domino effect of substantial proportion, perhaps jeopardizing immediate and future projects for that subcontractor itself, the general contractor, other subcontractors relying on the work from a project, and the customer. Clearly, despite Pegasus's argument that the Board was only protecting the general contractor, many people rely on one subcontractor's representation that it will follow through on its bids

and contracts. This is a rational basis for the Board to revoke a license.

The Saline County Circuit Court's decision is reversed. The Arkansas Contractor Licensing Board's decision is affirmed.

GLAZE, J., concurs.

IMBER, J., not participating.

TOM GLAZE, Justice, concurring. I join in the result reached by the majority because there is unquestionably substantial evidence to support the decision rendered by the Arkansas Contractors Licensing Board. However, I am unclear what standard of review the majority is using to reach its decision in affirming the Board.

Obviously, if the Board based its decision on substantial evidence (which we opine it did), the Board's decision could not be arbitrary, capricious, or an abuse of discretion. *E.g., see* the Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-212(h)(5) and (6); *see also Wright v. Arkansas State Plant Board*, 311 Ark. 125, 842 S.W.2d 42 (1992). If the issue on review was whether the Board's action was arbitrary, capricious, or an abuse of discretion (not substantial evidence), the review of the Board's ruling becomes a closer question. Then the question is whether the Board's action need only be supported on any rational basis. Someday the court needs to address these two different standards and decide which one applies when reviewing administrative agency decisions.

Carol ROSS *v.* STATE of Arkansas

CR 01-177 64 S.W.3d 272

Supreme Court of Arkansas
Opinion delivered January 10, 2002

Jeff Rosenzweig, for appellant.

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

W.H. "DUB" ARNOLD, Chief Justice. This is an appeal from a misdemeanor conviction for violation of the requirement to have a horse testing positive on the "Coggins" test

for infectious anemia to be destroyed, quarantined, or "permitted to a research facility." Appellant was fined $250. We affirm.

Buck, a horse belonging to appellant Carol Ross, tested positive for equine infectious anemia on the Coggins test for that illness. Arkansas Code Annotated § 2-40-813 (Supp. 1999) requires that a horse testing positive either be destroyed, or quarantined a quarter-mile from a public road or other horses if tested positive before 1997 (a grandfather clause applicable to Buck), or "permitted to a research facility." Appellant was tried in Perry County Municipal Court and convicted. She appealed *de novo* to Perry County Circuit Court and was convicted and sentenced to a $250 fine plus court costs. It is from that conviction that appellant brings the instant appeal.

The issue on appeal is whether Ark. Code Ann. § 2-40-813 is unconstitutionally vague and therefore void, in violation of the due process guarantees of the United States and Arkansas Constitutions, because of the failure to define "research facility" and the failure of the State to provide a mechanism for "permitting" a horse thereto. Appellant asserts that the statute at issue is void for vagueness, both facially and as applied, because it does not give sufficient guidance to persons on how to comply with its terms. The State asserts that the appellant lacks standing to challenge the constitutionality of the statute. We agree that appellant lacks standing.

In numerous cases, we have held that a litigant has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to that particular litigant. *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997); *Hamilton v. Hamilton*, 317 Ark. 572, 879 S.W.2d 416 (1994); *Medlock v. Fort Smith Serv. Fin. Corp.*, 304 Ark. 652, 803 S.W.2d 930 (1991). The general rule is that one must have suffered injury or belong to a class that is prejudiced in order to have standing to challenge the validity of a law. *Morrison, supra*; *Medlock, supra*. Stated differently, plaintiffs must show that the questioned act has a prejudicial impact on them. *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996) (holding that Tauber failed to prove that he was prejudiced during sentencing because he received only the required minimum sentence for a DWI, first offense); *Garrigus v. State*, 321 Ark. 222, 901 S.W.2d 12 (1995). Under these *general* standing requirements, appellant may arguably have standing. However, the test for determining whether a party has standing to challenge for *vagueness* is more specific.

When challenging the constitutionality of a statute on grounds of vagueness, the individual challenging the statute must be one of the "entrapped innocent," who has not received fair warning; if, by his action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993); *Burrow v. State*, 282 Ark. 479, 669 S.W.2d 441 (1984). In the present case, the appellant's actions fall squarely within the actions described by the statute in that after her horse tested positive on the Coggins test; it appears she failed to quarantine him. Moreover, the appellant never attempted to "permit" her horse to a "research facility," which is that part of the statute she contends is vague. As such, appellant has no standing to raise this constitutional argument, and we must, therefore, affirm the case.

Affirmed.

IMBER, J., not participating.

Carmen Hendrickson ATKINSON *v.* STATE of Arkansas

CR 01-097 64 S.W.3d 259

Supreme Court of Arkansas
Opinion delivered January 10, 2002

John C. Stratford, for appellant.

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

TOM GLAZE, Justice. Appellant, Carmen Atkinson, appeals the June 23, 2000, judgment and commitment order of the Lonoke County Circuit Court, convicting her of first-degree murder in the death of Joshua Smith and sentencing her to life in prison. Atkinson raises two points for reversal: (1) the trial court committed reversible error by not granting her motions for directed verdict; and (2) the trial court committed reversible error by failing to give Atkinson's requested instruction on second-degree murder. Neither issue has merit. In addition, the State, as required by Ark. Sup. Ct. R. 4-3(h), calls to our attention an error committed by the trial court that was neither abstracted nor briefed by Atkinson. The State argues the error was not prejudicial to Atkinson and, for that reason, is not reversible. We agree.

Joshua Smith had been Atkinson's long-time boyfriend and was the father of two of her children. In January of 1998, Atkinson had an affair with Richard Lackie, whereupon she and her children moved in with Lackie. Smith and Lackie had been friends and often went fishing, hunting, and drinking together. On August 18, 1998, Lackie and Smith went to a remote field, where they shot snakes, squirrels, and rabbits. On this occasion, Lackie then shot Smith in the back of the head with a shotgun, from a range of less than three feet. Lackie then took a shovel, covered Smith's body with some dirt, and left.

The next day, Atkinson and Lackie drove to a salvage yard in Little Rock, where Atkinson sold Smith's car for $100. In September of 1998, Atkinson went to the home of Smith's mother, Judy

Smith, and told her that Smith was out of town and that he was living with Atkinson and Lackie and wanted his mail transferred to their house. On October 1, 1998, Lackie was arrested at a bank after attempting to obtain cash from an automatic teller machine ("ATM") with Smith's ATM card. Atkinson had accompanied Lackie to the bank, but climbed into the driver's seat and drove away as Lackie was taken away in handcuffs. Atkinson subsequently parked the car at a gas station in Butlerville and had a friend, Regina Williams, drive her home. Atkinson was picked up at her home later in the day on October 1, 1998, and was then interviewed by the police.

Lackie ultimately entered into an agreement with the State to plead guilty to the murder of Smith, in exchange for a thirty-five year sentence, and to testify against Atkinson. Atkinson was arrested on June 25, 1999, for first-degree murder in the death of Smith, pursuant to Ark. Code Ann. § 5-10-102 (Repl. 1997).

At trial, Lackie testified that Atkinson had asked him to kill Smith. Specifically, Lackie testified that Atkinson, with whom he was living, told him, beginning in June 1998, she wanted Smith dead and regularly asked him to kill Smith. Lackie testified that Atkinson came up with the plan for him to take Smith and kill him where no one could find him so that she could have his social security income check. Atkinson was not present at the shooting. Lackie testified that he killed Smith after Smith threw sand in his eye during an argument. Lackie further testified that he decided to kill Smith just a second before it happened, and that he was under the influence of drugs at the time of the killing. Lackie also testified that he would not have killed Smith but for the fact that Atkinson had asked him to do so. Lackie stated that on the day that he killed Smith, Atkinson had suggested to him that it was "a good day to . . . get rid of [her] problem," which Lackie interpreted as meaning that it was a good day to kill Smith.

Anthony Hughes similarly testified that Atkinson, with whom he had been sexually involved since February of 1998, had asked him to kill Smith on one occasion in July or August of 1998. Hughes further testified that Atkinson had discussed killing Smith herself or talking Lackie into killing Smith on several other occasions. Hughes also testified that Atkinson had asked him if he knew where Atkinson could get a gun or if he could find her a gun, and, upon asking her why she wanted a gun, she responded, saying she was going to get rid of Smith.

Shawn Lackie, Richard Lackie's brother, testified that at a party on September 12, 1998, Richard Lackie had asked him to chop the head, arms, and legs off a body because there were tattoos on them, but that he had told Richard that he was crazy and walked off. Dr. Stephen Erickson, associate medical examiner at the state crime lab, testified that he identified Smith's body through dental records and that Smith's body had a tattoo on his left arm with "Carmen" and a tattoo on his lower leg with "Carmen," a heart, and "Josh." Shawn Lackie further testified that he told his father about Richard's request; the father told him that Shawn needed to report it to the police. Shawn Lackie then testified that he made a statement to Lonoke County officers, who set him up with a wire to try to get Richard Lackie to tell Shawn where Smith's body was located. Shawn Lackie testified that he went over to the home of Atkinson and Richard Lackie and asked Richard if he still wanted him to get rid of the body. Shawn testified that when Lackie said "head, arms, and legs" in front of Atkinson, she just started laughing. Shawn Lackie further testified that when he asked Atkinson and Richard if it was Smith, they looked at each other and just laughed and said, "No." Shawn stated that the next day, he and an undercover officer, who was wired, went to Richard Lackie's house and told Richard that the undercover officer was the person that was ready to do the job. Shawn testified that the undercover officer asked Richard where Smith's body was, and Richard gave them some directions, but the directions did not lead the police to a body.

Frank Sturdivant, a Lonoke County criminal investigator in the investigation into Smith's death, testified that Atkinson made an oral statement on October 1, 1998, in which she denied knowing the whereabouts of Smith's body. However, Sturdivant further testified that Atkinson's written statement rendered on October 1, 1998, gave a description of the geographical location of the place where the murder had taken place; Sturdivant went to that geographical location and subsequently located Smith's body. Sturdivant testified that Atkinson told him in her October 1, 1998, statement that, in September 1998, Richard Lackie had told her about Smith's death, but that in Atkinson's October 2, 1998, statement, which was transcribed from an audio tape, Atkinson told him that Richard Lackie told her about Smith's death on August 18, 1998.

Kandi Howell testified that she was present at a conversation after Atkinson was arrested in connection with Smith's homicide. Howell stated that when Atkinson was asked how she was able to

get one man to kill another for her, Atkinson responded by saying that she could get a man to kill for her with sexual favors.

Wanda Malone testified that Atkinson told her, when they were in prison together in 1998, that she made Richard Lackie kill Smith, and that Atkinson told Wanda that she told Richard to cut his head, arms, and legs off because of the tattoos.

Atkinson then testified in her own defense, and denied making the post-arrest statements to Howell and Malone. Atkinson further testified that she had discussed wanting Smith dead with both Richard and Anthony Hughes, but that she was never serious about it and that she never asked either Lackie or Hughes to kill Smith. Atkinson testified that she dropped the car off at the gas station in Butlerville because she did not want to be found with the car, but she did not know why. Finally, Atkinson testified that she wrote a letter to Richard Lackie, in which she referred to the solicitation of murder charge against her, and asked Richard if he would "destroy any kind of evidence for me that states I had something to do with this."

At the close of the State's case, Atkinson moved for a directed verdict. The trial court denied Atkinson's motion for a directed verdict, stating, "there were sufficient facts for the jury to consider and it would be a fact question for the jury." At the close of Atkinson's case, she renewed her motion for a directed verdict. The trial court again denied Atkinson's motion for a directed verdict, stating that there was "ample evidence presented to the jury, and it is a factual question."

Prior to the case being submitted to the jury, a discussion occurred between the State, Atkinson, and the trial court regarding Atkinson's request for jury instructions on lesser-included offenses. The State contended that the jury should not be instructed as to any lesser-included offenses. Atkinson disagreed, contending that she was entitled to a second-degree murder instruction because there was sufficient evidence to support a second-degree murder instruction. Specifically, Atkinson contended that because Richard Lackie testified that he shot Smith on a sudden impulse, Atkinson was entitled to a second-degree murder instruction because there was lack of premeditation. The trial court rejected Atkinson's argument, finding that it was not required to give a second-degree murder instruction in a case where, viewing the facts in the light most favorable to the defendant, there was no rational basis for a

verdict acquitting Atkinson of first-degree murder and convicting her of the included offense.

The case was then submitted to the jury, and, on June 22, 2000, the jury returned a guilty verdict against Atkinson and sentenced her to life in prison. The judgment and commitment order of the Lonoke County Circuit Court was filed on June 23, 2000. It is from this order that Atkinson brings this appeal. Of her two points on appeal, we first consider Atkinson's argument that there was insufficient evidence to convict her of first-degree murder because double jeopardy considerations require this court to consider a challenge to the sufficiency of the evidence prior to the other issues on appeal. *See, e.g., Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001).

Atkinson argues that the trial court erred in denying her motion for a directed verdict based upon the sufficiency of the evidence because (1) Atkinson did not have the intent or purpose to cause the death of Smith and did not cause his death; (2) Richard Lackie testified that he decided to kill Smith in the woods behind a church, and there was no testimony that Atkinson was there; (3) Atkinson was not an accomplice, in that she did not directly participate in the commission of the offense and did not have the purpose of promoting or facilitating the commission of the offense; and (5) the testimony of Richard Lackie had not been substantiated by any believable testimony. We disagree.

It is well settled that a motion for a directed verdict is a challenge to the sufficiency of the evidence. *E.g., Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001) (citing *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995)). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Smith, supra.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Id.* Only evidence supporting the verdict will be considered. *Id.*

Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999). Such a determination is a question of fact for the fact-finder to determine. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993). The credibility of witnesses is an issue for

the jury and not the court. *Phillips v. State*, 344 Ark. 453, 40 s.W.3d 778 (2001). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.* We will disturb the jury's determination only if the evidence did not meet the required standards, thereby leaving the jury to speculation and conjecture in reaching its verdict. *Id.* When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it. *Id.*

Viewing the evidence in the light most favorable to the State, we turn to the question whether there was substantial evidence to sustain Atkinson's conviction of first-degree murder under Ark. Code Ann. § 5-10-102.[1] The threshold issue in making this determination is whether Atkinson was an accomplice to the murder of Smith.

We have outlined the elements required to support accomplice liability on numerous occasions. Under Ark. Code Ann. § 5-2-403 (Repl. 1997), an accomplice is defined 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.

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[1] Ark. Code Ann. § 5-10-102 provides, in pertinent part:

> (a) A person commits murder in the first degree if:
>
> * * *
>
> (2) With a purpose of causing the death of another person, he causes the death of another person.

Id. Ark. Code Ann. § 5-2-202 (Repl. 1977) defines "purposely" as follows:

> (1) "Purposely." A person acts purposely with respect to his conduct or as a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.

Id.

> (b) When causing a particular result is an element of an offense, a person is an accomplice in the commission of that offense if, acting with respect to that result with the kind of culpability sufficient for the commission of the offense he:
>
> > (1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the result; or
> >
> > (2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the result; or
> >
> > (3) Having a legal duty to prevent the conduct causing the result, fails to make proper effort to do so.

Id.

One's status as an accomplice is ordinarily a mixed question of law and fact. *See, e.g., Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998) (citing *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). One's presence at the crime scene or failure to inform law enforcement officers of a crime does not make one an accomplice as a matter of law. *Id.* Relevant factors in determining the connection of an accomplice to a crime are the presence of the accused in proximity of a crime, the opportunity to commit the crime, and an association with a person involved in a manner suggestive of joint participation. *Id.* A defendant is an accomplice so long as the defendant renders the requisite aid or encouragement to the principal with regard to the offense at issue, irrespective of the fact that defendant was not present at the murder scene and did not directly commit the murder. *See Sumlin v. State*, 273 Ark. 185, 618 S.W.2d 372 (1981) (holding that it is irrelevant that Sumlin, who was in jail at the time of the murder, did not pull the trigger, if he aided, solicited, or encouraged his wife, Ruth Sumlin, in committing the murder).

In the present case, the evidence was more than sufficient for the jury to have found that Atkinson was an accomplice to the murder of Smith so as to sustain the jury's verdict convicting appellant of first-degree murder. Richard Lackie's testimony indicated that Atkinson asked him to kill Smith for her on numerous occasions. In addition, Lackie testified that he did kill Smith because Atkinson had asked him to do so. Further, Anthony Hughes's testimony indicated that Atkinson had told him that she had asked Richard Lackie to kill Smith for her. Moreover, while Atkinson testified that she was not serious about her request, she nevertheless

testified that she had discussed wanting Smith dead with both Lackie and Hughes. The abundant testimony indicating Atkinson's desire for Smith to be dead and her encouragement of Lackie to kill Smith for her is not only evidence of her purposeful intent to kill Smith, but is also evidence of her role as Lackie's accomplice, nothwithstanding the fact that she was not present at the shooting. *See Sumlin, supra.*

We further note that Ark. Code Ann. § 16-89-111(e) (Supp. 2001)[2] requires that the testimony of an accomplice be corroborated in order to convict a defendant of a felony. *See, e.g., Barnett v. State*, 346 Ark. 11, 53 S.W.3d 527 (2001). For purposes of § 16-89-111(e), corroborating evidence is sufficient if, without considering the accomplice's testimony, other evidence at trial independently establishes the offense and tends to connect the defendant with its commission. *Id.* The corroborating evidence does not have to be sufficient, standing alone, to sustain a conviction. *Id.* Moreover, corroboration can be provided by the acts, declarations, or testimony of the accused. *Id.*

In the present case, Atkinson's own statements acknowledging that she encouraged Lackie to kill Smith were sufficient to corroborate Lackie's testimony that she asked him to kill Smith. Moreover, Hughes testified that Atkinson had discussed killing Smith herself or asked Lackie to kill Smith for her. Based upon our standard of review of the sufficiency of the evidence, by which we defer to the jury as fact-finders regarding the credibility of the witnesses, we cannot say that the trial court erred in denying Atkinson's motion for directed verdict based upon the sufficiency of the evidence.

Atkinson next argues that the trial court erred by failing to give the jury her requested instruction on second-degree murder. Specifically, Atkinson argues that based on the testimony of Richard Lackie that he committed the murder at the last minute while he

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[2] Section 16-89-111(e) provides:

(1)(A) A conviction or an adjudication of delinquency cannot be had in any case of felony upon the testimony of an accomplice, including in juvenile court, unless corroborated by other evidence tending to connect the defendant or the juvenile with the commission of the offense.

(B) The corroboration is not sufficient if it merely shows that the offense was committed and the circumstances therefor.

Id.

was under the influence of drugs, the trial court committed reversible error when it declined to give Atkinson's requested instruction on a lesser-included offense of second-degree murder. As authority for her argument, Atkinson relies on *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980), where we held it to be error for the trial court not to instruct the jury on second-degree murder where there was evidence that on the date of the homicides Mr. Robinson was probably "confused," in a "dreamlike state," and had "an unusual lack of appreciation" for what had happened — evidence upon which the jury could have relied in order to find an absence of premeditation and deliberation. We disagree with Atkinson's application of *Robinson* holding to the facts of this case.

We have acknowledged that it is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by the slightest evidence. *Chapman v. State*, 343 Ark. 643, 38 S.W.3d 305 (2001). However, the trial court may refuse to offer a jury instruction on an included offense when there is no rational basis for a verdict acquitting the defendant of the charged offense and convicting him of the included offense. *Chapman, supra* (citing Ark. Code Ann. § 5-1-110(c) (Repl. 1977)). Moreover, it is not error for the trial court to decline to give the proffered instruction on the lesser offense when the evidence clearly shows that the defendant is either guilty of the greater offense charged or innocent. *Id.* In cases in which a defendant makes a claim of innocence, no rational basis exists to instruct the jury on a lesser-included offense because the jury need only determine whether the defendant is guilty of the crime charged. *Id.*

In the present case, no rational basis existed to instruct the jury on second-degree murder. First, as we discussed in our analysis of the sufficiency of the evidence, we note that Atkinson was an accomplice to a murder where Richard Lackie testified that Atkinson had asked him to kill Smith. This testimony was corroborated by Atkinson's own testimony. Second, even though Lackie testified that he decided to shoot Smith at the last second while he was under the influence of drugs, Lackie also testified that Atkinson had asked him to kill Smith on numerous occasions and that he would not have killed Smith but for Atkinson asking him to do so. Third, medical evidence showed that Lackie shot Smith in the back of the head from a distance of three feet or less, which is indicative of his purposeful intent to commit murder. Finally, in light of Atkinson's defense of innocence, no rational basis existed to instruct the jury

on a lesser-included offense, because the jury needed only to determine whether Atkinson was guilty or innocent of first-degree murder. Therefore, we cannot say that the trial court erred in declining to instruct the jury on second-degree murder, and we affirm the trial court on this point.

Finally, this court has reviewed the transcript of the record in this case in accordance with Ark. Sup. Ct. R. 4-3(h).[3] That rule requires, in cases in which there is a sentence to life imprisonment or death, that all prejudicial errors be reviewed in accordance with Ark. Code Ann. § 16-91-113(a) (1987). Pursuant to its obligation under Rule 4-3(h), the State examined the transcript and appellant Atkinson's abstract to ensure that all rulings adverse to her have been abstracted or supplementally abstracted for our review. The State certified that it briefed all issues raised by Atkinson on appeal and found one error on the part of the trial court involving the trial court's communication with the jury, which was neither abstracted nor briefed by Atkinson.

During the jury's deliberation in the guilt phase, the jury sent a note to the trial court containing two questions: "May we please see the letters written by Carmen to Richard in jail? Also statements to police by Carmen on October One and October Two." After a discussion between the trial court and counsel for the parties, the trial court stated the following: "I'm just going to say that the letters and statements, the written forms, are not in evidence. The spoken word is what they have to consider." When the court asked whether anyone objected to that answer, counsel for the prosecution responded, "no," and counsel for appellant responded, "It's a correct statement of the law."

The record lodged by Atkinson does not reflect whether, or in what manner, the trial court's answer was actually communicated to the jury. On September 6, 2001, however, we granted the State's motion to remand this case to the trial court for it to settle the record concerning whether, and in what manner, the trial court's

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[3] Ark. Sup. Ct. R. 4-3(h) provides:

When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant in accordance with Ark. Code Ann. § 16-91-113(a). To make that review possible, the appellant must abstract all rulings adverse to him or her made by the trial court on all objections, motions, and requests made by either party, together with such parts of the record as are needed for an understanding of each adverse ruling. The Attorney General will make certain and certify that all of those objections have been abstracted and will brief all points argued by the appellant and any other points that appear to involve prejudicial error.

response to the jury's questions was communicated to the jury. In accordance with our writ of *certioriari*, the trial court held a hearing to settle the record on September 27, 2001, at which Atkinson and her counsel, as well as the prosecuting attorney and deputy prosecuting attorney, were present.

Arkansas Code Annotated § 16-89-125(e) (1987) provides that trial courts must call juries into open court in order to communicate with them when they have a query during deliberations. Noncompliance with this statutory provision gives rise to a presumption of prejudice, and the State has the burden of overcoming that presumption. *Rhodes v. State*, 290 Ark. 60, 716 S.W.2d 758 (1986); *Clayton v. State*, 321 Ark. 602, 906 S.W.2d 290 (1995). The failure of a defendant and his counsel to be present when a substantial step, such as the judge's answering questions of law in the jury room is taken in defendant's case results in violation of the defendant's fundamental right to be present at any stage of the criminal proceeding is critical to the outcome. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997). However, this court has held that strict compliance with the rule was waived where attorneys went with the judge to the jury room, everything that happened was reported in the record, and there was no possibility of prejudice. *Martin v. State*, 254 Ark. 1065, 497 S.W.2d 268 (1973). In *Goff, supra*, on the other hand, this court held that strict compliance with § 16-89-125(e) had not been waived where the State failed to show what occurred during a trial judge's visit to the jury room.

While the trial court here violated § 16-89-125(e) by communicating with the jury other than in open court, reversal of Atkinson's conviction here, in these particular limited circumstances, is not warranted, because the State clearly rebutted the presumption of prejudice which arose from the violation. The trial court found, without objection by Atkinson, that its communication with the jury was limited to answering the jury's questions via a note, using the language agreed upon by the parties. The record clearly reflects the substance of the trial court's communication with the jury, and the court answered the jury's questions in the manner agreed upon by the parties in open court. Here, the trial court never had any contact with the jury during deliberations, and Atkinson fully agreed with the court and State regarding the answer

written on the same note on which the jury had written its questions.[4] In short, the State clearly rebutted the presumption of prejudice which arose from any violation of § 16-89-125(e). To reverse this case on these facts would place form over substance and would in effect adopt a brightline rule which would require an automatic reversal merely by showing § 16-89-125(c) had been violated. That is not the rule. Here, the court's communication with the jury was shown not to be prejudicial to Atkinson, and Atkinson made no objection to the contrary. Thus, we affirm the trial court on all points.

BROWN and THORNTON, JJ., dissent.

IMBER, J., not participating.

RAY THORNTON, Justice, dissenting. In its analysis of the Rule 4-3(h) error that was brought to our attention by the State, the majority today has concluded that the State has overcome the presumption of prejudice that arose from the trial court's violation of Ark. Code Ann. § 16-89-125(e) (1987) when it communicated its answer to the jury's questions by means of a note without first bringing the jury into the courtroom. While I agree that the appellant's other points on appeal have no merit, I cannot agree with the majority's conclusion regarding the Rule 4-3(h) error. For this reason, I respectfully dissent.

The majority correctly acknowledges the well-established line of cases where we have held that strict compliance with Ark. Code Ann. § 16-89-125(e) may be waived where the attorneys go with the judge to the jury room, everything that happens is reported in the record, and, thus, there is no possibility of prejudice. *See Bledsoe v. State*, 344 Ark. 86, 39 S.W.3d 760 (2001) (citing *Martin v. State*, 254 Ark. 1065, 497 S.W.2d 268 (1973)). However, I am unable to agree with an extension of this exception to our strict compliance rule to the circumstances of this case.

Unlike the cases in which we have held that strict compliance had been waived where the attorneys go with the judge to the jury room and everything that happens is reported in the record, the trial judge and the attorneys here did not enter the jury room. In addition, while the trial court and the parties orally agreed to the language proposed for the note, and the discussion of such proposed

[4] Apparently, the note had been lost.

language was reflected in the record, the written note is not included in the record because it has since been lost. The exact language of the note is not part of the record. Instead, we are told what the trial court intended to convey by means of a note. Additionally, what occurred in the jury room when the trial court's response was received by the jury was not reflected in the record. *See Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997). There is nothing in the record to indicate the language actually used in the note because because no court reporter was present in the jury room to record the reading of the trial court's communication with the jury. In *Tarry v. State*, 289 Ark. 193, 710 S.W.2d 202 (1986), we held that the State had not met its burden of overcoming the presumption of prejudice by showing what occurred when the trial judge answered the jury's questions because the record was incomplete regarding the trial judge's actual communication with the jury. *Id.* As in the present case, the court reporter in *Tarry*, *supra*, did not record what happened when the trial judge entered the jury room to answer the jury's questions. *Id.*

Finally, the State's reliance upon *Houston v. State*, 41 Ark. App. 67, 848 S.W.2d 430 (1993) is misplaced. In that case, the court of appeals held that the presumption of prejudice had been rebutted where the record clearly reflected what occurred when the jury sent the note to the judge, as well as the judge's response, the note itself had been preserved for the record, and the trial court's communication with the jury occurred after the jury had already finished its deliberations on guilt. *Id.* Here, unlike in *Houston*, *supra*, the note has not been preserved as part of the record and the jury was still in the midst of deliberations in the guilt phase when the trial court sent its response to the jury's questions by means of a note.

I am unwilling to accept that the presumption of prejudice arising from a violation of the statute prohibiting a trial court's communication with the jury outside the confines of the courtroom may be cured by the trial court's effort to reconstruct the language that a missing note contained. The creation of such an exception to the rule established by statute will open the door to allow unrecorded communication with a jury that is in the midst of reaching a verdict. I cannot find that the State has rebutted the presumption of prejudice where the offending note is not available for our review. In my opinion, passing notes back and forth simply does not comply with the statutory requirement that all communication with a jury must be made of record in open court with all

parties present. I do not think we should extend the narrow exception to full compliance with the statute to fit the circumstances of this case.

In reaching my conclusion, I am mindful of the policy reasoning behind Ark. Code Ann. § 16-89-125(e), which we discussed in *Davlin v. State*, 313 Ark. 218, 853 S.W.2d 882 (1993). We stated:

> The following quotation, which stresses the importance of strict compliance with section 16-89-125(e)'s predecessor, bears repeating here:
>
> > The procedure set out in the statute is not difficult to follow and places no burden at all on the trial court or attorneys, and places very little burden on the jury. It simply recognizes that the courtroom, where the trial is being conducted, is the proper place for the giving of all instructions to the jury in open court and where all the jury and anyone else interested, including the defendant, can hear the instructions in the context given. The defendant, as well as the public, is entitled to know what goes on in the courtroom, but they are not entitled to know what goes on in the jury room. We can think of many good reasons why a jury should receive all instructions in the public forum of the courtroom and we can think of no good reason why it should not. To strictly follow the simple procedure as set out in the statute, would avoid such difficulties that have arisen in th[is] . . . case. . . .
>
> *Martin v. State*, 254 Ark. 1065, 497 S.W.2d 268 (1973) (referring to Ark. Stat. Ann. § 43-2139 (Repl. 1964), identical in all respects to section 16-89-125(e)).

Davlin, supra. Trial in open court is a fundamental right, and a contemporaneous objection is not required. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997).

Here, the trial court failed to follow the statute and erred in communicating with the jury by means of a note. The State failed to rebut the presumption of prejudice arising from that error because the note is not available for our review, and I would conclude that the trial court's violation of Ark. Code Ann. § 16-89-125(e) must be deemed prejudicial to appellant. I would reverse and remand the case to the trial court.

As Justice George Rose Smith wrote in *Tarry*:

> Although we have not held, and do not intend to hold, that this right of defendant cannot be waived, we take this means of giving notice that we will carefully scrutinize every case tried after the date of our decision in *Martin* (July 23, 1973) to determine whether there has been a waiver of defendant's right to have such proceedings held only in open court, and that *all reasonable doubts will be resolved by us against waiver.*

Tarry, supra (citing *Jackson v. State*, 256 Ark. 406, 507 S.W.2d 705 (1974); *Andrews v. State*, 251 Ark. 279, 472 S.W.2d 86 (1971)) (emphasis added).

Because I cannot agree with the majority's conclusion that the State has overcome the presumption of prejudice that arose from the trial court's violation of the statute prohibiting the trial court from communicating with the jury outside the presence of the courtroom, I respectfully dissent.

I am authorized to state that Justice BROWN joins in this dissent.

STATE of Arkansas *v.* Misty Renee PRUITT

CR 01-776 64 S.W.3d 255

Supreme Court of Arkansas
Opinion delivered January 10, 2002

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellant.

Paul Petty, for appellee.

DONALD L. CORBIN, Justice. This is an appeal by the State of Arkansas from an order of the White County Circuit Court granting Appellee Misty Renee Pruitt's motion to suppress. For reversal, the State raises several allegations of error regarding the trial court's finding that a search of Pruitt's vehicle was illegal, thus suppressing evidence found during the search and a subsequent statement made by Appellee. As is required by Ark. R. App. P.—Crim. 3(c), the State alleges that error has been committed to the prejudice of the State and that the correct and uniform administration of the criminal law requires review of this appeal. We disagree and dismiss the appeal.

The record reflects that on the evening of December 8, 2000, a gold 1999 Chrysler Sebring convertible pulled into a parking lot of a convenience store at the intersection of Highways 367 and 385 in Judsonia. Present in the parking lot were Kensett Police Officer Terry Evans and White County Deputy Mike Rogers. The driver of the Sebring, Christy Ireland, pulled up behind the officers and flashed the car's headlights. Ireland and a rear-seat passenger, James Ball, then got out of the car while arguing with one another. Pruitt, seated in the front passenger seat initially remained in the vehicle. Ireland reported to the officers that Ball had attempted to grab the car's steering wheel while she was driving. Deputy Rogers took Ball aside, while Officer Evans radioed Sergeant Robert Parsons Jr., of the Judsonia Police Department, for assistance.

According to Parsons, when he arrived on the scene, Pruitt was still sitting in the vehicle, but then voluntarily exited the vehicle. Evans inquired if there was any contraband in the car, and the women replied, "No." Parsons then asked the women if they had used methamphetamine, and they admitted to having used it within the last twenty-four hours. Thereafter, Parsons requested consent to search the vehicle from Ireland. Even though both officers admitted that they did not know who owned the vehicle, at no point prior to the search did either officer inquire as to who owned it. Instead, Parsons simply presented Ireland with a consent to search form, and she signed it. Evans and Parsons both testified that Pruitt was

present when they requested the consent, but that she never indicated that she was the owner of the car, nor objected to the search.

During the search, Evans discovered a black purse on the front passenger floorboard. Without asking who owned the purse, Evans opened it and found two white rocks in a plastic bag and a second plastic bag with a powder residue on it. The rocks were identified as methamphetamine. Parsons discovered a Wal-Mart sack that contained a light bulb with a coke bottle cap attached to it and a glass tube stuck down through the cap. Inside the bulb was a burned white rock, also methamphetamine. He also discovered a Bearcat scanner in the rear of the car. Parsons admitted that neither he nor Evans looked at the vehicle's registration papers that were located in the car's glove box until the end of the search, after the drugs had already been discovered.

Pruitt was placed under arrest and transported to the police department in Judsonia. After being advised of her *Miranda* rights, Pruitt provided a written statement admitting that Ball had given her the methamphetamine in exchange for her driving him to Bald Knob. Parsons then conducted a taped interview with Pruitt who confirmed her written version of events. During this interview, Parsons also apologized to Pruitt for failing to ask for her consent to search the vehicle. Pruitt was charged with possession of a Schedule II controlled substance, namely methamphetamine, with intent to deliver, and use of a communication facility.

She subsequently filed a motion to suppress the evidence seized as a result of the search of her car, on the basis that the officers did not obtain a valid consent to search. Pruitt also requested that her subsequent confession be suppressed as the fruit of an illegal search. The State filed no response to the suppression motion, and the circuit court held a hearing on the motion on April 4, 2001. Neither side made any opening statements. Evans, Rogers, and Parsons each testified, as well as Pruitt. At the conclusion of the hearing, the trial court indicated that closing statements were unnecessary and then proceeded to rule from the bench, granting Pruitt's motion to suppress the evidence and her statement.

The State then requested permission to file a motion for reconsideration and supporting brief. The court granted this request, and the State filed its motion on April 11, 2001. In its motion for reconsideration, the State argued that Ireland, as the driver of the vehicle, had apparent authority to grant consent to the search, particularly in light of the fact that Pruitt stood silently by and failed

to object to the search. The State averred that the officers' reliance on this authority was reasonable and held in good faith, thus rendering the consent valid. The State argued in the alternative that any violation of Pruitt's constitutional rights was minimal, and Pruitt failed to demonstrate that her Fourth Amendment rights were violated.

After considering the State's motion and Pruitt's response, the trial court entered a written order affirming its original grant of Pruitt's motion to suppress. Specifically, the trial court stated:

> Arkansas Rules of Criminal Procedure 11.2(b) provides that the registered owner or a person in apparent control of a vehicle may grant consent to search the vehicle. While many times the apparent control of the vehicle is in the hands of its driver, that is not always the case. In the case at hand, Officer Parsons obtained a consent to search from Christie [sic] Ireland, a person whom he never observed operate or control the vehicle. While one can assume that Officer Evans told Officer Parsons that Ms. Ireland had driven the vehicle earlier, when Officer Parsons arrived at the scene, the defendant, Misty Renee Pruitt, was the only person inside the vehicle. In the Court's opinion Officer Parsons did not in good faith act reasonably when he did not bother to ask any of the three persons at the scene who was the owner of the vehicle in question. When Officer Parsons attempted to obtain a valid consent to search, it was necessary for him to simply ask who was the owner of the vehicle and if that person were available to obtain a consent from such owner.

The trial court also ruled that Evans did not act in good faith when he searched the purse found on the passenger's side of the vehicle, particularly when he knew Pruitt had been seated on that side of the car. Finally, the trial court found that the language of the written consent signed by Ireland did not extend to a search of a closed container. From that order, comes the instant appeal.

The threshold issue in the instant matter is whether the State has properly brought this appeal pursuant to Rule 3(c). Pruitt contends that this is not an appealable matter because it does not involve the correct and uniform administration of the law. It is well settled that there is a significant difference between appeals brought by criminal defendants and those brought on behalf of the State. The former is a matter of right, whereas the latter is neither a matter of right, nor derived from the Constitution, but rather is

only granted pursuant to the confines of Rule 3. *See State v. McCormack*, 343 Ark. 285, 34 S.W.3d 735 (2000); *Bowden v. State*, 326 Ark. 266, 931 S.W.2d 104 (1996). The limited instances in which the State may bring appeals was set forth in *State v. Guthrie*, 341 Ark. 624, 19 S.W.3d 10 (2000). There, this court stated:

> 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).

Id. at 628, 19 S.W.3d at 13 (quoting *State v. Stephenson*, 330 Ark. 594, 595, 955 S.W.2d 518, 519 (1997)). Stated differently, this court will only accept appeals by the State when our holding will establish a precedent that will be important to the correct and uniform administration of justice. *Stephenson*, 330 Ark. 594, 955 S.W.2d 518; *State v. Hart*, 329 Ark. 582, 952 S.W.2d 138 (1997); *State v. Rice*, 329 Ark. 219, 947 S.W.2d 3 (1997).

In determining the propriety of an appeal by the State, this court must determine whether the issue subject to appeal is one involving interpretation of a rule or statute, as opposed to one involving the application of a rule or statute. *Guthrie*, 341 Ark. 624, 19 S.W.3d 10. This court has consistently held that an appeal that raises the issue of application, rather than interpretation, of a statutory provision does not involve the correct and uniform administration of the criminal law. *McCormack*, 343 Ark. 285, 34 S.W.3d 735; *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995). Moreover, where the resolution of the issue on appeal turns on the facts unique to that case, it cannot be said that the appeal is one requiring interpretation of our criminal rules with widespread ramifications. *See State v. Gray*, 330 Ark. 364, 955 S.W.2d 502, *supplemental opinion on denial of reh'g*, 330 Ark. 368-A, 958 S.W.2d 302 (1997); *Harris*, 315 Ark. 595, 868 S.W.2d 488.

In the instant appeal, the State does not allege that the trial court misinterpreted the law; rather, the State argues that the

trial court erred in finding that the officers did not act reasonably in relying on Ireland's consent. A review of the trial court's order reflects that he properly considered the law regarding warrantless searches as set forth in Ark. R. Crim. P. 11.1 and 11.2. In order to make such a determination, the trial court was required to review the facts and circumstances surrounding the search of the vehicle and purse. It is well settled that this court will not accept an appeal by the State where the trial court has acted within its discretion after making an evidentiary decision based on the particular facts of the case or even a mixed question of law and fact. *McCormack*, 343 Ark. 285, 34 S.W.3d 735; *Guthrie*, 341 Ark. 624, 19 S.W.3d 10. The instant appeal is not one involving an erroneous interpretation of Rules 11.1 and 11.2; rather, the State's argument is premised on the notion that the trial court misapplied the provisions of these rules to the facts and circumstances in this case. In *Guthrie*, this court refused to take on the role of fact-finder or to engage in a search for error. We again refuse to do so in the instant matter.

Finally, we disagree with the State's assertion that the policy of ensuring the correct and uniform administration of justice requires us to consider this appeal, because Fourth Amendment search and seizure issues are frequently the subject of litigation. The State's theory ignores the fact that the validity of this search was a fact-intensive matter, and will have limited precedential effect. The facts present in this case are not facts commonly shared in other cases involving vehicle searches. Stated differently, a review of this appeal will not have widespread ramifications on the interpretation of our criminal law. Accordingly, the State's appeal of this issue does not fall within the confines of Rule 3, and is therefore not properly before us.

Appeal dismissed.

GLAZE, J., dissents.

IMBER, J., not participating.

TOM GLAZE, Justice, dissenting. Once again, this court sidesteps review of a search and seizure case that specifically involves the interpretation and application of its rules, Rules 11.1 and 11.2 of the Rules of Criminal Procedure. Our Rule 3(c) of the Arkansas Rules of Appellate Procedure provides for an appeal by the State when the correct and uniform administration of the criminal rules requires review by this court. Here, not only are Rules 11.1 and 11.2 in issue here, but also in question is the purely

legal issue of "probable cause." *See Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989); *see also State v. Sullivan*, 340 Ark. 315, 11 S.W.2d 526 (2000) (where we granted review where appeal involved the constitutional safeguards applicable to traffic stops and the misinterpretation and misapplication of Ark. R. Crim. P. 16.2), *but see State v. Guthrie*, 341 Ark. 624, 16 S.W.3d 10 (2000) (where in a split decision, this court in a search and seizure case similar to *Sullivan*, refused the State a review under Ark. R. Crim. P. 3(c)). In my view, the majority court was wrong in *Guthrie*, and it is wrong here, as well.

Joshua BROWN *v.* STATE of Arkansas

CR 01-1196 64 S.W.3d 274

Supreme Court of Arkansas
Opinion delivered January 10, 2002

Charles Duell, Chief Public Defender, for appellant.

No response.

PER CURIAM. Appellant Joshua Brown, by and through his attorney, Charles Duell, has filed a motion to file a belated brief and for an extension of time. The motion reflects that Appellant was convicted of rape and first-degree murder and sentenced to

twenty-five years' and life imprisonment, respectively. The judgment and commitment order was filed on April 4, 2001, and an amended order was filed on April 5, 2001. The notice of appeal was timely filed on May 2, 2001, the record was timely lodged with this court's clerk on November 5, 2001. Appellant's brief was due to be filed on December 17, 2001.

To this date, no brief has been filed on Appellant's behalf. Mr. Duell admits that he had notice of the brief's due date, and he accepts full responsibility for failing to timely file the brief. He further requests an additional ninety days in which to prepare and file Appellant's brief. We find that such error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See Johnson v. State*, 337 Ark. 609, 990 S.W.2d 553 (1999) (*per curiam*); *Harkness v. State*, 264 Ark. 561, 572 S.W.2d 835 (1978). We thus grant the motion and order that Appellant's brief be filed with this court's clerk on or before April 10, 2002.

A copy of this *per curiam* opinion will be forwarded to the Committee on Professional Conduct. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*).

Motion granted.

IMBER, J., not participating.

Lloyd CALLIE *v.* STATE of Arkansas

CR 01-1351 64 S.W.3d 274

Supreme Court of Arkansas
Opinion delivered January 10, 2002

Walker, Shock & Cox, P.L.L.C., by: *James O. Cox*, for appellant.

No response.

PER CURIAM. Appellant Lloyd Callie, by and through his attorney, has filed a motion for rule on clerk. His attorney, James O. Cox, states in the motion that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by an attorney for a criminal defendant, is good cause to grant the motion. *See In Re Belated Appeals in Criminal Cases,* 265 Ark. 964 (1979) (*per curiam*).

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

IMBER, J., not participating.

Steven EDWARDS *v.* STATE of Arkansas

CR 00-1452 64 S.W.3d 706

Supreme Court of Arkansas
Opinion delivered January 10, 2002

W. Ray Nickle, for appellant.

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

PER CURIAM. Appellant pleaded guilty to murder in the first degree and was sentenced to forty years' imprisonment. Pursuant to Ark. Code Ann. § 16-93-611 (Supp. 1997), appellant would not be eligible for parole until he had served at least seventy percent of his sentence. During the 1999 legislative session, the Arkansas General Assembly amended § 16-93-611 to allow circuit courts the discretion to waive the seventy percent requirement in some cases in which the defendant was a juvenile at the time of the offense. *See* Ark. Code Ann. § 16-93-611 (Supp. 1999). Appellant

filed a petition seeking to have the requirement waived in his case. The State filed a motion to dismiss arguing that because two years had passed since entry of the sentence, the circuit court was without jurisdiction to hear appellant's petition. The circuit court agreed and granted the State's motion. On appeal, appellant argues that the circuit court erred in dismissing the petition, because § 16-93-611, as amended, creates an exception to the limitations for modifying a sentence set by Ark. Code Ann. § 16-90-111[1] and that § 16-93-611 should apply retroactively.

Arkansas Code Annotated § 16-93-611 provides:

> (a) Notwithstanding any law allowing the award of meritorious good time or any other law to the contrary, any person who is found guilty of or who pleads guilty or nolo contendere to murder in the first degree, § 5-10-102 . . . shall not, except as provided in subsection (b) of this section, be eligible for parole or community punishment transfer until the person serves seventy percent (70%) of the term of imprisonment, including a sentence prescribed under § 5-4-501, to which the person is sentenced. . . .
>
> (b) The sentencing judge, in his discretion, may waive subsection (a) of this section under the following circumstances:
>
> > (1) The defendant was a juvenile at the time of the offense;
> >
> > (2) The juvenile was merely an accomplice to the offense; and
> >
> > (3) The offense occurred on or after July 28, 1995.

According to appellant, the 1999 amendment to § 16-93-611 was proposed to specifically address appellant's case and others similarly situated by granting the trial court the discretion to waive the seventy percent requirement. Appellant claims that under the limited circumstances set forth in subsection (b), the trial court is reinvested with jurisdiction to consider a waiver of the requirement beyond the "120 day (90 day) limit."

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[1] Arkansas Code Annotated § 16-90-111(b) (Supp. 1997) allowed a circuit court to reduce a sentence within 120 days after the sentence was imposed. In 1999, the Arkansas General Assembly lowered that limitation to 90 days. *See* Ark. Code Ann. § 16-90-111(b) (Supp. 1999). In his brief, appellant refers to the limitation as being "120 days (90 days)." However, appellant's petition was filed beyond the time period under either version.

In an attempt to bolster his argument, appellant called State Senator Mike Bearden to testify to the legislative intent of the amendment, but Senator Bearden's testimony should not have been admitted into evidence. We have specifically held that the testimony of legislators with respect to their intent in introducing legislation is clearly inadmissible. *Yamaha Motor Corp. v. Richard's Honda Yamaha*, 344 Ark. 44, 38 S.W.3d 356 (2001), citing *Board of Trustees v. City of Little Rock*, 295 Ark. 585, 750 S.W.2d 950 (1988). In short, if the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation. *Langley v. State*, 343 Ark. 324, 325, 34 S.W.3d 364, 365 (2001). Aside from Senator Bearden's testimony, appellant offers nothing more than the conclusory allegation that § 16-93-611 creates an exception to the limitations set out in § 16-90-111. Appellant cites no authority or language in either statute supporting the allegation.

The plain language of § 16-93-611 allows a circuit court discretion when deciding whether to waive the seventy percent requirement. According to the plain language of § 16-90-111, a court may not exercise that discretion outside of the limitations set by the General Assembly. Moreover, there is no mention of § 16-90-111 in the language of § 16-93-611. Because appellant filed his petition outside of the period set out in § 16-90-111, the circuit court was correct in dismissing his petition.

Finally, there is no language in § 16-93-611 that expressly reflects the General Assembly's intent to make the statute retroactive, as appellant claims. Although Senator Bearden testified to such intent, that is not sufficient. Only when the General Assembly expressly provides, will a statute be applied retroactively. *E.g., State v. Ross*, 344 Ark. 364, 368, 39 S.W.3d 789, 791 (2001).

Affirmed.

IMBER, J., not participating.

Tony PENNINGTON *v.* STATE of Arkansas

CR 01-1352 64 S.W.3d 708

Supreme Court of Arkansas
Opinion delivered January 10, 2002

Walker, Shock & Cox, P.L.L.C., by: *James O. Cox*, for appellant.

No response.

PER CURIAM. Appellant Tony Pennington, by and through his attorney, has filed a motion for rule on clerk. Attorney, James O. Cox, states in the motion that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by an attorney for a criminal defendant, is good cause to grant the motion. *See In Re Belated Appeals in Criminal Cases,* 265 Ark. 964 (1979) (*per curiam*).

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

IMBER, J., not participating.

Phillip WILLIAMS *v.* STATE of Arkansas

CR 01-1170 65 S.W.3d 401

Supreme Court of Arkansas
Opinion delivered January 10, 2002

Thomas B. Devine, III, for appellant.

No response.

PER CURIAM. Thomas B. Devine, III, as a state-salaried, full-time public defender, was appointed by the trial court to represent appellant Phillip Williams, an indigent defendant, in this criminal case. Williams was convicted and sentenced to life imprisonment in the Arkansas Department of Correction. Mr. Devine timely filed a notice of appeal from the judgment of conviction and lodged the appellate record with the Supreme Court Clerk.

Mr. Devine now asks this court to relieve him as appellant's counsel and to appoint new counsel. Mr. Devine cites *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000), that public defenders cannot be paid separately to file appeals.[1] Accordingly, we grant Mr. Devine's motion to be relieved for good cause shown. Mr. Tim Cullen will be substituted as appellant's attorney in this matter.

IMBER, J., not participating.

[1] Act 1370 of 2001 provides that part-time public defenders may receive compensation from appellate courts.

Jimmy Don WOOTEN *v.* STATE of Arkansas

CR 01-986 64 S.W.3d 708

Supreme Court of Arkansas
Opinion delivered January 10, 2002

Alvin Schay, for appellant.

No response.

PER CURIAM. Appellant, Jimmy Don Wooten, by and through his attorney, Alvin Schay, has filed a motion for belated appeal, which will be treated as a motion for rule on the clerk. Appellant's attorney states in the motion that he was appointed to represent appellant in a Rule 37 appeal in a captial case, and the original due date for the abstract and brief was November 13, 2001. He obtained a thirty-day extension to December 13, 2001; and, although he intended to seek another thiry-day extension, he failed to do so by December 13, 2001.

Mr. Schay 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.*

IMBER, J., not participating.

Marcel Wayne WILLIAMS *v.* STATE of Arkansas

CR 00-822 64 S.W.3d 709

Supreme Court of Arkansas
Opinion delivered January 17, 2002

William A. McLean, for appellant.

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

W.H. "DUB" ARNOLD, Chief Justice. Marcel Williams was found guilty of capital murder and sentenced to death. We affirmed his conviction and sentence in *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999). Williams subsequently filed a petition for postconviction relief in the trial court pursuant to Arkansas Rule of Criminal Procedure 37, alleging ineffective assistance of counsel. The trial court denied the petition. On appeal, Williams asserts that the trial court erred in finding that he received effective assistance of counsel in the penalty phase of his jury trial. He contends that his trial counsel was ineffective for failing to introduce mitigation evidence concerning his troubled youth and asserts that the trial court should have vacated his death sentence and ordered a new sentencing phase of the trial. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(8). We find no error and affirm.

In considering Williams's appeal, it is unnecessary to repeat all the facts and evidence previously detailed in *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999). The record reflects that the trial court appointed two attorneys to represent Williams in his original trial: Herbert Wright and Phillip Hendry. The two attorneys recruited the assistance of Bill James, who also participated in Williams's defense but was not appointed by the court. After a jury trial, Williams was found guilty of all charges and convicted of the capital murder of Stacy Errickson. Following the sentencing phase of his trial, Williams was sentenced to death by lethal injection.

At his Rule 37 hearing, Williams asserted only one ground for relief. He alleged that his trial counsel rendered ineffective assistance in the penalty phase of his trial by failing to properly investigate mitigating evidence and present such evidence to the jury during the sentencing phase of his trial. The record reflects that all three members of Williams's trial counsel testified it was their strategy to gain credibility with the jury, in the face of overwhelming evidence of Williams's guilt, by admitting guilt to the jury and seeking mercy through a punishment of life without parole. In an effort to obtain potentially mitigating evidence, counsel ordered a mental evaluation of Williams and reviewed his school, medical, and prison records. The potentially mitigating evidence of which counsel was aware consisted of the following: Williams had been in training school early, near the age of eleven or twelve; he had previously spent time in the Department of Correction; his mother did not provide a good home life for him; he had confrontations with his stepfather; his mother had a lot of men in and out of the house and possibly used drugs in his presence; his family faced economic hardship; and he was allegedly raped in prison at the age of sixteen.

Defense counsel did not present any of the potentially mitigating evidence of Williams's troubled background to the jury. Counsel testified at the Rule 37 hearing that they did not want to put Williams on the stand to testify to his troubled youth because they feared opening him up to questions by the prosecuting attorney about details of the gaps in time during the kidnapping of Ms. Errickson, as well as other crimes Williams had committed around the same time, including the abduction and rape of another young woman which Williams had already pleaded guilty to. Counsel also feared that, by putting Williams on the stand, they would open him up to questions about the major disciplinary problems in his prison record. Counsel considered using Williams's mother to put on evidence about his troubled past, but she would not cooperate with them; and Williams could not recommend anyone else who could

have presented the evidence on his behalf. Thus, defense counsel chose to present only one witness during sentencing: Michael Orndorff, an inmate at the Arkansas Department of Correction. Orndorff originally received the death penalty, but his sentence was commuted to life without parole. Defense counsel intended for Orndorff to communicate to the jury that life in prison without parole, as opposed to being on death row, is an extremely harsh punishment.

Overall, the defense submitted six mitigating factors to the jury for consideration: (1) the capital murder was committed while Williams was under extreme mental or emotional disturbance; (2) the capital murder was committed while Williams was acting under unusual pressures or influences or under the domination of another person; (3) the capital murder was committed while the capacity of Williams to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse; (4) the youth of Williams at the time of the commission of the capital murder; (5) that Williams accepted responsibility for his conduct and admitted his participation in the crime; and (6) that Williams showed remorse for his actions.

The State presented evidence bearing on three aggravating circumstances: (1) that Williams had previously committed another felony, an element of which was the use or threat of force or violence to another person or creating a substantial risk of death or serious physical injury to another person; (2) that the capital murder was committed for pecuniary gain; and (3) that the capital murder was committed in an especially cruel and depraved manner. At the conclusion of the sentencing phase, the jury found that all three aggravating circumstances existed beyond a reasonable doubt, but found the probable existence of only one mitigating circumstance: that Williams had accepted responsibility for his conduct. The jury concluded that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt and that the death penalty was justified beyond a reasonable doubt.

Rule 37 is a narrow remedy designed to prevent wrongful incarceration under a sentence so flawed as to be void. *Nooner v. State*, 339 Ark. 253, 4 S.W.3d 497 (1999). Judicial review of counsel's performance must be highly deferential. *Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997). We will not reverse the trial court's decision granting or denying postconviction relief unless it is

clearly erroneous. *Nooner v. State, supra.* 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. *Id.* In making a determination on a claim of ineffectiveness, the totality of the evidence before the factfinder must be considered. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000).

Williams argues that his counsel was ineffective in the sentencing phase of his trial for failing to introduce mitigation evidence concerning his troubled youth. We have often quoted the standard for ineffective assistance of counsel from *Strickland v. Washington*, 466 U.S. 668, 687 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show 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 defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

See Sanford v. State, 342 Ark. 22, 25 S.W.3d 414 (2000). Thus, a defendant must first show that counsel's performance "fell below an objective standard of reasonableness." *Id.* (citing *Strickland v. Washington, supra*). Second, the defendant must show that counsel's errors "actually had an adverse effect on the defense." *Id.* (citing *Strickland v. Washington, supra*). In reviewing the denial of relief under Rule 37, this court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Thomas v. State, supra*; *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 499 (1992). A postconviction petitioner claiming ineffective assistance has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Wainwright v. State, supra.* 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 in that the decision reached would have been

different absent the errors. *Thomas v. State, supra.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Williams argues that the case of *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000) is directly on point and supports his position that his counsel was ineffective. Contrary to Williams's argument, *Sanford v. State* is factually different from the case now before us. We determined that Sanford's attorney was ineffective because the attorney made no effort to obtain Sanford's school records, jail records, medical records, or family history. *Id.* If obtained, those records would have shown that Sanford was considered mildly mentally retarded, had been in special education, and had a good school record with only one disciplinary incident. *Id.* We held that the attorney's "failure to investigate caused the jury not to have before it all the available significant mitigating evidence" and further held that such failure raised "a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." *Id.* at 34, 25 S.W.3d at 422 (citing *Williams v. Taylor*, 529 U.S. 362 (2000)).

Sanford referred to another decision in which the appellant's attorney failed to discover or put on any mitigation evidence: *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983). Available evidence in *Pickens* indicated that the appellant was physically abused by his father as a youth, tried to run away several times, and had prior difficulties with the law as both a juvenile and an adult. *Id.* The Eighth Circuit Court of Appeals held that, given the severity of the potential sentence and the reality that the appellant's life was at stake, it was incumbent upon counsel to offer mitigating proof. *Id.* However, the court based its decision upon the fact that there was no indication in the record that counsel made a tactical decision not to offer the evidence. The court noted it was more likely that counsel "abdicated all responsibility for defending his client in the sentencing phase." *Id.* at 1467. It was undisputed that counsel made no investigation whatsoever into any potential mitigating circumstances, prompting the court to add: "It is only after a full investigation of all the mitigating circumstances that counsel can make an informed, tactical decision about which information would be the most helpful to the client's case." *Id.* However, the court made it clear in *Pickens* that it would not have faulted a strategy decision by counsel to concentrate on another possible line of defense "if it were a reasoned choice based on sound assumptions." *Id.*

In this case, contrary to *Sanford* and *Pickens*, counsel clearly made a full investigation of all information available to them at the time and made a tactical decision not to offer that information to the jury. Phillip Hendry, the member of counsel assigned to handle the sentencing phase of the trial, and his co-counsel investigated Williams's school records, jail records, medical records, and family history for substantial mitigating circumstances. The results of that investigation are set out above. Counsel also had Williams evaluated by a psychiatrist, but the psychiatrist's report indicated that he was competent and also contained information they felt could have been damaging to his case. Counsel did not present any of the evidence of Williams's troubled youth to the jury because they did not want to put Williams on the stand to testify, his mother would not testify on his behalf, and he could not recommend anyone else to present the evidence. Though counsel testified at the Rule 37 hearing that, looking back, they felt they should have done things differently, they admitted that, at the time of trial, they did not know any other way to introduce the information about Williams's troubled youth.

Hendry stated at the Rule 37 hearing: "[I]n hindsight seeing . . . that . . . our strategy was not accepted . . . I would probably now put a lot of things in maybe that I didn't do the first time." However, he also acknowledged: "[T]he reason we did not do that is because we wanted to avoid Marcel taking the stand . . . there was too much negative that could come out of him by taking the stand," and "we saw some of the things we could have brought out in sentencing, his background, . . . as being flipped and being turned into a non-specified aggravator . . . something that could be argued in close that would harm him." The other members of Williams's trial counsel also admitted that, in hindsight and after learning more about how the mitigation phase of trial works, they felt they should have petitioned the court for funds to hire a psychiatrist or psychologist to tell the jury about Williams's background. Herb Wright testified.: "[I]t wasn't that we didn't have mitigation, [it was] that we were ignorant of how to present it without exposing him." However, counsel admitted that they believed they did the best they could at the time with the knowledge they had. A fair assessment of counsel's performance under *Strickland v. Washington, supra*, requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. *Thomas v. State, supra*. Thus, hindsight has no place in a review of effective assistance of counsel.

Matters of trial strategy and tactics, even if arguably improvident, are not grounds for a finding of ineffective assistance of counsel. *Dunham v. State*, 315 Ark. 580, 868 S.W.2d 496 (1994). As the decision not to introduce evidence of Williams's troubled background was made after a full investigation and pursued in Williams's best interest, we hold that it was a reasonable trial strategy decision and that counsel's performance did not fall below an objective standard of reasonableness.

At any rate, Williams has not shown that counsel's failure to introduce the evidence of his troubled past prejudiced the outcome of the sentencing phase of his trial. The *Sanford* decision relied heavily upon *Williams v. Taylor*, 529 U.S. 362 (2000), in concluding there was a reasonable probability that the outcome of the sentencing phase in that case would have been different if competent counsel had presented and explained the significance of all available mitigating evidence. In *Williams*, however, the appellant offered factual substantiation of such a substantial amount of omitted mitigating evidence that the Court was convinced that there was a reasonable probability that the evidence could have changed the result of the sentencing phase. The evidence was much more substantial than in the present case.

Existing documents in *Williams* "dramatically described mistreatment, abuse, and neglect during [the appellant's] early childhood, as well as testimony that he was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin." *Id.* at 370. Other omitted evidence showed that the appellant did not advance beyond sixth grade in school, his parents had been imprisoned for the criminal neglect of the appellant and his siblings, he had been severely and repeatedly beaten by his father, he was in the custody of the social services bureau for two years during which he had a stint in an abusive foster home, and he was returned to the custody of his parents after they were released from prison. *Id.* In addition, the appellant had received commendations in prison for helping to crack a prison drug ring and for returning a guard's missing wallet, and prison guards were willing to testify that he was among the inmates least likely to act in a violent or dangerous way. *Id.*

In the instant case, Williams contends, with no factual substantiation, that he had a poor home life and was allegedly raped in prison at age 16. Williams's most specific assertion is that "a different result could have occurred" if his trial counsel had presented mitigation evidence concerning his troubled youth. That

allegation, however, is merely conclusory and does not establish that Williams was denied a fair trial. When a defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Hill v. Lockhart*, 28 F.3d 832 (1994) (citing *Strickland v. Washington, supra*). It is likely that the jury would have viewed Williams's prior difficulties with the law as both a juvenile and an adult unfavorably, and they may not have been sympathetic to his troubled family background. He failed to call anyone to the stand at his Rule 37 hearing or to proffer the substance of any specific testimony to show what evidence could have been presented and whether it would have changed the mind of one of the jurors. *See Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). We will not grant postconviction relief for ineffective assistance of counsel where the petitioner failed to show what the omitted testimony was and how it could have changed the outcome. *Id.* Williams has failed to demonstrate there is a reasonable probability that, but for counsel's failure to introduce the evidence of his troubled youth, the jury would have reached a sentence of life imprisonment without parole. As Williams has failed to demonstrate both error and prejudice, we affirm.

Affirmed.

BROWN, J., concurs.

IMBER, J., not participating.

ROBERT L. BROWN, Justice, concurring. I disagree with the majority's conclusion that the three defense counsel in this case made a strategic decision not to present mitigating evidence of Williams's family and penal history. Each attorney testified that he was unaware that this evidence could be offered through a witness other than the appellant and *for that reason*, failed to present the proof to the jury. It may have been a strategic decision not to call Williams to discuss his past, but it was clearly ineffective representation not to have presented this evidence through another witness such as a psychiatrist, psychologist, or social worker.

Defense counsel William Owen James made this point abundantly clear at the Rule 37.5 hearing:

> With regard to what I've learned since this case, I'd like to preface this, I was a pup in this game. I didn't know anything about it. I'd watched some capital murder cases, hear bits and pieces, but I had never tried one. And so I hate to criticize, but, I mean, we completely and absolutely dropped the ball. We didn't do anything we should have done for sentencing phase. I think there was huge amount of mitigation that could have been brought forward. I believe that this man's life from the time he was born, I mean he went to prison when he was 14 or 15. He went to training school. He got out and robbed someplace with a broken shotgun because he thought he could [go] back to the training school, was charged as an adult and went to prison and then got out seven months before this happened, I believe. And I think the, I mean, the evidence would have showed that his family life was pretty messed up, that he didn't have lot of guidance.
>
> . . . .
>
> I absolutely disagree that it was trial strategy on the part of the defense team, after careful consideration that the witnesses put on in the sentencing phase was the best way to proceed in this particular case. Before this I had tried no capital cases. From November to the time of the trial I was there every time and I don't know — it frankly didn't come up that much. The idea of mitigation was apparently by all of us. Like I said, I certainly don't mean to discredit the folks who were helping me learn, but, this is the bottom line, we had no idea what mitigating — we thought mitigation was Boy Scout merits he should have got. We had no idea what we should have been looking for.

James concluded that without question this social and penal history should have been conveyed to the jury through a psychiatrist or psychologist.

Lead defense counsel Herb Wright, Jr., testified similarly:

> The concept of using a psychiatrist or psychologist or some type of mitigation specialist to come and present a life history of the client was foreign. That is something I learned in other experiences. I think to do that makes an incredible difference.
>
> . . . .
>
> In looking back, the problem as I see wasn't that we didn't have mitigation, is that we were ignorant of how to present it without

> exposing him. I was concerned about putting him on in the penalty phase. Now I know that I can achieve the goal through a psychologist or a psychiatrist or a mitigation specialist.

Wright acknowledged that it was error on his part not to have presented a psychiatrist or psychologist to explain to the jury Williams's background and history. He was simply ignorant as to how to go about it. He acknowledged that the defense team did not want to call Williams to testify, but the team did not know that they could have hired and called a professional to present this mitigating evidence. The third defense counsel, Phillip Hendry, testified that looking back on it, he would have put on Williams's background in mitigation.

The importance of mitigation evidence in the sentencing phase of a death case has been emphasized by this court. We no longer engage in a proportionality review of comparable crimes and sentences as part of our death-case analysis, because we have concluded that the weighing of aggravating and mitigating circumstances by the jury affords sufficient protection against arbitrary verdicts. *See Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995). That, of course, highlights the importance of mitigating evidence.

Nevertheless, I agree with the majority that Williams has not shown that with the omitted social history and background, there is a reasonable probability that the results of his trial would have been different. What he offers in the way of early incarcerations, a dysfunctional family, and rape while in prison does not compare to the omitted history in either *Williams v. Taylor*, 529 U.S. 362 (2000), or *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000).

For that reason, I agree to affirm.

Christy Evans BANKS *v.* Jim EVANS

01-464 64 S.W.3d 746

Supreme Court of Arkansas
Opinion delivered January 17, 2002

[redacted]

[redacted]

Scott Manatt, for appellant.

Henry, Halsey & Thyer, PLC, for appellee.

TOM GLAZE, Justice. This appeal presents us with questions of first impression regarding the interpretation and application of Ark. Code Ann. §§ 9-11-401 to -413, the Arkansas Premarital Agreement Act. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1) and (4).

On March 12 and 13, 1996, appellant Christy Evans Banks and appellee Jim Evans signed a premarital agreement in contemplation of marriage. The couple married on March 16, 1996, but separated in January of 1997. Jim filed for divorce on March 4, 1997. The couple attempted a reconciliation in November of 1997, but the attempt failed and the parties separated for good on April 6, 1998. Jim then filed an amended complaint for divorce, asserting that the property rights to be adjudicated were governed by the premarital agreement. Christy filed a counterclaim for divorce, and she also filed a request for production of documents, including numerous financial records. Jim objected to the request and filed a motion for protective order, asserting that the court should not permit discovery to proceed until the validity of the premarital agreement was determined. At the same time, Jim also filed a petition to determine the enforceability of the agreement. In an order entered December 8, 1998, the chancellor held that the premarital agreement was valid and enforceable; the court also ruled that the agreement was not unconscionable and that Jim and Christy's reconciliation did not abrogate the contract.[1]

On October 6, 1999, Jim filed a second amended complaint for divorce, this time asserting eighteen months' separation as

[1] Christy appealed that ruling, but the court of appeals dismissed the appeal for lack of a final order.

grounds. Following a hearing on October 19, 1999, the chancellor entered a divorce decree, specifically reserving the issue of the distribution of property until a later date. On December 28, 2000, after a hearing on the reserved property issues, the chancellor entered a supplemental decree of divorce, ordering that the marital residence be sold and the proceeds distributed after the sale. The court rejected Christy's claim that she had an interest in certain other property, including a Tahoe vehicle, a pontoon boat, and a country club membership.

From the supplemental decree of divorce, Christy brings the present appeal. She argues that the trial court erred in denying her request for discovery, in finding the premarital agreement to be valid, and in failing to distribute the marital property as set forth in Ark. Code Ann. § 9-12-315.

Chancery cases are tried *de novo* on appeal, and the appellate court does not reverse the chancellor's findings unless they are clearly erroneous. *See Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000). Further, in reviewing a chancery court's findings, we give due deference to the chancellor's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Davis v. Child Support Enfcm't*, 341 Ark. 349, 20 S.W.3d 273 (2000).

Although Christy's initial point on appeal is the chancellor's ruling regarding discovery, we address the validity of the premarital agreement first. Arkansas law has long recognized the validity of such agreements. *See, e.g., Oliphant v. Oliphant*, 177 Ark. 613, 7 S.W.2d 783 (1928). In Arkansas, a premarital agreement is valid if it was freely entered into, and is free from fraud and not inequitable. *Arnold v. Arnold*, 261 Ark. 734, 553 S.W.2d 251 (1977); *Gooch v. Gooch*, 10 Ark. App. 432, 664 S.W.2d 900 (1984). Parties contemplating marriage may, by agreement, fix the rights of each in the property of the other differently than established by law. Such agreements must be made in contemplation of the marriage lasting until death, rather than in contemplation of divorce. *Hughes v. Hughes*, 251 Ark. 63, 471 S.W.2d 355 (1971). However, the mere fact that a prenuptial agreement becomes operative upon divorce — so long as that is not its only purpose — does not render it invalid. *Dingledine v. Dingledine*, 258 Ark. 204, 523 S.W.2d 189 (1975). In

determining the fairness or equity of the agreement, the court may consider the parties' respective stations in life, their experiences, their education, and their knowledge of financial and legal matters. *Gooch, supra.*

In 1987, the General Assembly passed Act 715, the Arkansas Premarital Agreement Act, codified at Ark. Code Ann. §§ 9-11-401 to -413 (Repl. 1998). Under the Act, a premarital agreement is defined as a written agreement between prospective spouses made in contemplation of marriage. § 9-11-401(1). The agreement becomes effective upon marriage, § 9-11-404, and after marriage, it may be amended or revoked only by a written agreement signed by the parties. § 9-11-405. With regard to the enforceability of such agreements, § 9-11-406 provides, in part, as follows:

> (a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> (1) The party did not execute the agreement voluntarily; *or*
>
> (2) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> (i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (ii) Did not voluntarily and expressly waive after consulting with legal counsel, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; *and*
>
> (iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(Emphasis added.)

Christy argues that the agreement was unconscionable and unenforceable for several reasons. First, she argues that the contract was invalid because she did not know Jim's net worth prior to signing the contract, and that Jim failed to rebut the presumption of "designed concealment," a presumption which arises when the provisions made for the wife are disproportionate to the means of the husband. *See Faver v. Faver*, 266 Ark. 262, 583 S.W.2d 44 (1979). In addition, she claims the agreement was abrogated when

she and Jim reconciled in 1997. Finally, Christy contends that the agreement was unconstitutional, gender-biased, and discriminatory.

We reject Christy's assertion that the premarital agreement was invalid because she was unaware of Jim's financial position. Article I of the agreement recited that "each Party is acquainted with the property of the other due to their friendship over a period of time and each has freely disclosed to the best of their knowledge and ability to the other the nature, extent, and value of said property[.]" Further, both Christy and Jim expressly waived their rights to a detailed disclosure of the other's financial obligations. The waiver Christy signed read in part as follows:

> I, Christy Miller, a party to the premarital agreement to which this waiver is attached, do hereby acknowledge that I have an adequate knowledge of the property, value of the property, and financial obligations of Jim Evans by virtue of our friendship over a period of time.
>
> I, Christy Miller, do hereby acknowledge that I have the right to have caused to be prepared a general list of the properties and value of such properties or interests owned by Jim Evans and to have said general list of properties prepared by him to be attached to the premarital agreement and made a part thereof.
>
> I, Christy Miller, do hereby waive the requirement that both parties to the agreement provide to the other and be provided by the other a fair and reasonable disclosure of the property, value of the property, and financial obligations of the other party beyond any disclosure already provided.
>
> I, Christy Miller, do hereby agree that this waiver and the similar waiver of Jim Evans shall be attached to the premarital agreement and made a part thereof in lieu of any general list of properties prepared by us.[2]

Furthermore, at the court's hearing on the validity of the premarital agreement, Jim testified that Christy had worked in sales for his company, NEA Optical, and was generally aware of how well the business was doing, because she sat in on confidential

[2] Jim signed an identical waiver, differing only in the names of the parties.

business meetings between Jim and his accountant, Danette Stewart. Additionally, Jim testified that Christy knew the kind of lifestyle he led, having gone on several trips with him and his daughters from a previous marriage. Jim's accountant, Danette Stewart, also testified that Christy had been present during business meetings, and that Jim never showed any reluctance in discussing financial information in front of Christy. Christy, on the other hand, testified that she did not understand the agreement when she signed it, and that Jim had never furnished her with any kind of financial disclosure prior to her signing the agreement.

This conflicting testimony was for the chancellor to resolve, and we give due deference to the chancellor's superior position to determine the credibility of witnesses and the weight to be given their testimony. *See, e.g., Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001). Clearly, the chancellor did not believe Christy's testimony that she did not understand the agreement. It is a rule of general application that one is bound to know the content of a document one signs, and if the signer has had the opportunity to read it before she signs it, she cannot escape the obligations imposed by the documents by merely stating that it was signed without reading it. *See Carmichael v. Nationwide Life Ins. Co.*, 305 Ark. 549, 810 S.W.2d 39 (1991). Here, the agreement was accompanied by a notarized statement that Christy stated that she "had read the foregoing instrument and fully understood the same," as well as a notarized statement by her attorney, H.T. Moore, that he had explained the contract to her and advised her of her legal rights and the legal effect of the agreement and the waiver of right to financial disclosure. In light of the testimony at the hearing, as well as her signature on the document, Christy's mere protest on appeal that she did not know Jim's net worth is unavailing.

Similarly unavailing is Christy's argument that Jim failed to overcome the presumption of designed concealment. This presumption, arising in cases where the wife's provision is disproportionate to the husband's means, "throws the burden upon [the party seeking to uphold the agreement] to prove that there was full knowledge on the part of the intended wife of all that materially affected the contract." *Faver v. Faver*, 266 Ark. 262, 583 S.W.2d 44 (1979). Christy asserts that because she never received any financial information from Jim, he failed to rebut the presumption. However, this argument ignores the fact that Christy signed an express waiver of her right to receive a financial disclosure from Jim. Having voluntarily agreed to the terms of the waiver, she cannot now be heard to complain about its terms.

Christy raises two other arguments in support of her contention that the premarital agreement was invalid, but we do not need to spend much time discussing them. First, she claims that the reconciliation she and Jim attempted in the fall of 1997 abrogated the agreement; however, Ark. Code Ann. § 9-11-405 provides that a premarital agreement can only be amended or revoked by written agreement signed by both parties. No such written agreement exists here. Second, she contends that the agreement is gender-biased and discriminatory. This argument, however, is wholly without merit, as the terms of the agreement apply equally to both husband and wife. Christy fails to support her claim with any convincing authority, and we therefore do not consider it. *See Public Defender Comm. v. Greene County*, 343 Ark. 49, 32 S.W.3d 470 (2000).[3]

Christy's next point on appeal is that the chancellor erred in denying her motion for discovery. She asserts that she was entitled to discovery pursuant to Ark. R. Civ. P. 26, and that discovery was necessary to address the antenuptial agreement, the disparate and unequal positions of the parties, and Jim's failure to disclose any financial statements, balance sheets, or financial data.

Arkansas Rule of Civil Procedure 26(b)(1) provides that parties may obtain discovery "regarding any matter, not privileged, which is relevant to the issues in the pending actions[.]" However, Rule 26(c) states that, "[u]pon motion by a party or by the person from whom discovery is sought, . . . and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" A trial court's decision on discovery issues will not be reversed absent an abuse of discretion. *City of Dover v. City of Russellville*, 346 Ark. 279, 57 S.W.3d 171 (2001).

In the present case, the decision to postpone discovery until after the court could determine the validity of the prenuptial agreement was clearly intended to save the time and expense of preparing answers to interrogatories and responses to requests for production of documents. If the agreement was found valid, then its terms

[3] Christy also briefly asserts that Jim does not come to the court with clean hands, and she alleges that he battered and slandered her. However, while Christy initially raised these tort claims against Jim in her counterclaim for divorce, she voluntarily nonsuited these claims prior to the trial court's original decree of divorce, and we need not discuss them further.

would control and there would be no need to discover the kind of financial information Christy sought from Jim, because she would not be entitled to any of his assets under the terms of the agreement. Further, the discovery sought was irrelevant to a determination of whether or not the agreement was valid, because Christy signed a waiver of disclosure of financial information, whereby she agreed that she knew the value of his property and that she waived her right to any further disclosure. Therefore, the trial court did not abuse its discretion in declining to permit the discovery Christy requested.

For her final point on appeal, Christy raises several arguments regarding the trial court's division of the couple's property. First, she argues that the trial court erred in failing to divide all of the couple's property when it entered the initial divorce decree in October of 1999; as noted above, the court specifically reserved the issue of property division when it first granted the divorce, and conducted a second hearing on the property questions in December of 2000. At that time, the court entered a supplemental decree under which the couple's Jonesboro home, which they owned as tenants by the entirety, was to be sold and the proceeds distributed in accordance with the decree.[4] Christy contends that this violated Ark. Code Ann. § 9-12-315, which provides in pertinent part as follows:

> (a) *At the time a divorce decree is entered*:
>
> (1)(A) All marital property shall be distributed one-half (1/2) to each party unless the court finds such a division to be inequitable.

(Emphasis added.)

However, this court has held that § 9-12-315 does not apply to property held as tenants by the entirety. *Hale v. Hale*, 307 Ark. 546, 822 S.W.2d 836 (1992); *Warren v. Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981). Thus, the trial court did not err when it declined to distribute that property at the time the initial decree was entered in October of 1999.

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[4] Jim had purchased the house in the name of the "James Evans Living Trust" during the time when he and Christy were separated, but when they reconciled, he refinanced the house in order to put both of their names on the title; the deed then reflected that the couple owned the home as a tenancy by the entirety.

Next, Christy argues that she should have been entitled to rent on the Jonesboro home during the period of time prior to the divorce, when Jim lived in the house but she did not. The chancellor rejected this argument, finding that Christy and Jim owned the property as a tenancy by the entirety and had an equal right of ownership and possession. In *Clifton v. Clifton*, 34 Ark. App. 280, 810 S.W.2d 51 (1991), the court of appeals cited *Cooper v. Cooper*, 251 Ark. 1007, 476 S.W.2d 223 (1982), for the proposition that the occupation of one tenant is deemed possession by all cotenants, and thus rejected a similar claim that an ex-spouse who no longer resided in the marital home was entitled to rent during the time he was not living there. The *Clifton* ruling was a correct one, and it is applicable to the facts here. Thus, we likewise conclude that the chancellor did not err in ruling that Christy was not entitled to rent on the residence.

Christy also argues that she should have been entitled to one-half of the couple's income-tax savings resulting from their joint filing; however, she cites no authority demonstrating that she was entitled to these amounts. Further, she contends that she should have received one-half the value of a Tahoe vehicle, a pontoon boat, a lot at Ridge Point, and a membership in the Ridge Point Country Club. However, the trial court found that the property was owned by a third-party corporation, and as such, was not marital property. This ruling is correct. Jim testified that his company purchased the vehicle, the boat, the lot, and the membership, and Christy conceded that her name was never on the title to any of these items. Therefore, the chancellor's ruling is not clearly against the preponderance of the evidence.

For the foregoing reasons, we affirm the trial court's rulings and decision.

IMBER, J., not participating.

Franklin David CHAMBERS, M.D. *v.*
Harold Patrick STERN, M.D.;
George Hamilton, M.D.; and
University of Arkansas Board of Trustees

01-568 64 S.W.3d 737

Supreme Court of Arkansas
Opinion delivered January 17, 2002
[Petition for rehearing denied February 14, 2002.*]

* IMBER, J., not participating.

David M. Hargis and *Douglas W. Bonner, Jr.*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, by: *Stuart P. Miller*; and *Barrett & Deacon, P.A.*, by: *D.P. Marshall Jr.* and *Leigh M. Chiles*, for appellee Harold Patrick Stern, M.D.

Anderson, Murphy & Hopkins, L.L.P., by: *Michael P. Vanderford*, for appellee George Hamilton, M.D.

Rhonda M. Thornton, Associate General Counsel, for appellee University of Arkansas.

ROBERT L. BROWN, Justice. The appellant, Franklin David Chambers, M.D., appeals from an order of dismissal in favor of the appellee University of Arkansas Board of Trustees; an order granting summary judgment in favor of appellee George Hamilton, M.D.; and an order granting summary judgment in favor of appellee Harold Patrick Stern, M.D. We find no error in the circuit judge's various orders, and we affirm the dismissal and summary judgments.

The underlying facts in this case concern a divorce action between Chambers and his wife, Debra. The couple had five children: Sylvia, Keith, Jenny, Brandi, and Alexee, and custody and visitation issues regarding the children were hotly contested. As part of the divorce action, Dr. Stern had been appointed to assist the chancery court in evaluating custody and visitation matters.

On June 30, 1997, Chambers sued the University of Arkansas Board of Trustees for medical malpractice for employing Stern, who, Chambers contended, misrepresented his credentials and used an experimental patient model in treating the Chambers family. According to Chambers, he was entitled to a direct action lawsuit against the liability carrier for the University Board of Trustees, St. Paul Fire & Marine Insurance Co., pursuant to Ark. Code Ann. § 23-79-210 (Repl. 1999).

In that same complaint, Chambers also sued Hamilton (1) for engaging in a civil conspiracy with Stern which resulted in Chambers's estrangement from his children, and (2) for medical malpractice in breaching the applicable standard of care by diagnosing Chambers with a narcissistic personality disorder after one forty-five minute session. The complaint added a cause of action against Stern for (1) defrauding Chambers by misrepresenting his credentials and engaging in an experimental therapeutic model, and (2) medical malpractice by violating the applicable standard of care and turning Chambers's children against him.

On July 18, 1997, the University Board of Trustees moved to dismiss the complaint against it on grounds that it was an instrumentality of the State and not subject to suit under the doctrine of sovereign immunity. In addition, the Board maintained that it had no liability coverage for the acts alleged in Chambers's complaint. On December 18, 1997, the trial court dismissed the complaint against the Board with prejudice.

On July 23, 1998, Hamilton moved for summary judgment on the basis that there was no evidence to establish a civil conspiracy between Stern and him and no evidence that he deviated from the applicable standard of care. On January 11, 2000, the trial court agreed with Hamilton and granted his motion.

On May 26, 1998, Stern moved for dismissal of the complaint against him or, in the alternative, summary judgment on grounds that he was immune from suit due to the judicial appointment and because there was no doctor-patient relationship between Chambers and him. On June 4, 1998, the trial court agreed that Stern was immune and granted Stern's motion to dismiss. Later, on October 8, 1998, the trial court amended its order to a grant of summary judgment and included a Rule 54(b) certification for immediate appeal. It is this order that was first appealed to this court by Chambers. We reversed and remanded the case for the trial court to determine whether Stern was acting within the scope of the chancery court's order when treating the Chambers family so as to afford him the protection of judicial immunity. *See Chambers v. Stern*, 338 Ark. 332, 994 S.W.2d 463 (1999) (*Stern I*).

On remand, the trial court again granted Stern summary judgment on October 23, 2000. The court found that during the first relevant time period, June 23, 1993 — April 18, 1994, Chambers had failed to assert facts that demonstrated Stern exceeded the scope of the chancery court's order. The court further found that Chambers could not "overcome Stern's immunity by asserting that he was not a good therapist, or that he should have been a better therapist." Finally, the court found that there was no showing that Dr. Stern was not functioning as a therapist within his court-appointed capacity during that time period.

As to the second relevant time period, April 18, 1994 — the later of the last therapy session by any family member with Dr. Stern or Dr. Stern's final communication with the chancery court, the court ruled that:

> Dr. Stern's involvement with Sylvia [*sic*], Alexee and Brandi related to his role as a court-appointed therapist dealing with the post-divorce issues of visitation, including but not limited to the issues of the parents' subsequent companions and remarriage.[1] Any therapy performed by Dr. Stern appears to be inextricably linked to the chancery court's mandate. Thus, Dr. Stern's actions were within the scope of the April 18, 1994, divorce decree and are entitled to judicial immunity.

I. Board of Trustees

Chambers first argues that pursuant to Ark. Code Ann. § 23-79-210 (Repl. 1999), he should be able to pursue a direct action against any liability insurer of UAMS and its Board of Trustees. He asserts that even though Stern and Hamilton admit that they are personally insured by a specific insurer (St. Paul), the Board has denied that it has any liability coverage covering it for the acts and this is not correct. Chambers further claims in his only citation to authority that pursuant to the doctrine of *stare decisis*, the trial court's ruling should be reversed because of this court's decision in *Rogers v. Tudor Ins. Co.*, 325 Ark. 226, 925 S.W.2d 395 (1996).

The Board responds that it had no liability coverage and that only the University's faculty, physicians, surgeons, students and the like are insured under the St. Paul policy. The Board points to the affidavit of Lynda Fossing, an account underwriter for St. Paul Medical Services which states that only individuals are included on the lists under the Coverage Summary of the policy, and not UAMS or any organization. The Board further claims that Chambers has not offered any evidence to the contrary.

We first consider our standard of review. The trial court, in granting the Board's motion to dismiss, noted its reliance on several items, including supporting affidavits and exhibits. Although this court generally reviews a trial court's decision on a motion to dismiss by treating the facts alleged in the complaint as true and viewing them in the light most favorable to the plaintiff, where the court has acknowledged consideration of matters outside the parties' pleadings, including exhibits, depositions, and affidavits, the

[1] Two of the Chambers's five children, Sylvia and Keith, were attending college by this time and had attained their majority status. Though it is not entirely clear, the trial court may have meant to name Jenny rather than Sylvia in this portion of its order.

court will treat the trial court's order as one granting summary judgment. *See* Ark. R. Civ. P. 56(c); *Stern I, supra; Stapleton v. M.D. Limbaugh Constr. Co.,* 333 Ark. 381, 969 S.W.2d 648 (1998).

This court uses the following standards for its review of orders of summary judgment:

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

Renfro v. Adkins, 323 Ark. 288, 295, 914 S.W.2d 306, 309-10 (1996) (internal citations omitted); *Cash v. Lim,* 322 Ark. 359, 360-62, 908 S.W.2d 655, 656-57 (1995); *Oglesby v. Baptist Medical Sys.,* 319 Ark. 280, 284, 891 S.W.2d 48, 50 (1995). Once a moving party establishes a *prima facie* entitlement to summary judgment by affidavits or other supporting documents or depositions, the opposing party must demonstrate a genuine issue of material fact by meeting proof with proof. *Renfro v. Adkins, supra.*

Crockett v. Essex, 341 Ark. 558, 563, 19 S.W.3d 585, 588-89 (2000) (quoting *Milam v. Bank of Cabot*, 327 Ark. 256, 261-62, 937 S.W.2d 201, 653, 656 (1997).

Chambers does little more in his argument than cite this court to the Direct Action statute, § 23-79-210, and *Rogers v. Tudor Ins. Co., supra.* We agree with Chambers that § 23-79-210 provides for direct actions against insurers to the extent of the insurance coverage carried on the organization or its employees. The initial factor, however, is whether there is coverage for the affected organization. Here, the Board maintains that neither it nor the University was covered by the St. Paul policy, and it presented the policy as well as the affidavit of Lynda Fossing, the account underwriter for St. Paul, as proof of its position. Chambers countered with no proof of his own. This failure of proof is fatal to Chambers's argument.

The trial court correctly determined that the Board is protected against being made a party in state court under the doctrine of sovereign immunity. *See* Ark. Const. art. 5, § 20.

Despite this absence of proof, Chambers claims that the case of *Rogers v. Tudor Ins. Co., supra,* stands for the proposition that because University physicians are covered by the St. Paul policy, this means that the University and its Board are also covered. We disagree. In *Rogers*, contrary to the present case, the board of trustees and the officers of the non-profit corporation were insured, and we held that those circumstances equated to coverage of the non-profit corporation itself. In the case before us, neither the Board nor the University's officers are covered — only its faculty and employees. These facts are a far cry from what was presented to us under the *Rogers* facts.

We affirm the trial court's order under this first point.

II. Dr. Hamilton

For his next point, Chambers urges that the following facts were proved and that they raise material issues that could only be resolved by a jury:

- that Hamilton was aware of Stern's Therapeutic Model and his uses thereof;
- that Hamilton "acknowledged multiple opportunities to have reviewed the Stern Therapeutic Model in prior years, admitting that 'Dr. Stern has referred several patients to me over the years[;]' "
- that Hamilton admitted to discussing Chambers's circumstances with Stern prior to his diagnosis of Chambers, as documented by his notes, "Dr. Stern seems to be act[ing] entirely [for] the benefit of the children[;]"
- that Stern had prior knowledge that Chambers would see Hamilton on July 21, 1994;
- that Dr. Warren Seiler's affidavit demonstrates the wrong done by Hamilton and the deviation from the applicable standards of care;

- that Seiler stated in his affidavit that "Dr. Stern secured a misdiagnosis in order to further complete the destruction of David Chambers' relationships with his children[;]"

- that Dr. Chester Jenkins stated in his affidavit that his evaluation of Chambers revealed no evidence of narcissistic personality disorder and that there were no findings of Hamilton which would support such a diagnosis or diagnostic impression;

- that in Dr. Carlene Lyle's deposition, she stated that Hamilton's diagnosis of Chambers based upon one interview was "precipitous;"

- that in a subsequent affidavit, Dr. Lyle stated that she knew that Hamilton was familiar with the Stern Therapeutic Model prior to Chambers's visit with Hamilton;

- that Dr. David Hall stated that "[a] reasonable psychiatrist would anticipate that the use of a diagnosis of narcissistic personality disorder would have a significant impact on the course of ongoing therapy[;]"

- that Stern used Hamilton's diagnosis to force "no contact" by Chambers with his children;

- that Hamilton worked together with Stern and Chambers's wife's attorney to secure an alternate therapist that would not be intimidated by Chambers; and

- that the Stern Therapeutic Model, known by Hamilton to be used, was truly bizarre and proximately caused the injuries claimed.

Chambers further argues that Hamilton's motion for summary judgment was supported by self-serving affidavits from Hamilton and Stern, both of whom were interested parties, and that summary judgment was inappropriate.

Hamilton's response is that no evidence of a conspiracy between Stern and him has been presented; nor is there any evidence that he committed any unlawful or deceitful act. Hamilton points to the fact that Chambers has conceded that he had no evidence or factual basis for his allegations of conspiracy. Additionally, Hamilton argues that there is no evidence that he was aware of

the therapeutic model and protocol used by Stern in his treatment of the Chambers family, and that even if there were such evidence, this would still fall short of proving a conspiracy between Stern and him to harm Chambers. As to the affidavit of Dr. Seiler, Hamilton emphasizes that Seiler has no personal knowledge of a conspiracy; he had no personal involvement in the underlying divorce or treatment of the family or Chambers; and that all of his conclusions are based on the faulty premise that Hamilton made a *final diagnosis* of the appellant. Moreover, Hamilton contends that he did not, as a matter of law, cause the injuries alleged by Chambers in that there is no evidence that he deviated from the applicable standard of care or that Chambers's alleged injuries were caused by any acts or omissions of Hamilton.

Chambers replies that he has documented the conspiracy and concludes that "[t]he evidence is available to show that the unorthodox, and catastrophic, practices followed by . . . Stern were generally known to those practicing in the field of psychiatry in central Arkansas, were known specifically by . . . Hamilton [and that m]uch damage was done, and the evidence of that is also available."

This court has recently set forth the elements of civil conspiracy:

> [I]n order to prove a civil conspiracy, [one] 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).

Dodson v. Allstate Ins. Co., 345 Ark. 430, 445, 47 S.W.3d 866, 876 (2001). We have further said:

> A conspiracy may be shown by direct evidence of an actual agreement or understanding between conspirators, but it may also be shown by circumstantial evidence. *Chapline v. State*, 77 Ark. 444, 95 S.W. 477. It also may be inferred from actions of alleged conspirators, if it be shown that they pursued the same unlawful object, each doing a part, so that their acts, although apparently independent, are in fact connected and cooperative, indicating a closeness

> of personal association and a concurrence of sentiment. *Wilson v. Davis*, 138 Ark. 111, 211 S.W. 152; *Stewart v. Hedrick*, 205 Ark. 1063, 172 S.W.2d 416; *Chapline v. State, supra.* Any act done or declaration made by one of the conspirators in furtherance, aid or perpetration of the alleged conspiracy may be shown as evidence against his fellow conspirators. *Wilson v. Davis, supra*; *Chapline v. State, supra.*

Mason v. Funderburk, 247 Ark. 521, 529, 446 S.W.2d 543, 548 (1969).

Hamilton is correct that Chambers has presented conclusions but has failed to show any direct or indirect evidence of a conspiracy. What did occur, based on the proof, is the following:

- Dr. Stern referred Chambers to Hamilton in July 1994;
- Hamilton met with Chambers on July 21, 1994;
- Hamilton made a progress note in his file which stated that his "diagnostic impression" of Chambers was "narcissistic personality disorder";
- Hamilton stated that the "diagnostic impression was based not only upon factual information verbally conveyed by Dr. Chambers, but also upon [Hamilton's] observations as to Dr. Chambers' demeanor, attitude, and other nonverbal means of communication"[;]
- Hamilton stated that the "diagnostic impression was not intended by [him] as a diagnosis and certainly not as a final or formal diagnosis"[;]
- Hamilton stated that he did not intend the progress note to be used in any legal proceeding;
- Hamilton did not recall any contact with Stern regarding Chambers before, on, or after, July 21, 1994;
- Hamilton had no record of the progress note ever being made available to Stern by him or his office;
- that Richard Byrd, Chambers's divorce attorney, by means of a medical authorization, obtained the records relating to

> Chambers from Hamilton and that after receiving it, Chambers disclosed the progress note to the chancery court.

It would be pure conjecture to infer a civil conspiracy based on Sterns's referral of Chambers to Hamilton. Moreover, there is nothing in the way of proof to support the fact that Hamilton had any contact with Stern regarding his diagnostic impression of Chambers after his one forty-five minute session with the man. In short, there is a failure on Chambers's part to show any acts committed by Hamilton and Stern, in combination, to accomplish an unlawful, oppressive, or immoral purpose. *See Dodson v. Allstate Ins. Co., supra.* We affirm the trial court's summary-judgment order on this point.

We next consider Chambers's claim that Hamilton was negligent in making the diagnosis of a narcissistic personalty disorder. In *Dodson v. Charter Behav. Health Sys., Inc.,* 335 Ark. 96, 983 S.W.2d 98 (1998), this court set out the requirements for a showing of negligence in the medical context:

> To establish a *prima facie* case of negligence, a plaintiff must show that damages were sustained, that the defendant breached the standard of care, and that the defendant's actions were the proximate cause of the damages. *See Union Pac. R.R. Co. v. Sharp,* 330 Ark. 174, 952 S.W.2d 658 (1997). Proximate cause is "that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Union Pac. R.R. Co. v. Sharp, supra; Craig v. Traylor,* 323 Ark. 363, 915 S.W.2d 257 (1996). Thus, a plaintiff must show causation in fact and legal causation. When there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. *See McGraw v. Weeks,* 326 Ark. 285, 930 S.W.2d 365 (1996). But proximate causation becomes a question of law if reasonable minds could not differ as to the result. *See Union Pac. R.R. Co. v. Sharp, supra; Tyson Foods Inc. v. Adams,* 326 Ark. 300, 930 S.W.2d 374 (1996).

Dodson, 335 Ark. at 105, 983 S.W.2d at 103.

We conclude, again, that Chambers's assertions that a material fact question exists concerning negligence and his diagnosis by Hamilton is without merit. All of the affidavits and sworn testimony filed in support of Chambers's response to the summary-judgment motion presuppose that Hamilton's diagnosis was a final

diagnosis. This was clearly not the case. By its terms as entered in the progress notes, Hamilton formed a diagnostic *impression* following one forty-five minute session with Chambers. An impression is not a final diagnosis. Furthermore, there is no proof that Hamilton conveyed this diagnostic impression to Stern or to anyone else. We affirm the trial court on this point as well.

III. Dr. Stern

For his third point, Chambers contends that in considering the trial court's grant of summary judgment in favor of Stern, we should conduct a *de novo* review. In making this contention, Chambers invites this court to revisit the issue of whether Stern was actually appointed by the chancery court for custody and visitation purposes and that, in any event, Stern practiced fraud on the chancery court and the Chambers family by misrepresenting his credentials and by employing an experimental therapeutic model.

Stern counters this by noting that the mandate in *Stern I* was for the trial court, on remand, to determine whether Stern's treatment of the Chambers family exceeded the scope of the chancery court's orders. Stern adds that Chambers failed to present any evidence that Stern's therapy exceeded the scope of those orders. We agree with Stern's assessment.

This court, in *Stern I*, specifically set forth the determinations it wanted the trial court to make:

> Accordingly, on remand, the trial court must determine as a matter of law [FN1] whether Dr. Stern's actions were within the scope of his court-appointed capacity, and if so, his actions taken pursuant to the appointment are entitled to judicial immunity.
>
> > FN1. Whether absolute immunity exists is a question of law for the courts. *See generally* 46 AM. JUR. 2d § 68 (1994 & Supp. 1999).
>
> However, if the trial court determines that Dr. Stern's actions were outside the scope of the court's appointment, it must determine at what point Dr. Stern exceeded the order and, consequently, forfeited his immunity. Specifically, the trial court must review Dr. Stern's involvement with the Chamberses from June 22, 1993, to April 18, 1994, in light of the chancery court's June 22, 1993, temporary relief order directing the following:

> That while the Court does not find a physical and mental evaluation of the parties or the children appropriate, the Court does find that a qualified therapist or counselor agreed to by the parties should *meet with and counsel the parties and the children relative to the divorce proceedings in which they are involved and the visitation and other matters related thereto and to conduct all necessary evaluations on the parties and children in connection therewith;* that only one therapist or counselor should be used for all the children and the parties and that therapist or counselor should *report directly to the Court his or her findings and observations* and the Court will handle the release of such report to the attorneys for the respective parties; that if the parties are unable to agree on the therapist or counselor to be used, the Court will appoint a therapist or counselor after giving each of the parties an opportunity to supply the Court with the names and qualifications of any therapists or counselors suggested by them for use herein; that Defendant shall be responsible for the payment, as and when due, of all charges made by the therapist or counselor; and that both the parties shall cooperate with and be responsive to the requests and directions of the therapist or counselor involved. (Emphasis added.)

Next, the trial court must review Dr. Stern's interactions with the Chamberses from April 18, 1994, through the later of (1) the last therapy session by any family member with Dr. Stern, or (2) Dr. Stern's final communication with the chancery court, in light of the chancery court's April 18, 1994, divorce decree, directing the following:

> The parties and the children are directed to cooperate with the Court appointed therapist, H. Patrick Stern, M.D., *to resolve visitation problems. Visitation is to be pursuant to Dr. Stern's direction pending further order of the Court.* [FN2] The Defendant is hereby directed to pay all charges associated with the subject therapy related to visitations problems pending further order of the Court. (Emphasis added.)

> FN2. We render no opinion regarding (1) the validity of the trial court's instruction that, "Visitation is to be pursuant to Dr. Stern's direction pending further order of the Court," or (2) the effect of the validity of that instruction upon the application of judicial immunity to Dr. Stern. The instruction's validity was not challenged, and these issues are not before us on appeal.

> Only after the trial court resolves the aforementioned legal issues may the jury consider the merits of appellant's malpractice claim.

Stern I, 338 Ark. at 338-40, 994 S.W.2d at 466-67.

On remand, the trial court made its decision. It determined that Stern's actions were within the scope of his court-appointed capacity and that he was entitled to judicial immunity. Again, Chambers has offered no proof to the contrary, and we will not consider, under our doctrine of law of the case, issues that could have been raised in the first appeal, such as the validity of the judicial appointment and fraud, but were not. *See McDonald's Corp. v. Hawkins*, 319 Ark. 1, 888 S.W.2d 649 (1994); *Alexander v. Chapman*, 299 Ark. 126, 771 S.W.2d 744 (1989).

Affirmed.

IMBER, J., not participating.

Blake JONES *v.* STATE of Arkansas

01-695 64 S.W.3d 728

Supreme Court of Arkansas
Opinion delivered January 17, 2002

H. Brock Showalter, Deputy Public Defender, for appellant.

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

ROBERT L. BROWN, Justice. This is an appeal by appellant Blake Jones from an adjudication of delinquency based on the offense of terroristic threatening in the first degree, a Class D felony. He was sentenced to twenty-four months of supervised

probation and seven days to serve in the Juvenile Detention Center. Jones raises two points on appeal: (1) the juvenile judge erred in denying his motion for directed verdict because the State had not proven the requisite mental intent for terroristic threatening; and (2) the rap song involved is protected speech under both the Arkansas and United States Constitutions. We affirm the adjudication and the disposition.

Blake Jones was fifteen at the time of the events giving rise to this appeal. While attending Fayetteville High School, a fellow student named Allison Arnold, who was also fifteen, had befriended him. The two had been friends for about three years. At various times while Jones was away at juvenile detention facilities for various offenses, Arnold wrote letters to him. On occasion, Jones composed rap songs and gave them to Arnold to read. In her trial testimony, Arnold said that he wrote poems and notes and gave them to her, and that "He'd always say he was expressing himself through a poem." She said some of those rap songs or poems contained violent language, but they were not directed toward any particular person. She described her relationship with Jones as a friendship in which she "just tried to witness to him." She had taken him to church with her family and had spoken to him about religious matters. Arnold added that she had wanted to help Jones and "give him hope."

On February 15, 2001, during the second period of the school day, Jones wrote several notes to Arnold in class and gave them to her. She refused to write back and let him know that she was not going to write notes because she wanted to pay attention in class. Her refusal to respond made Jones mad. He testified that upon his recent return to Fayetteville High School from the detention facility, their friendship had cooled, and Arnold had acted "snobby" toward him. After she refused to write back to him, he wrote a rap song and gave it to her:

> I hope you remember this day, cuz you'll forever be the cause of my violence and rage,
>
> You steadily rejected me, now I'm angry and full of fucking misery,
>
> You try to be judgmental telling me to act right. Before you take the speck from my eye, take the fucking board from your eye,

> I didn't do nothing to deserve this, and now I'm stressed, and when I'm stressed, I'm at my best,
>
> I'm a motherfuckin murderer, I slit my mom's throat and killed my sister. You gonna keep being a bitch, and I'm gonna cliche [click],
>
> My hatred and aggression will go towards you, you better run bitch, cuz I can't control what I do. I'll murder you before you can think twice, cut you up and use you for decoration to look nice,
>
> I've had it up to here bitch, there's gonna be a 187 on your whole family trik [trick],
>
> Then you'll be just like me, with no home, no friends, no money,
>
> You'll be deprived of life itself, you won't be able to live with yourself,
>
> Then you'll be six feet under, beside your sister, father, and mother,
>
> You'll be in hell, and I'll be in Jail, but I won't give a fuck cuz we all know I've been there before,
>
> Goodbye forever my good friend. I'll see you on judgement day when I'm punished for my sin.[1]

Jones did not give Arnold the rap song immediately, but he handed it to her during fifth period. While Arnold read the song, Jones was laughing. He asked Arnold whether she liked the rap lyrics, and she told him that she thought they were "sick and gross." She further testified that she was frightened and appalled because: "[H]e knew where I lived, he knew my family, he wrote about my sister[ ] and my dad, that's written to my family. It was handed to me, and it was given to me. It was written for me." Jones asked her to give the note with the rap lyrics back to him, and she refused.

There are two matters of factual dispute surrounding this incident. First, although Jones claimed he told her "Don't take this serious," Arnold denied that he made the statement. The second factual dispute is whether or not Arnold first asked to see his

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[1] Although the content of the rap indicates otherwise, Jones's mother was not dead. In fact, Jones previously had told Arnold that his mother was killed in a car accident, though this was untrue as well.

writing. In Jones's written statement, he asserted that Arnold asked to see the note. Arnold denied this in her trial testimony.

Instead of handing the note back to Jones, Arnold asked the teacher if she could use the restroom. She testified that this interchange with her teacher occurred within three to five minutes after she read the note. A witness for Jones, Sarah Stone, testified that the time differential was more like fifteen minutes. After getting permission to leave the classroom, she went directly to principal John Wesson's office. Once in the principal's office, she showed him the note. He called the Fayetteville Police Department and then called Jones to the office.

Officer David Williams arrived, and Arnold told him that she felt scared because she thought Jones was capable of carrying out the conduct described in the note. According to Officer Williams's trial testimony, Arnold was crying and seemed scared of Jones, positioning herself so that the police officer physically separated the two of them. Jones, on the other hand, told the police officer that he did not believe that "this was a big deal, and he didn't understand why everyone was upset." He volunteered an apology to Arnold. He also gave a statement admitting that he wrote the note. According to Principal Wesson's testimony, he told the principal and Officer Williams that he was "modeling his writing after [rap artist] Eminem." He insisted that he was simply writing "to get his feelings out." In his written statement he said: "I got mad and wrote a letter to express myself. It was a rap and pretty gruesome." Principal Wesson testified that Jones seemed to have no understanding that his writing could frighten or harm another person.

On February 16, 2001, the prosecuting attorney filed a Petition for Adjudication of Delinquency against Jones. The petition alleged that Jones had committed an act of terroristic threatening in violation of Ark. Code Ann. § 5-13-301 (Repl. 1997), a Class D felony.[2] On February 27, 2001, the petition was heard in juvenile court. The prosecutor presented the testimony of Arnold, Officer Williams, Principal Wesson, and Allison Arnold's father, J.R. Arnold. At the conclusion of the State's case, the defense moved for a directed verdict on the specific ground that the State had failed to prove the requisite intent to terrorize or cause extreme fright. The

[2] The petition also alleged that Jones had engaged in disorderly conduct in violation of Ark. Code Ann. § 5-71-207 (Repl. 1997), a Class C misdemeanor. Apparently, in the van on the way back to Youth Bridge, the juvenile facility where Jones lived, he exposed himself. This incident is not at issue in this appeal.

juvenile judge denied the motion. Defense counsel then presented the testimony of Fayetteville High School student Sarah Stone, who testified about Jones's history of writing rap songs, and next the testimony of Jones himself. After Jones's testimony was concluded, the following exchange occurred:

> THE COURT: Thank you, Mr. Jones. You can return to your seat. Call your next, Ms. Poole.
>
> DEFENSE COUNSEL: The defense rests, Your Honor.
>
> THE COURT: Thank you. Statements, Ms. Robinson?

The defense did not renew its motion for directed verdict. The State then immediately began its closing argument.

After closing arguments, the juvenile judge ruled from the bench. She found that the rap lyrics constituted a threat. She noted that Jones was mad at Arnold when he wrote the rap song and that the lyrics were intended to cause Arnold fear. The judge further observed that Arnold knew of Jones's criminal history, and that Arnold had been intensely frightened and upset by the episode. She adjudicated Jones delinquent on the charge of terroristic threatening and sentenced him to 24 months of supervised probation, as well as seven days in a juvenile detention facility. She specifically ordered that Jones have no contact with Arnold or her family. Because Jones was already in state custody at the time of the incident and resultant trial, the judge committed Jones to the custody of the Department of Youth Services.

I. Sufficiency of the Evidence

Jones's first point on appeal is that the trial judge erred in denying his motion for a directed verdict based on the fact that the State failed to prove the required mental state for terroristic threatening.[3] We are precluded from addressing this point because it is not preserved for our review.

Under the Juvenile Code, the Arkansas Rules of Criminal Procedure apply to delinquency proceedings. Ark. Code Ann.

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[3] For purposes of a bench trial, Ark. R. Crim. P. 33.1(b) uses the term "motion for dismissal" rather than "motion for directed verdict."

§ 9-27-325(f) (Supp. 2001); *see also L.H. v. State*, 333 Ark. 613, 973 S.W.2d 477 (1998); *Mason v. State*, 323 Ark. 361, 914 S.W.2d 751 (1996). Arkansas Rule of Criminal Procedure 33.1 states in relevant part:

> (b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.
>
> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment.

Ark. R. Crim. P. 33.1 (b)-(c). Thus, if a defendant fails to renew a motion for dismissal at the close of all the evidence, the sufficiency challenge is deemed waived on appeal. *See also Trammell v. State*, 70 Ark. App. 210, 16 S.W.3d 564 (2000) (juvenile adjudicated delinquent on terroristic threatening charge waived his sufficiency challenge on appeal when he did not renew his motion for directed verdict after the close of all the evidence).

Here, Jones in no way attempted to renew his motion at the close of all the evidence. After Jones rested his case, the State immediately began closing arguments. Accordingly, Jones waived any sufficiency arguments that he may have presented to the juvenile judge by way of his initial motion to dismiss at the close of the State's case.

II. Free Speech Argument

We turn next to Jones's contention that his rap song was protected speech under the Arkansas and U.S. Constitutions. As an initial point, we fail to see where Jones's counsel raised the Arkansas Constitution as an argument before the juvenile judge. Arguments, even constitutional arguments, are improperly raised for the first time on appeal. *B.C. v. State*, 344 Ark. 385, 40 S.W.3d 315 (2001) (holding, in juvenile delinquency adjudication, that juvenile's equal protection argument was not preserved when it was not raised before the trial court); *see also Goff v. State*, 341 Ark. 567, 19 S.W.3d 579 (2000); *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997).

Because it is not preserved, we will not address his claim under the Arkansas Constitution.

Whether Jones's rap song was protected speech under the U.S. Constitution was argued to the juvenile judge by both the prosecutor and defense counsel in closing arguments. The prosecutor contended that the rap song fell within an exception to protected speech because it was a threat. Defense counsel responded that Jones did not lose his First Amendment protection while in school and referred to a Pulaski County School District case where a rap song was found to be protected speech.[4] The prosecutor responded that Jones's rap song fell within the fighting-words exception to protected speech and that the Pulaski County School District case was distinguishable. The juvenile judge agreed and found that the rap song was not protected speech but fell within the fighting-words exception to First Amendment protection. Because the First Amendment and its exceptions were specifically argued to the juvenile judge, and her findings were based in part on constitutional principles, we deem the argument to be appropriately before us.

Turning to his free-speech claim under the U.S. Constitution, Jones urges that neither the "fighting words" nor the "true threat" exception apply to his case and that his rap song was protected speech. We disagree. Preliminarily, we note that Jones is not mounting a facial challenge to our terroristic threatening statute (Ark. Code Ann. § 5-13-301(a)(1)(A) (Repl. 1997)), as was the case with the statute at issue and the vagueness assertion in *Shoemaker v. State*, 343 Ark. 727, 38 S.W.3d 350 (2001), which Jones relies on. Rather, Jones contends that the application of the statute to his rap song is unconstitutional under the First Amendment. The First Amendment is made applicable to the states through the Fourteenth Amendment. *Lovell v. City of Griffin*, 303 U.S. 444 (1938). The United States Supreme Court in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), noted that its jurisprudence, over the years, has recognized several exceptions to blanket protection for expressive speech. *R.A.V.*, 505 U.S. at 382-83 ("From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the

[4] The reference was to *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833 (8th Cir. 2001) (rehearing *en banc* granted and opinion vacated, Nov. 5, 2001).

social interest in order and morality.' ") (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

Two of those categories of unprotected speech are at issue in this case. The first is the well-established "fighting words" doctrine. *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Shoemaker v. State, supra*; *Johnson v. State*, 343 Ark. 343, 37 S.W.3d 191 (2001). The second is the "true threat" exception. *See Watts v. United States*, 394 U.S. 705 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech."); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371 (9th Cir. 1996) ("In general, threats are not protected by the First Amendment.").

"Fighting words" have been defined by the United States Supreme Court as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire, supra.* Quoting the New Hampshire Supreme Court, the *Chaplinsky* Court alternatively described fighting words as those which "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Id.* at 573. This court first recognized the "fighting words" doctrine in 1956 in the case of *Youngdahl v. Rainfair, Inc.*, 226 Ark. 80, 288 S.W.2d 589 (1956) (quoting extensively from *Chaplinsky* and upholding, over striking workers' constitutional objection, an injunction against picketing). We have since applied it a number of times in different contexts. *See, e.g., Johnson v. State, supra* (assessing as-applied challenges to statute); *Lucas v. State*, 257 Ark. 726, 520 S.W.2d 224 (1975) (giving statute a narrowed reading); *Shoemaker v. State, supra* (declaring statute unconstitutional). We agree with the State that the fighting-words exception is not applicable to the facts of this case.

The "true threat" doctrine was first announced in the United States Supreme Court case of *Watts v. United States, supra.* In *Watts*, the Court held that the defendant could not be prosecuted for a statement made at a political rally which, when taken literally, threatened President Lyndon Johnson's life. Instead, the Court directed that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Watts*, 394 U.S. at 707. However, the Court also held that the statute which makes a knowing threat against the president a crime was constitutional. The Court did not set out a test in *Watts* for distinguishing between a true threat and hyperbolic political comment.

Since *Watts*, several federal circuit courts have disagreed on the applicable standards governing the assessment of whether a threat is true and, thus, not protected by the First Amendment. The question has been addressed by the First, Second, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeal and by various state supreme courts as well. The Circuit Courts disagree, however, on whether the appropriate focus should be on the declarant of the statement and what he should reasonably have foreseen, or rather on the recipient of the statement and what she reasonably would have believed.

For example, the First Circuit has held that the appropriate standard is "whether [the defendant] should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made." *U.S. v. Fulmer*, 108 F.3d 1496, 1491 (1st Cir. 1997). However, the Second Circuit has announced its test that a true threat exists when the language "on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *United States v. Francis*, 164 F.3d 120, 122-23 (2d Cir. 1999) (citing *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976)). The Second Circuit has further said: "The test is an objective one — namely, whether 'an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury.' " *United States v. Malik*, 16 F.3d 45 (2d Cir. 1994) (internal citation omitted).

The Sixth Circuit, on the other hand, has said: "Although it may offend our sensibilities, a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation." *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997). *See also United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992) ("[T]he standard . . . is an objective standard, *i.e.*, would a reasonable person consider the statement to be a threat."). The Ninth Circuit has set a slightly different objective test: "[W]hether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *Bauer v. Sampson*, 261 F.3d 775, 782 (9th Cir. 2001) (quoting *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 371 (9th Cir. 1996)).

The Eighth Circuit has taken a somewhat different approach from those of the other circuits in establishing an objective

test. Rather than a brief verbal formulation of a test, the Eighth Circuit has outlined five factors which govern its review of whether a threat is true or hyperbolic. In *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), the Eighth Circuit said:

> When determining whether statements have constituted threats of force, we have considered a number of factors: the reaction of the recipient of the threat and of other listeners; whether the threat was conditional; whether the threat was communicated directly to its victim; whether the maker of the threat had made similar statements to the victim in the past; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. This list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive.

Dinwiddie, 76 F.3d at 925.

The five *Dinwiddie* factors were recently applied in the Pulaski County Special School District expulsion case, which was argued before the juvenile judge and where a rap song was also at issue. In *Doe v. Pulaski County Special Sch. Dist.*, 263 F.3d 833 (8th Cir. 2001) (panel decision vacated and *en banc* rehearing granted Nov. 5, 2001), a panel of the Eighth Circuit ruled the defendant school district's expulsion of a student for writing a threatening rap song to his ex-girlfriend unconstitutional. That panel's decision was subsequently vacated on November 5, 2001, and rehearing *en banc* was granted by the Eighth Circuit. At this writing, the rehearing *en banc* has not taken place.

In *Doe*, the expelled student wrote his rap song during the summer months when school was not in session. He wrote the four-page song to his ex-girlfriend, K.G., with whom he was extremely angry because she had broken up with him in order to be with another boy. In the song/letter, Doe threatened to rape K.G., sodomize her, and kill her with a knife by hiding under her bed. A friend of Doe's found the rap lyrics in Doe's bedroom. Doe eventually told K.G. in a telephone conversation about the general content of the letter. During this conversation, she asked to see the letter, and he refused. Through the same friend who initially found the letter, she was later able to covertly obtain it. K.G. was frightened and worried about the contents of the letter, and one of her friends reported her concerns to school administrators. After this report, the letter came to light, and Doe was expelled by the school after an administrative process. No criminal charges were brought.

Doe filed suit in federal district court to set aside the expulsion, and the district judge ruled the expulsion a violation of the First Amendment. In an unpublished disposition, the district court held that the letter did not constitute a true threat to K.G. The now-vacated Eighth Circuit panel affirmed that decision. That panel, in applying the *Dinwiddie* factors, particularly emphasized three factors. First, the panel found it significant that Doe did not show the letter to K.G. Secondly, K.G. had no knowledge of any past violent behavior on Doe's part. Finally, Doe and K.G. continued to see one another socially at church functions even after K.G. knew about the content of the letter. For these reasons, the panel affirmed the district judge's decision that the letter did not constitute a true threat to K.G.

Turning to the case at bar, we observe that this court has never addressed the "true threat" doctrine, and, accordingly, has never adopted a test for what constitutes a true threat. In considering the various tests adopted by the circuit courts and various state supreme courts, we conclude that an objective test focusing on how a reasonable person would have taken the statement and using the *Dinwiddie* factors has the most merit. *See also In re Kyle M.*, 200 Ariz. 447, 27 P.3d 804 (Ct. App. 2001); *State v. Perkins*, 243 Wis. 2d 141, 626 N.W.2d 762 (2001); *In re Steven S.*, 25 Cal. App. 4th 598, 31 Cal. Rptr. 2d 644 (1994). As reported in *Dinwiddie*, those factors are not exclusive but provide initial guidance in groping with the question.

Applying the five *Dinwiddie* factors to this case, we conclude that Jones's language constituted a true threat to Arnold. First, there was the reaction of Arnold to the threat. Her reaction to Jones's letter was immediate and unequivocal. Within minutes of receiving it, she asked permission to leave the classroom. She then proceeded to the principal's office where she reported the incident. She was intensely frightened and upset, by everyone's account, and she told the attending police officer that she believed Jones was capable of carrying out the threat because he had a criminal record and knew where her family lived.

Secondly, the threat made was not conditional. The lyrics which Jones composed indicated that he was mad at Arnold, and he placed no conditions on his intended conduct. Thirdly, Jones communicated the threat directly to Arnold by handing the note to her. Finally, though Jones had not made similar statements to Arnold in the past, she clearly believed that he had the capacity to carry out his threat. She knew that he had been in and out of juvenile

detention facilities for various offenses. And while Jones's offenses may have been nonviolent — the record on appeal does not reveal his criminal history — Arnold was convinced that his juvenile record indicated a criminal disposition to make good his threat. Viewing these factors together, we conclude that a reasonable person in Arnold's position would have taken the rap song as a true threat.

Moreover, there are several important factual differences between this case and *Doe v. Pulaski County Special Sch. Dist., supra.* Our review in the instant case is of a juvenile adjudication and not administrative action, as is the case in *Doe.* Also, unlike *Doe,* Jones wrote his rap lyrics and within hours gave the song directly to Arnold. Arnold also knew that Jones had a juvenile record for criminal offenses, and she immediately went to the authorities upon receiving the letter and ceased contact with Jones, unlike the *Doe* victim who continued to socialize with Doe for some time after learning about his rap song.

We affirm the juvenile judge's decision. Although the judge based her decision on the "fighting words" doctrine, we can still affirm her decision because she reached the right result, albeit for the wrong reason. *See, e.g., Harris v. State,* 339 Ark. 35, 2 S.W.3d 768 (1999) (citing *Dandridge v. State,* 292 Ark. 40, 727 S.W.2d 851 (1987); *Chisum v. State,* 273 Ark. 1, 616 S.W.2d 728 (1981)). We hold that because Jones's rap lyrics constituted a true threat to Arnold, the rap song is not protected by the First Amendment.

Affirmed.

IMBER, J., not participating.

COLUMBIA NATIONAL INSURANCE COMPANY *v.*
Gary FREEMAN and Peggy Freeman

01-614 64 S.W.3d 720

Supreme Court of Arkansas
Opinion delivered January 17, 2002

Appeal from Cleburne Circuit Court; *John Dan Kemp*, Judge;

Robert J. Donovan, for appellant.

Belew & Bell, by: *John M. Belew*; *Bell & Associates, P.A.*, by: *Harvey L. Bell*; and *Scott Ellington*, for appellees.

RAY THORNTON, Justice. On October 27, 1997, a fire caused major damage to Circle F Trading Company, a western wear and general store, owned and operated by appellees, Gary and Peggy Freeman. The Freemans were insured against losses to the building, its contents, continuing business expenses, and other coverage, by appellant, Columbia National Insurance Company. Appellant responded promptly to the notice of the fire and concluded that the inventory was destroyed.

Before it would pay for appellees' continuing business expenses, appellant requested that appellees provide it with an itemization of those business expenses. Appellees provided an itemized list of expenses, but it is disputed whether the actual bills and invoices were submitted to appellant. No payment for business expenses, including the mortgage payment, was ever made by appellant.

Appellant sought to locate a mobile building to serve as a temporary office for Circle F's continuing operations, but no such building was provided. Because the first inventory of the merchandise was based upon the retail value of the merchandise and amounted to $107,905.13, appellant obtained a second appraisal of the inventory of $71,231.69.

On December 5, 1997, appellant paid appellees $77,892.28 for inventory, supplies, lost income, and damaged feed. No payment was made for continuing business expenses, and no temporary office facility was provided. There was a disagreement between the parties as to whether an agreement was reached in late December of 1997 as to a settlement of $32,725 for the cost of repairing the building. However, in January of 1998, appellant tendered a check in the amount of $ 26,180.02, representing eighty percent of the $32,725. Appellees rejected the check. Circle F Trading Company never reopened.

On May 14, 1998, appellees filed a complaint in the Circuit Court of Cleburne County. The complaint alleged three causes of action: (1) breach of contract; (2) the tort of bad faith; and (3) tortious interference with contract/business expectancy. At trial, the court determined that there was sufficient evidence of bad faith to submit that issue to the jury. The case was submitted to the jury on two interrogatories. The issue before the jury was whether appellant had acted in bad faith in its dealings with appellees. The jury returned a verdict for appellees and awarded $170,000 in compensatory damages and $200,000 in punitive damages.

Appellant brings this appeal, raising seven points for our consideration. We find no error and affirm the trial court on all points.

We first consider whether the trial court erred in denying appellant's motion for directed verdict on the issue of bad faith. Specifically, appellant argues that there was insufficient evidence to establish that appellant acted in bad faith. When reviewing a denial of a motion for a directed verdict, we determine whether the jury's verdict is supported by substantial evidence. *State Auto Property and Casualty Ins. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999). Substantial evidence is defined as evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond mere suspicion or conjecture. *Id.* In determining whether substantial evidence exists, we have stated that we will rely upon two crucial principles to avoid invading the province of the jury. *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993). First, the court will consider only the evidence favorable to the successful party below, and second, the court will defer to the jury's resolution of the issue unless we can say that there is no reasonable probability to support the version of the successful party below. *Id.* Additionally, in reviewing the evidence, the weight and value to be given the testimony of the

witnesses is a matter within the exclusive province of the jury. *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993).

Remaining mindful of our standard of review, we must now determine whether there was sufficient evidence to support the jury's verdict that appellant acted with bad faith in its dealings with appellees. An insurance company commits the tort of bad faith when it affirmatively engages in dishonest, malicious, or oppressive conduct in order to avoid a just obligation to its insured. *Swaim, supra.* We have defined "bad faith" as dishonest, malicious, or oppressive conduct carried out with a state of mind characterized by hatred, ill will, or a spirit of revenge. *Id.* Mere negligence or bad judgment is insufficient so long as the insurer is acting in good faith. *Id.* The tort of bad faith does not arise from a mere denial of a claim; there must be affirmative misconduct. *Id.*

In *State Auto Property and Casualty Ins. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999), we reviewed our prior cases dealing with the issue of bad faith and explained the circumstances under which an insurance company acted in bad faith. In *Swaim*, we also explained the circumstances under which an insurance companies was not acting in bad faith. Specifically, we explained:

> [W]e have held that nightmarish red tape, an abrupt attitude evidenced by an insurance representative about higher premium costs following cancellation of a group policy, and confusion over the referral process did not amount to bad faith. *See American Health Care Providers v. O'Brien, supra.* Nor did the fact that an insurance company waited three months to investigate a claim. *See Reynolds v. Shelter Mut. Ins. Co.*, 313 Ark. 145, 852 S.W.2d 799 (1993).
>
> Examples of cases where we have found substantial evidence of bad faith include where an insurance agent lied by stating there was no insurance coverage (*Southern Farm v. Allen, supra*); aggressive, abusive, and coercive conduct by a claims representative, which included conversion of the insured's wrecked car; (*Viking Insurance Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992)); and where a carrier intentionally altered insurance records to avoid a bad risk (*Employers Equitable Life Ins. Co. v. Williams*, 282 Ark. 29, 665 S.W.2d 873 (1984)).

Swaim, supra.

Turning to the case now on review, we must determine whether there was sufficient evidence to submit to the jury the issue

of bad faith. First, appellees argue that appellant acted in bad faith when it failed to pay appellees' ongoing business expenses. These expenses included utility bills and appellees' mortgage payment. Bill Green, an insurance adjuster who worked for appellant, was responsible for providing appellees money to cover their ongoing business expenses. He testified that he asked appellees to provide him documentation of the ongoing business expenses before he could pay the expenses. Mr. Freeman and Mrs. Freeman each testified that they had made the requested copies of the bills and mailed the documentation to Mr. Green. Mr. Green testified that the only documentation he received from appellees was a handwritten list of bills, that he determined that this was inadequate documentation, and that he declined to pay appellees' ongoing business expenses. The issue whether appellant received appropriate documentation is one for the factfinder to resolve based upon the credibility of the witnesses. There was sufficient evidence for the jury, without resorting to suspicion or conjecture, to determine whether adequate documentation had been provided, and to support a finding that failure to cover appellees' ongoing business expenses, to which they were entitled, was an act of bad faith.

Next, appellees contend that appellant acted in bad faith when it failed to provide appellees with a temporary location for their business. Sufficient evidence was admitted to present to the jury the question of whether appellant's agent agreed to provide a trailer for appellees to use, researched the cost of providing such a service, and then failed to go forward with the agreement.

Additionally, appellees argue that appellant was acting in bad faith when it failed to comply with an agreement reached between the parties on the issue of cost for building repairs. Evidence was introduced that appellant's agent and appellees agreed in late December 1997 upon the sum of $32,725 for the cost of repairing the building but that after entering into this agreement, appellant tendered only eighty percent of the amount agreed upon. There was sufficient evidence of such an agreement to submit to the jury the question of whether an agreement was entered into by the parties and then breached by appellant.

Appellees next argue that the jury had sufficient evidence to support a conclusion that appellant acted in bad faith by altering appellees' claim file. Appellees identify two events that indicate that appellant was altering appellees' file. First, appellees argue that appellant's employee purposely misplaced documents which detailed disputed events. Appellees argue that these documents were

missing because they contained critical information involving the parties attempting to negotiate appellees' claims. Next, appellees argue that a second file known as a "dummy file" was established on their claim in bad faith. Once again, these assertions reflect a question of credibility that the jury could consider in its evaluation of appellant's alleged acts of bad faith.

Appellees further argue that appellant falsely accused them of being uncooperative. Appellees claimed that a letter written by one of appellant's employees addresses this issue.[1] The letter warned appellees that if they failed to fulfill certain obligations in their insurance policy, then any settlement offer from appellant was at risk of being reduced. Appellees also contend that appellant falsely considered appellees to be uncooperative because they hired an attorney. They claim that this position was discussed in correspondence between appellant's employees. The correspondence discussed that appellees' claim was very complicated and that it was further "complicated by [appellees] hiring an attorney." This evidence could be considered by the jury in determining whether appellant's actions were the result of "ill will."

Finally, appellees argue that appellant acted with bad faith when it requested that two appraisals be performed on appellees' inventory and chose to pay appellees based on the lower of the two appraisals.

After reviewing the testimony and the alleged acts of bad faith, we hold that the trial court properly denied appellant's motion for directed verdict. Specifically, we conclude that there was substantial evidence to support the jury's verdict that appellant's actions constituted oppressive conduct carried out with a state of mind characterized by ill will. Accordingly, the trial court's denial of appellant's motion for a directed verdict is affirmed.

In appellant's second point on appeal, it argues that the trial court should have excluded documents written by Joe Hoelzeman, Richard Walls, and Steve Wenger. On appeal, we will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001). Nor will we reverse a trial court's ruling on evidentiary matters absent a showing of prejudice. *Id.* Appellant

[1] We note that this letter was written by Joe Hoelzeman. However, the letter had Bill Green's name signed at the bottom. Mr. Green testified that he did not actually review or sign the letter.

argues that these documents should have been excluded because they include evidence of "subsequent remedial measures" which are inadmissible pursuant to Rule 407 of the Rules of Evidence.

Rule 407 provides:

> Whenever, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Id.

An example of improper evidence showing a subsequent remedial measure may be found in *Carton v. Missouri Pacific Railroad Company*, 315 Ark. 5, 865 S.W.2d 635 (1993). In that case, appellant argued that the trial court should have admitted certain pictures. The pictures showed that after appellant was injured by falling on oil-soaked gravel appellee replaced the gravel with clean gravel. We held that the pictures were evidence that appellee had taken subsequent remedial measures and affirmed the trial court exclusion of the evidence. *Id. See also Lawhorn v. Aryes Corporation*, 67 Ark. App. 66, 992 S.W.2d 162 (1999).

In the case now on review, appellant sought to exclude three documents. First, a letter written by Joe Hoelzeman on February 17, 1998. The letter states that appellees have hired an attorney and requests that the claim be transferred to a new adjuster. The second document was a report written on March 11, 1998, from Richard Walls to appellant. This document reviews the status of appellees' claim. The third document appellant sought to exclude was a memo to the file written by Steve Wenger and dated April 8, 1998. This memo once again reviews appellees' claims and discusses possible problems appellant may encounter in the negotiation process such as taking an across the board depreciation on all property. The final document appellant sought to exclude was Joe Hoelzeman's response to Steve Wenger's memo. The response seeks to correct a mistake made in the Steve Wenger's memo and acknowledges that the across the board depreciation on all items is no longer a company policy. After reviewing the documents that appellant sought to exclude, we conclude that the documents do

not contain any evidence of subsequent remedial measures. Specifically, the documents do not describe measures which had appellant taken previously would have made an event less likely to occur. Accordingly, we affirm the trial court.

In appellant's third point on appeal, it argues that the trial court erred when it allowed appellee Gary Freeman to testify about whether he could afford to rebuild his business. Appellant argues that his testimony should have been excluded because it was not relevant pursuant to Rule 401 of the Rules of Evidence. Rule 401 states that " 'relevant evidence' means evidence having 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." We have held that a trial court's ruling on relevancy is entitled to great weight and will not be reversed absent an abuse of discretion. *Arthur v. Zearley*, 337 Ark. 125, 992 S.W.2d 67 (1999).

The testimony appellant sought to exclude is as follows:

> MR. BELEW [*appellees' attorney*]: Did you have any money to repair the building?
>
> MR. DONOVAN [*appellant's attorney*]: Objection, your honor, it's not relevant under the terms of the policy.
>
> MR. BELEW: Your, honor, it certainly is relevant. He hadn't been paid for his building. And the question is did he have the economic ability to put his building back without his insurance proceeds. That's the question.
>
> THE COURT: Objection will be overruled.
>
> MR. BELEW: Do you have the money to build your building back?
>
> GARY FREEMAN [*appellee*]: No sir.

Appellees' contend that this testimony was relevant because it established: (1) that appellees did not have the money to replace their business without receiving their insurance proceeds; and (2) that appellees had not yet received these proceeds. We cannot say that the trial court abused its discretion by admitting this evidence.

In appellant's fourth point on appeal, it argues that the trial court should have granted its motion for directed verdict on count I of appellees' complaint. Count I of appellees' complaint was a claim for breach of contract. Specifically, appellant argues that appellees failed to provide sufficient evidence that appellant breached its contract with appellees.

Appellees respond by arguing that we should not consider this argument on appeal because appellant withdrew its motion for directed verdict on count I and agreed to submit this issue to the jury. *See Mine Creek Contractors, Inc. v. Grandstaff*, 300 Ark. 516, 780 S.W.2d 543 (1989) (holding that a party cannot concede an issue at trial and then raise it on appeal). After reviewing the colloquy between the attorneys and the trial court, we agree with appellees that appellant withdrew its motion for directed verdict on count I of appellees' complaint and agreed to submit the issue to the jury.

However, we note that the issue was not submitted to the jury. The trial court did not instruct the jury on a breach of contract claim. Moreover, the jury did not consider a breach of contract claim or render a verdict on a breach of contract claim. Specifically, the verdict form submitted to the jury contained two interrogatories both dealing with the issue of bad faith. The first interrogatory provided: "[D]o you find from a preponderance of the evidence that Columbia National Insurance Company is guilty of bad faith?" The second interrogatory provided: "If you have answered interrogatory no. 1 'yes' then you may assess those damages, if any, that you find were proximately caused by the bad faith of Columbia National Insurance Company." Because appellant agreed to withdraw its motion for directed verdict on count I of appellees' complaint, and because the jury did not render a verdict based on appellees' breach of contract claim, we decline to address this issue on appeal.

In appellant's fifth point on appeal, it argues that the trial court erred in denying its motion for judgment notwithstanding the verdict. Specifically, appellant argues that there was insufficient evidence to support the award of $170,000 in compensatory damages. A motion for judgment notwithstanding the verdict is technically only a renewal of the motion for directed verdict made at the close of the evidence. *Wheeler, supra.*

After reviewing the evidence, we conclude that there was sufficient evidence to support the jury's award of $170,000. At trial, appellees offered evidence of underpayment in inventory, costs to

repair the building, loss of income, and normal operating expenses. Considering the testimony in the light most favorable to appellees, there was evidence that appellees incurred operating expenses in the amount of approximately $35,000 a year, based on the testimony of Wade Turner, appellees' certified public accountant. Mr. Turner testified that appellees incurred $2,926 a month in normal operating expenses, and that appellees lost $22,000 a year in net income for four years. The cost to repair the building was $32,725. Deducting the amount paid by or tendered by appellant, there was evidence that the total of appellees' compensatory damages exceeded $170,000. Because the jury's award of $170,000 in compensatory damages is supported by the evidence, we conclude that the trial court did not err in denying appellant's motion for judgment notwithstanding the verdict.

In its sixth point on appeal, appellant argues that the trial court improperly excluded testimony favorable to appellant. Specifically, appellant argues that the trial court improperly determined that certain testimony was hearsay and therefore inadmissable. The evidence appellant sought to have admitted involved statements made by employees at the Secretary of State's office to James Cunningham, appellant's employee. At trial, an issue of whether Columbia Insurance Group, Inc., was qualified to do business in Arkansas arose. Appellant wanted to admit the testimony to show that Columbia Insurance Group, Inc., was not registered to do business in Arkansas because someone at the Secretary of State's Office informed James Cunningham that it was not necessary for the company to register. The trial court did not allow Mr. Cunningham to testify about what he was told by the employee at the Secretary of State's Office. Appellant's attorney proffered the content of Mr. Cunningham's testimony.

Pursuant to Rule 801(c) of the Rules of Evidence, "'hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Such testimony is inadmissible evidence unless it fits within one of the exceptions outlined in Rule 801. Rule 802 of the Rules of Evidence.

In the case now before us, the testimony appellant sought to have admitted was hearsay testimony which did not fit within any of the articulated exceptions to Rule 801. Specifically, appellant sought to have Mr. Cunningham testify about what he was told by an employee at the Secretary of State's Office. This testimony was

offered to explain why Columbia Insurance Group, Inc. was not authorized to do business in Arkansas.[2] Because the evidence constituted inadmissible hearsay, the trial court did not err by excluding James Cunningham's proffered testimony.

In appellant's final point on appeal, it argues that the trial court improperly admitted evidence concerning other claims against appellant. The parties agreed before trial that appellees would not offer evidence regarding other claims in which appellant was involved unless appellant "opened the door." During Roger Langster's testimony, appellees' attorney asked Mr. Langster: (1) if he had ever had a problem with Joe Hoelzeman; (2) if he had ever gone to Joe Hoelzeman's supervisors to get a claim resolved; and (3) if he had to call "the home office" to get assistance in dealing with matters. Appellant objected to these question arguing that appellees had violated the agreement regarding offering evidence about other claims in which appellant was involved. The trial court overruled appellant's objection and admitted the testimony. Next, Tommy Smith testified. Appellees' attorney asked Mr. Smith if Mr. Langster had told him that he had problems with Joe Hoelzeman. Appellant once again objected. The trial court allowed the testimony and issued a limiting instruction to the jury that the evidence could be considered solely for the purpose of determining whether appellant was guilty of bad faith or tortious interference.

On appeal, appellant contends that the cumulative effect of the testimony offered by Mr. Langster and Mr. Smith allowed the jury to infer that appellant was guilty of misconduct in other claims and that this inference prejudiced appellant. We note that appellant has failed to offer any citation to authority to support its position. *See City of Van Buren v. Smith*, 345 Ark. 313, 46 S.W.3d 527 (2001) (holding that this court does not consider arguments that are unsupported by convincing argument or sufficient citation to legal authority). Additionally, we note that appellant does not explain how it was prejudiced by admission of the testimony. Accordingly, we hold that the trial court did not abuse its discretion when it allowed Mr. Langster and Mr. Smith to testify.

For the reasons we have stated, the trial court is affirmed.

IMBER, J., not participating.

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[2] We note that Columbia Insurance Group, Inc. is not a party to this appeal.

Joe Edwin CLEM *v.* STATE of Arkansas

CR 01-1436 68 S.W.3d 289

Supreme Court of Arkansas
Opinion delivered January 17, 2002

Jon A. Williams and *Val Price*, for appellant.

No response.

PER CURIAM. Appellant Joe Edwin Clem, by and through his attorneys, has filed a motion for rule on clerk. His attorneys, Jon A. Williams and Val Price, state in the motion that the record was tendered late due to a mistake on their 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.

Lee Charles LEWIS *v.* STATE of Arkansas

CR 01-1327 64 S.W.3d 753

Supreme Court of Arkansas
Opinion delivered January 17, 2002

John F. Gibson, Jr., for appellant.

No response.

PER CURIAM. Lee Charles Lewis, by his attorney, 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's counsel but rather was due to unforeseen casualty.

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. We have held that a statement that it was someone else's fault or no one's fault will not suffice. *Clark v. State*, 289 Ark. 382, 711 S.W.2d 162 (1986). Therefore, appellant's motion must be denied.

If the appellant's attorney 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, 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.

David NUEHRING *v.* STATE of Arkansas

01-1341 64 S.W.3d 718

Supreme Court of Arkansas
Opinion delivered January 17, 2002

Deborah R. Sallings, Deputy Public Defender, for appellant.

No response.

PER CURIAM. On January 28, 1999, appellant, David Nuehring, pleaded guilty to one count of domestic battery in the third degree, two counts of criminal mischief in the first degree, one count of terroristic threatening in the first degree, and

one count of resisting arrest. He was sentenced to five years probation and fined $100.00. Ed Webb represented appellant in this matter.

On August 4, 2000, the State filed a petition seeking to revoke appellant's probation. On the same day, the State filed a criminal information charging appellant with one count of domestic battery in the first degree, one count of domestic battery in the third degree — second offense, and one count of endangering the welfare of a minor.

On March 20, 2001, a hearing was held to consider the State's petition for revocation and to address the newly filed criminal information. At that hearing, appellant was represented by Michael Sherwood. On May 9, 2001, a judgment and commitment order was filed, sentencing appellant to 120 months imprisonment. On May 10, 2001, a second judgment and commitment order was filed revoking appellant's probation and sentencing him to seventy-two months imprisonment. Appellant's sentences were to run consecutively.

On June 5, 2001, appellant filed a *pro se* notice of appeal. He also requested that the record be prepared for appeal and that an appeal bond be issued. The record does not reflect that Michael Sherwood was served with copies of these motions. Additionally, the record does not reflect that Mr. Sherwood filed a notice of appeal on appellant's behalf or that he requested to be relieved as appellant's attorney.

On July 30, 2001, a hearing was held to consider appellant's motions. Mr. Sherwood did not appear at this hearing. Appellant informed the trial court that he had contacted Mr. Sherwood about proceeding with an appeal, but that Mr. Sherwood "never got back" to him. Following this information, the trial court appointed the public defender's office to represent appellant.

On July 31, 2001, the public defender's office filed a notice of appeal on appellant's behalf. Because this notice of appeal was untimely, the public defender's office now requests permission to file a belated appeal. In criminal cases, we have constantly held that a belated appeal may be filed when an attorney admits that an error has been made and accepts responsibility for that error. *See In Re Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*).

In this case, appellant claims that he informed Mr. Sherwood that he wished to proceed with an appeal but that Mr. Sherwood took no further action. As a result of Mr. Sherwood's inaction, the trial court appointed new counsel. This appointment came more than thirty days from the date the judgment and commitment orders were filed. Therefore, the newly appointed counsel was unable to perfect a timely appeal on appellant's behalf. Because the record does not establish Mr. Sherwood's involvement in appellant's case after March 20, 2001, we are remanding this case to the trial court to settle the record. Specifically, we are remanding this matter to the trial court for a hearing to determine whether Mr. Sherwood was relieved of his responsibility to represent appellant in this matter, and whether appellant requested that Mr. Sherwood file a notice of appeal on appellant's behalf. The parties have thirty days from the date of this *per curiam* to settle these issues.

Appellant's motion also requests that we determine who is to represent him during his appeal. We decline to rule on this issue until the record is settled.

Remanded.

IMBER, J., not participating.

Darrell Wayne HILL *v.* STATE of Arkansas

CR 00-1210 65 S.W.3d 408

Supreme Court of Arkansas
Opinion delivered January 24, 2002

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

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

ROBERT L. BROWN, Justice. Appellant Darrell Wayne Hill was initially convicted in 1980 of the capital felony murder, kidnapping, and aggravated robbery of Donald Lee Teague as well as the attempted capital murder, kidnapping, and aggravated robbery of E. L. Ward. Hill was sentenced to death. This court affirmed in part and reversed in part on appeal. *See Hill v. State*, 275 Ark. 71, 628 S.W.2d 284 (1982), *cert. denied*, 459 U.S. 882 (1982) (*Hill I*). Specifically, we affirmed the conviction and sentence for the capital felony murder of Donald Lee Teague but set aside the offenses of kidnapping and aggravated robbery with respect to Teague. We further affirmed the convictions and sentences for attempted capital felony murder, kidnapping, and aggravated robbery in connection with E. L. Ward.

Hill subsequently petitioned for postconviction relief under our prior Rule 37, and this court denied the petition. *See Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983) (*Hill II*). Hill then petitioned the United States District Court, Eastern District of Arkansas, for *habeas corpus* relief, which was granted. *See Hill v. Lockhart*, 824 F. Supp. 1327 (E.D. Ark. 1993) (*Hill III*). The federal

district court concluded that trial counsel did not render Hill effective assistance of counsel with respect to investigating and presenting an insanity defense during the guilt phase of the trial. The court also concluded that counsel did not render Hill effective assistance of counsel during the penalty phase. The court found, too, that, given Hill's long history of mental illness, drug and alcohol abuse, and troubled childhood, it was unreasonable for counsel not to offer into evidence the pertinent medical records during the penalty stage. The court further found that it was not reasonable for counsel to fail to thoroughly investigate possible mitigating evidence. *See id.*

The State appealed, and Hill cross-appealed. The Eighth Circuit Court of Appeals reversed the federal district court with respect to ineffective assistance of counsel at the guilt phase but affirmed the court as to ineffective assistance of counsel during the penalty phase. *See Hill v. Lockhart*, 28 F.3d 832 (8th Cir. 1994) (*Hill IV*). Accordingly, the Eighth Circuit reinstated Hill's convictions for murder and attempted murder but vacated the sentences for each and directed the federal district court to order the State to retry the question of the proper penalty relating to those convictions. *See id.*

Following a resentencing trial, Hill was again sentenced to death, and a notice of appeal was filed. However, on February 27, 1996, Hill filed a *pro se* "Motion to Stop Appeal Process," and his counsel filed a motion for evaluation to determine Hill's capacity to make a knowing and voluntary waiver of his right to appeal. *See Hill v. State*, 323 Ark. 796, 917 S.W.2d 537 (1996) (*per curiam*) (*Hill V*). This court remanded the matter to the trial court to make findings on whether Hill had the mental competency to abandon his appeal. *See id.*

Ultimately, this court declined to honor Hill's request to waive his appeal. *See Hill v. State*, 327 Ark. 777, 940 S.W.2d 487 (1997) (*per curiam*) (*Hill VI*). Hill's sentence was later affirmed by this court in *Hill v. State*, 331 Ark. 312, 962 S.W.2d 762 (1998) (*Hill VII*), *cert. denied*, 525 U.S. 860 (1998). On January 28, 1999, Hill filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.5 and later filed an amended petition on August 16, 1999. Following a hearing, Hill's petition was denied by the trial court.

I. Rule 610

Hill first argues that his trial counsel was ineffective at resentencing for failing to object properly to, and then for failing to

appeal, the manner in which the prosecutor questioned three of his mitigation witnesses. All three of the witnesses testified that they were friends of Hill's, and there were references to the fact that he had changed over twenty years and that he could now lead a productive life.[1] Hill specifically argues that the prosecutor's cross-examination of the three witnesses should have been challenged by trial counsel on the basis of Ark. R. Evid. 610, which, he argues, clearly prohibits the use of one's religious beliefs to question or enhance one's credibility. He asserts that the prosecutor's questioning amounted to using a "religious belief to support an argument that the testimony of the holder of that belief is not credible on account of that belief," all of which, he contends, violates Rule 610. He further argues that the prosecutor's closing argument that because of their beliefs the three mitigation witnesses could not sit on the jury, and, thus, it was the duty of the jurors to follow the law, is the equivalent of arguing that it was the duty of the jurors to return a death sentence. These statements, Hill contends, were manifestly improper and would have warranted a mistrial, had trial counsel objected to them properly. He concludes that for these reasons, had defense counsel raised these issues properly on direct appeal, there is a reasonable probability that he would have obtained a reversal.

This court uses the following standard of review when examining a claim of ineffectiveness:

> To prevail on a claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. *Jones v. State,* 340 Ark. 1, 8 S.W.3d 482 (2000); *Weaver v. State,* 339 Ark. 97, 3 S.W.3d 323 (1999). This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 99, 3 S.W.3d at 325. Petitioner must also show that the deficient performance prejudiced his defense; this requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.* Unless the petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Chenowith v. State,* 341 Ark. 722,

[1] The State points out the somewhat bizarre circumstance that Hill's attorney for the Rule 37.5 proceedings was the same as his attorney at the resentencing. The trial court pointed out at the beginning of a preliminary Rule 37.5 proceeding that Hill had, first, waived a Rule 37.5 proceeding but then asked that the same attorney represent him for purposes of postconviction matters. We question the propriety of such dual representation but are unwilling to reject the Rule 37.5 appeal *sua sponte* for that reason alone.

> 19 S.W.3d 612 (2000) (*per curiam*); *Thomas v. State,* 330 Ark. 442, 954 S.W.2d 255 (1997).
>
> The reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* To rebut this presumption, the petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, *i.e.,* that the decision reached would have been different absent the errors. *Id.* A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.* In making a determination on a claim of ineffectiveness, the totality of the evidence before the factfinder must be considered. *Chenowith,* 341 Ark. 722, 19 S.W.3d 612. This court will not reverse the denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Jones,* 340 Ark. 1, 8 S.W.3d 482; *State v. Dillard,* 338 Ark. 571, 998 S.W.2d 750 (1999).

Camargo v. State, 346 Ark. 118, 122-23, 55 S.W.3d 255, 258 (2001) (quoting *Coulter v. State,* 343 Ark. 22, 27, 31 S.W.3d 826, 829 (2000)). *See also Strickland v. Washington*, 466 U.S. 668 (1984).

Hill's claim of ineffectiveness has essentially two parts: (1) counsel was ineffective in not making the proper objections at resentencing, and (2) counsel was ineffective for failing to raise the issue on appeal. With respect to these claims, there were three mitigation witnesses called by the defense: Freddie Nixon, Laura Organ, and Janis Golden. As to Ms. Nixon, Hill's counsel objected to the following question by the prosecutor on cross-examination: "Ms. Nixon, do you have any religious or philosophical beliefs that would cause you to oppose the imposition of the death penalty?" Counsel objected to the cross-examination of Ms. Nixon about her philosophy. The trial court sustained the objection. The prosecutor later questioned Ms. Nixon about her involvement with certain organizations. Defense counsel again objected, and the trial court sustained the objection. Later, the prosecutor again asked what organizations Ms. Nixon belonged to besides the Methodist Church. She responded that she was a member of the Arkansas Interfaith Conference, which, she divulged, was not involved in death cases. Finally, the prosecutor asked Ms. Nixon whether she belonged to any organization which had taken a position with regard to Hill's situation. Hill's counsel started to object, and Ms. Nixon answered, "The United Methodist Church." The trial court then overruled counsel's objection. Ms. Nixon added that the

Methodist Church had an official position in opposition to capital punishment as a part of its overall policy regarding criminal justice. The trial court sustained counsel's objection when the prosecutor asked Ms. Nixon whether that was her position as well. She then testified that there was room for disagreement on the death penalty within the Methodist church. During the prosecution's cross-examination of Ms. Nixon, there were several sidebar conferences between counsel and the trial court regarding defense counsel's objections.

Next, Ms. Organ testified that she met Hill while working at the United Methodist Headquarters and that she was a member of the United Methodist Church. The prosecutor asked her why she was testifying, and she answered that it was due to her close friendship with Hill. The prosecutor asked Ms. Organ whether she belonged to any organization within the Methodist Church or any other special groups. She replied that she was a member of Civitan. The prosecutor then asked about any other groups to which she belonged. Defense counsel objected based on his previous objections made, and the trial court overruled the objection. Ms. Organ replied that she was a member of the Coalition to Abolish the Death Penalty. At a sidebar conference, Hill's counsel asked the court about the prosecutor's interrogation, and the court replied:

> He didn't get into the views. I didn't want the views. The reason I made that ruling is, I'm trying to be at least as consistent as I can in this trial as I was in the other trial. So, I'm not going to get into the views. I think that's proper. I don't know if my ruling is as proper in the beginning, but I'm going to stick with it. I think Mr. Holt [the prosecutor] understands that. I'm just trying to be consistent with the ruling I made with respect to Rev. Nixon's previous ruling [in the original trial]. You know, a bias is something that quite frankly, Mr. Holt has not gotten in to and I'm trying to stay out of people's views on this issue, not organizations or what they belong to. For example, you show that she belongs to a Victim's Rights Organization, you certainly can bring that out. But, now that's — I don't blame you for approaching. I don't have any problem with that. I'm trying to explain the basis for both of my rulings.

With regard to Janis Golden, she testified on direct examination that she met Hill while working as an administrative assistant in the bishop's office of the United Methodist Church for the Arkansas area. On cross-examination, the prosecutor asked whether she held the view that the State should not impose the death penalty.

Defense counsel objected on previously asserted grounds, and the trial court overruled the objection. She replied that yes, she did.

It was the prosecutor's position throughout his cross-examination of these three mitigation witnesses that he could delve into a witness's bias against the death penalty as contrasted with a showing of impaired credibility based on religious beliefs.

Arkansas Rule of Evidence 610 provides: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impared [impaired] or enhanced." Ark. R. Evid. 610 (2001). It is clear from an examination of the testimony of each of the three witnesses, and the appellant's objections to the prosecutor's cross-examination of each, that the proper objections were made. Hill's counsel specifically objected to the witnesses' being cross-examined on their philosophies, and the trial court sustained those objections and only permitted the prosecutor to question the reason why each witness was testifying.

Rule 610 clearly makes inadmissible one's beliefs or opinions on matters of religion for purposes of demonstrating a lack of credibility. But that was not the case here. As outlined above, each witness merely testified about their memberships in organizations and, in the case of Ms. Golden, her beliefs about the death penalty. None testified as to their beliefs or opinions based on religious convictions. Moreover, defense counsel was adroit in making his objections to assure that the prosecutor did not impermissibly run afoul of Rule 610.

We conclude that Hill's counsel did make the proper objections. Although he did not specifically reference Rule 610, it appears from the context of these objections and the colloquies with the trial court that Rule 610 was the premise for his argument. Accordingly, we hold that counsel was not ineffective for merely failing to articulate the rule number. *See Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000) (citing Ark. R. Evid. 103) (stating "[t]he specific ground of an objection must be stated if the specific ground was not apparent from the context").

We note, in addition, that this court conducted an Ark. Sup. Ct. Rule 4-3(h) review in *Hill VII, supra,* in which we examined all rulings adverse to Hill for prejudicial error. Most of Hill's counsel's objections during the prosecutor's cross-examination of his three mitigation witnesses were sustained by the trial

court. However, those that were overruled were reviewed by this court under Rule 4-3(h), and no prejudicial error was found. *See Hill VII, supra.* Our review and affirmance of those overruled objections became the law of the case. *See Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996). Accordingly, any suggested ineffectiveness on the part of Hill's counsel for failing to appeal the court's rulings is without merit.

Nor do we believe that trial counsel was ineffective for not objecting to the prosecutor's closing argument about the inability of the three mitigation witnesses to sit as jury members because of their bias against the death penalty. Asserting the bias of a witness is different from asserting a witness's impaired credibility due to religious beliefs under Rule 610. *See, e.g., Redman v. Watch Tower Bible & Tract Soc'y of Penn.*, 69 Ohio St. 3d 98, 630 N.E.2d 676 (1994). We conclude that any objection on this point would not have led in any respect to a new trial.

II. Jury Instructions

Hill next claims that his counsel was ineffective for failing to appeal the trial court's denial of two proffered jury instructions: (1) a definition of mitigation from *James v. State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984), and (2) an instruction informing the jury that Hill would not be eligible for parole if he were sentenced to life imprisonment without the possibility of parole. He further asserts that the trial court's denial of relief on the basis of this court's Rule 4-3(h) review was error. Appellant submits that where the future dangerousness of the defendant is at issue, and state law prohibits the defendant's release on parole for capital murder, due process requires that the sentencing jury be informed that the defendant is not parole eligible. For authority, Hill cites us to *Simmons v. South Carolina*, 512 U.S. 154 (1994).

On the proffered instruction regarding mitigation, Hill observes that this court has held that a definition of mitigation is not required. *See Pruett v. State*, 287 Ark. 124, 697 S.W.2d 872 (1985). He asserts, however, that the *Pruett* case should be overruled. He concludes that there was a reasonable probability that his appeal on these points would have been successful, had counsel argued the error in refusing the two instructions. He further points out that trial counsel was ineffective in never getting a ruling on the mitigation instruction.

Hill's argument on this last point is without merit. Both proffered instructions were marked: "Defense Proffered Refused." Thus, there was clearly a ruling, and neither instruction was given to the jury. Moreover, this court found no prejudicial error in its Rule 4-3(h) review in *Hill VII, supra*, and that is law of the case. *See Davis v. State, supra*. But, even so, the trial court was on sound ground in rejecting the proffered parole instruction, which contemplated an absolute prohibition against parole, since the governor could always commute a sentence of life imprisonment without parole. Because this court has held that there is no error in refusing an instruction which may have misled or confused the jury, *see Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992), counsel would not have been ineffective for failing to raise such an issue on appeal. *See Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000).

With regard to *Simmons v. South Carolina, supra*, there, the Court based its ruling on the fact that the jury was faced with a penalty decision between death or life imprisonment, and the trial court refused to inform the jury that state law prohibited the defendant's release on parole.[2] The Court specifically noted: "In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed." *Simmons*, 512 U.S. at 161.

The South Carolina circumstances were manifestly not the same as what occurred at resentencing. In this case, the trial court specifically instructed the jury: "After making the determinations required to complete Form One and Form Two, if applicable, you will then complete Form Three. . . . If you make those findings, you will impose the death penalty. Otherwise, you will sentence Darrel [sic] Wayne Hill to life imprisonment without parole." Hence, in the case at hand, the fact that the life imprisonment was without parole was specifically communicated to the jury.

As to Hill's proffered mitigation instruction, we decline to overrule *Pruett v. State, supra*. In that case, we concluded

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[2] Although the United States Supreme Court most recently discussed this issue again in *Kelly v. South Carolina*, ___ U.S. ___ (Jan. 9. 2002), it again based its decision on South Carolina's sentencing scheme. It reasoned that the state supreme court erred in its analysis that appellant was not entitled to an instruction that he would be ineligible for parole if he received a life sentence because state law provided the jury with a third sentencing alternative and future dangerousness was not an issue. The Court noted that because the jury can only make a sentencing recommendation if it finds an aggravating circumstance, and that at that time, the only alternative was death or life without parole, the state court's reasoning was flawed. The Court further found that appellant's future dangerousness was at issue.

that the statutory language naming the elements of mitigation was not vague or beyond the common understanding of the ordinary juror. Thus, an instruction providing a definition of mitigation was not necessary. In the instant case, the jury was instructed that: "Unlike aggravating circumstances, you are not required to be convinced of the existence of a mitigating circumstance beyond a reasonable doubt. A mitigating circumstance is shown if you believe from the evidence that it probably existed."

Hill, in asking the court to overrule a prior decision, has the burden of showing that the court's refusal to overrule the prior decision would result in injustice or great injury. *See B.C. v. State*, 344 Ark. 385, 40 S.W.3d 315 (2001). He has failed to meet that burden. We hold, once more, that no further definition of mitigation was necessary.

III. Aggravating Circumstances

For his final point, Hill argues that counsel erred in not appealing the admission of two prior felony convictions as aggravating circumstances. The convictions at issue were an Oklahoma conviction for robbery with a firearm and a Missouri conviction for first degree robbery. Hill submits that these convictions were inadmissible as aggravators, because it could not be determined from the documents comprising the exhibits that these were crimes of violence, as required by Ark. Code Ann. § 5-4-604(3) (Repl. 1997). Accordingly, he maintains that the failure of counsel to object to the Oklahoma conviction and then his failure to raise the admissibility of both convictions on appeal constituted ineffective assistance of counsel.

We agree with the State that in connection with the Missouri conviction, the trial court overruled counsel's objection. As stated above, review of that ruling would have been included in this court's Rule 4-3(h) review of all rulings adverse to the appellant, and it became law of the case. *See Davis v. State, supra.* As no prejudicial error was found in *Hill VII, supra,* in that review, appellant's argument is without merit.

As for the Oklahoma conviction, the State is also correct. Because trial counsel did not specifically object to the admission of the Oklahoma conviction, it was not reviewed by the court in his direct appeal under Rule 4-3(h). Nevertheless, following the penalty phase, the jury found the following aggravating circumstances:

> Darrel [sic] Wayne Hill previously committed another felony an element of which was the use of threat or violence to another person, or creating a substantial risk or [sic] death or serious physical injury to another person.
>
> In the commission of the capital murder, Darrel [sic] Wayne Hill knowingly created a great risk of death to a person other than the victim.
>
> The capital murder was committed for the purpose of avoiding or preventing an arrest.
>
> The capital murder was committed for pecuniary gain.

The jury further found no evidence of any mitigating circumstances. Under these circumstances, this court can conduct a harmless-error analysis:

> (d) On appellate review of a death sentence, if the Arkansas Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance or circumstances for any reason and if the jury found no mitigating circumstances, the Arkansas Supreme Court shall conduct a harmless error review of the defendant's death sentence. The Arkansas Supreme Court shall conduct this harmless error review by:
>
> (1) Determining that the remaining aggravating circumstance or circumstances exist beyond a reasonable doubt; and
>
> (2) Determining that the remaining aggravating circumstance or circumstances justify a sentence of death beyond a reasonable doubt.
>
> (e) If the Arkansas Supreme Court concludes that the erroneous finding of any aggravating circumstances by the jury would not have changed the jury's decision to impose the death penalty on the defendant, then a simple majority of the court may vote to affirm the defendant's death sentence.

Ark. Code Ann. § 5-4-603(d) (Repl. 1997). Assuming it was error for the jury to consider Hill's prior Oklahoma conviction and, thus, counsel was ineffective in not objecting to it, there were sufficient other aggravators to sustain the death sentence. We conclude that based on the three other aggravators affirmed by this court in *Hill VII, supra*, the jury would not have changed its decision to impose

the death penalty, even without consideration of the Oklahoma conviction as an aggravator. Accordingly, counsel was not ineffective in failing to raise the issue of the Oklahoma conviction to the trial court or on appeal.

Affirmed.

Devin Lavalle JONES *v.* STATE of Arkansas

CR 01-965 65 S.W.3d 402

Supreme Court of Arkansas
Opinion delivered January 24, 2002

Jeff Rosenzweig, for appellant.

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

JIM HANNAH, Justice. Appellant Devin Lavalle Jones appeals his conviction for second-degree murder from Pulaski County Circuit Court. Jones asserts he was denied his right to a speedy trial under the Arkansas and United States Constitutions in that the State failed to show good cause when it nol-prossed his case. This court holds that the loss of the State's only witness and consequent lack of evidence constitutes good cause to nol-pros the case.

Jones also asserts he has been subjected to an *ex post facto* law in that two of the felonies considered under the sentencing enhancement statute were committed after the murder. We hold there is no *ex post facto* issue. There was no change in the law that made Jones criminally liable for an act that was lawful when committed. Nor was there any change in the law that made the crime he was charged with greater than it was when committed. Felonies meeting the statutory requirements have long been used to enhance punishment even though the felonies used for enhancement were committed after the crime for which punishment is being determined.

Facts

On December 27, 1996, Timothy Bey was shot and killed. On December 30, 1996, Jones was arrested. Jones was charged with the murder by felony information on March 26, 1997. The case was

continued from March 27, 1997, to June 11, 1997, on Jones's motion. Then, on June 11, 1997, the trial court granted the State's motion to nol-pros the case due to a lack of evidence to move forward because the State's only witness had changed his story. It was not until the Spring of 2000 that a new witness came to the attention of the police as a byproduct of a federal investigation of other crimes. Charges were refiled on May 18, 2000. On January 5, 2001, the case was continued at the defense's request to allow him to pursue a writ of prohibition on the issue of speedy trial. The petition was denied by this court on January 25, 2001. Then, again at the defense's motion, the case was continued from January 25, 2001, to June 12, 2001. Trial commenced June 12, 2001. Jones was tried over four years after his arrest. He now alleges violation of his right to a speedy trial.

Jones sought and obtained three continuances for a total of 234 days. The State also caused passage of time by nol-prossing the case. The State, however, alleges that the time that passed from the date the case was nol-prossed until it was refiled also tolled the running of the time on speedy trial. This period was two years and 342 days. If the total time of continuances and the period resulting from the nolle prosequi are added together, and then subtracted from the total, Jones was tried 317 days after his arrest. Trial commenced June 12, 2001, and Jones was convicted of second-degree murder.

Speedy Trial

We note at the outset that the State argues we need not address the speedy trial argument because Jones failed to preserve the issue. There is no merit to this claim. In response to the motion by the State to nol-pros the case, Jones moved that the dismissal on the motion to nol-pros the case be granted with prejudice. A dismissal or, in other words, a nolle prosequi, is not a bar to a future prosecution for the same offense. *Halton v. State*, 224 Ark. 28, 271 S.W.2d 616 (1954). Jones thus argued the dismissal on the nol-pros motion was without good cause and should be dismissed with prejudice. The issue is properly before this court.

Jones argues his case was not brought to trial within one year of his arrest and that thereby his right to a speedy trial was violated. This is a murder case where there is no statute of limitations. The basic rule regarding speedy trial is that any defendant in circuit court who is not brought to trial within twelve months from the date of his arrest is entitled to have the charges dismissed with

an absolute bar to prosecution. *Burmingham v. State*, 346 Ark. 78, 57 S.W.3d 118 (2001); *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000); Ark. R. Crim. P. 28.1. Further, the burden is on the State to bring the case to trial within the required time. *State v. Washington*, 273 Ark. 82, 617 S.W.2d 3 (1981). The defendant is under no obligation to demand a trial in order to preserve his right to a speedy trial. *Burmingham, supra; Jones v. State*, 329 Ark. 603, 951 S.W.2d 308 (1997).

In this case, Jones was tried more than four years after his initial arrest. Because more than one year passed from the date of arrest, the State bears the burden of showing that sufficient time may be excluded as "legally justified" such that the time that may be counted against speedy trial between arrest and trial does not exceed twelve months. *Webb v. Ford*, 340 Ark. 281, 9 S.W.3d 504 (2000); *State v. Lewis*, 268 Ark. 359, 596 S.W.2d 697 (1980). The State has long been required to show good cause where a criminal defendant has not been brought to trial within the required time. *Randall v.* State, 249 Ark. 258, 260, 458 S.W.2d 743 (1970); *Ware v. State*, 159 Ark. 540, 555, 252 SW. 934 (1923).

The minimum requirements of the federal constitution on this issue were set out in *Barker v. Wingo*, 407 U.S. 514 (1972). Under *Wingo*, there are four factors to be considered in determining whether an individual received a speedy trial. They are "length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant." *Grooms v. State*, 260 Ark. 879, 880, 545 S.W.2d 610 (1977). But before *Wingo* applies, since the length of delay is only a triggering mechanism, it must be such as to be presumptively prejudicial. *Matthews v. State*, 268 Ark. 484, 598 S.W.2d 58 (1980). Over four years would meet that requirement.

Arkansas Rule of Criminal Procedure 28 governs limitations on prosecutions, excluded periods, and consequences. Rule 28.1 sets the time within which a trial must be brought at one year from arrest. The rules also provide for exclusion of time from arrest, such as continuances at the defendant's request. Excludable periods are set out under Rule 28.3. Rule 28.3 also states a requirement that any period to be excluded from the one-year period "shall" be set forth in a written order or docket entry. *Burmingham, supra*; Ark. R. Crim. P. 28.3. This requirement of a written order or docket entry is satisfied when there is such an order or docket entry as well as when the record itself demonstrates the delays were attributable to the accused and where the reasons were memorialized in the

proceedings at the time of the occurrence. *Jones v. State*, 323 Ark. 655, 916 S.W.2d 736 (1996); *Lynch v. State*, 315 Ark. 47, 863 S.W.2d 834 (1993); *Hudson v. State*, 303 Ark. 637, 799 S.W.2d 529 (1990).

The record shows that Jones sought and obtained three continuances. The time under these continuances is thus excluded under Rule 28.3(c). Jones asserts, however, that the period from June 11, 1997, until May 18, 2000, resulting from the nolle prosequi is not excludable because there was no good cause therefor. The State argues this period is excluded under Rule 28.3(f), which provides:

> The time between a dismissal or nolle prosequi upon motion of the prosecuting attorney for good cause shown, and the time the charge is later filed for the same offense or an offense required to be joined with that offense.

The Bill of Exceptions dated June 11, 1997, shows the State moved to nol-pros the case, stating that the only evidence they had was a witness who had changed his story and would no longer testify Jones had shot Bey. Jones moved for a dismissal with prejudice. The court, however, noted the State had made a record on the nol-pros and that speedy trial was tolled. Jones's motion to dismiss with prejudice was denied.

Jones now asserts that a lack of evidence does not constitute good cause. In *Caulkins v. Crabtree*, 319 Ark. 686, 894 S.W.2d 138 (1995), this court held that good cause on behalf of the State is not established merely by a defendant's inability to show a lack of good cause. The burden to show good cause is on the State. Also, more is required than mere proof that nolle prosequi is not being used as a device to avoid a speedy-trial dismissal. *Caulkins, supra.*

In the case at bar, the State argues a lack of evidence is good cause. In *Carter v. State*, 280 Ark. 34, 655 S.W.2d 379 (1983), a situation arose that is helpful in analyzing the present case. In *Carter*, a wife was being prosecuted for the murder of her husband. Just before the wife was to be tried, it was learned that the daughter would testify that she and not her mother had killed her father. Based upon this development, the State moved to nolle prosequi the case against the mother. This motion was granted. However, a subsequent proceeding in juvenile court found there was insufficient evidence to adjudicate the daughter a juvenile delinquent. The State then refiled the murder charge against the mother. The mother moved for dismissal based upon failure to comply with

Rule 28. This court found that the State had good cause because of the daughter's intent to confess and because the State in seeking the nolle prosequi was not simply attempting to evade the speedy-trial requirement. Thus, this analysis satisfies the requirements later noted in *Caulkins, supra*, in that there is good cause for the nolle prosequi, and there is more than mere proof that nolle prosequi was not being used as a device to avoid a speedy-trial dismissal. In *Carter*, as in the case at bar, the State moved to nol-pros the case due to a lack of evidence, and the nolle prosequi was not being used as a device to avoid a speedy-trial dismissal. In *Wingo, supra,* the U.S. Supreme Court noted that a missing witness is a valid reason for an appropriate delay. *Washington, supra*, is inapposite. Here, the State's only witness initially cooperated with the State and then recanted his earlier statement.

[redacted] The right to a speedy trial is protected by both Art. 2, § 10, of the Arkansas Constitution and the Sixth Amendment to the United States Constitution. This case was nol-prossed. Arkansas Code Annotated § 16-89-122 (1987) provides that the prosecuting attorney, with the permission of the court, may dismiss the indictment, and the dismissal will not be a bar to future prosecution for the same offense. A dismissal or, in other words, a nolle prosequi, is not a bar to a future prosecution for the same offense. *Halton, supra.* The effect is to set aside or annul the indictment. *Moore v. State*, 170 Ark. 697, 280 S.W. 657 (1926); *Ley v. State*, 42 Ark. 105 (1883). Similar reasoning appears to prevail under federal analysis. In *United States v. Loud*, 474 U.S. 302, 310 (1985), the U.S. Supreme Court stated, "The court has found that when no indictment is outstanding, only the 'actual restraints imposed by arrest and holding to answer a criminal charge . . .' engage the particular protections of the speedy trial provisions of the Sixth Amendment." The Court was citing *United States v. MacDonald*, 456 U.S. 1 (1981), wherein the U.S. Supreme Court further stated, "Although a delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment (citation omitted), or to a claim under any applicable statute of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending." *MacDonald,* 456 U.S. at 6. The court in *MacDonald* went on to state, "Similarly, the Speedy Trial Clause has no application after the Government acting in good faith, formally drops charges. Any undue delay before charges are filed must be scrutinized under the Due Process Clause, not the Speedy Trial Clause," and that "Once charges are dismissed, the speedy trial guarantee is no longer applicable. At that point, the formerly accused is, at most, in the same position as any other subject of a criminal investigation." *MacDonald* 456 U.S. at 7, 9.

The U.S. Supreme Court also noted that the purpose of the right to a speedy trial is not intended to prevent prejudice to the defendant by the passage of time. That protection is provided by due process and statutes of limitation. Rather, the purpose is to minimize the possibility of a lengthy incarceration prior to trial and to shorten the disruption of life caused by arrest and unresolved criminal charges. *MacDonald, supra.*

However, even so, the period of delay must be for good cause shown. *Washington, supra*; Ark R. Crim P. 28.3(f). We must determine then if this lack of investigation gives rise to an unreasonable delay. This court has said that the constitutional right to a speedy trial is violated only by vexatious, capricious, and oppressive delays manufactured by the ministers of justice. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979); *Leggett v. Kirby*, 231 Ark. 576, 331 S.W.2d 267, *cert. den.* 362 U.S. 981 (1960). A speedy trial is a trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, or oppressive delays manufactured by ministers of justice; and what constitutes a speedy trial must be determined from the varying circumstances of each particular case with reference to the practical and efficient operation of the law. *Randall v. State*, 249 Ark. 258, 458 S.W.2d 743 (1970). There is no evidence here of any vexatious, capricious, and oppressive delays manufactured by the ministers of justice. Rather, the delay resulting from the nolle prosequi was the result of a lack of evidence, and that is a permissible delay. *Carter, supra.* Although more than four years passed from the date of Jones's arrest on December 30, 1996, and his trial in June of 2001, when the total time consumed by Jones's continuances and the time attributable to the nol-pros are added together and subtracted from the total, Jones was tried within the one-year time requirement of Rule 28.

Enhancement Based Upon Offenses Committed After the Charged Offense

Jones argues that he may not be punished now to a greater extent for the murder of Bey than he could have been had he been tried and convicted before he was able to commit the subsequent felonies. Jones asserts that the felonies he committed after the murder for which he was convicted may not be used to enhance his sentence on that murder conviction. This issue has already been addressed by this court. The date of commission of the offense being used to enhance a sentence under Ark. Code Ann. § 5-4-501 (Supp. 2001) is not relevant. The provisions of the

Arkansas Habitual Criminal Statute are not deterrent, but rather punitive in nature, such that a prior conviction regardless of the date of the crime may be used to increase punishment. *Beavers v. State*, 345 Ark. 291, 46 S.W.3d 532 (2001); *see also Washington, supra*. In this case, Jones's own conduct after the murder caused the enhancement of his sentence, not a change in the law. Further, the enhancement statute is not a distinct additional offense, but rather it provides a guide for the court or jury in fixing final punishment on the charged offense. *Finch v. State*, 262 Ark. 313, 556 S.W.2d 343 (1977).

Jones, however, argues that use of the offenses committed after the murder constitutes an *ex post facto* application of law in violation of the Arkansas and United States Constitutions. *Ex post facto* is inapplicable here. Long ago, this court stated, "An *ex post facto* law declares an offense to be punishable in a manner that it was not punishable at the time it was committed, and relates exclusively to criminal proceedings." *Taylor v. The Governor*, 1 Ark. 21 (1837). *See also*, *Burns v. State*, 303 Ark. 64, 793 S.W.2d 779 (1990). An *ex post facto* law is one that makes an action done before the passing of the law, and which was innocent when done, criminal or one that aggravates a crime, or makes it greater than it was, when committed. *Herman, et al v. State*, 256 Ark. 840, 512 S.W.2d 923 (1974).

For *ex post facto* to apply then, there must be a change in the law which either criminalizes a previously innocent act or which increases the punishment received for an already criminalized act. Jones has made no such argument. The period of enhancement for each crime is laid out in Section 5-4-501(d)(1)(A-F). Section 5-4-501 has been amended a number of times. The murder was committed in 1996, and so only the 1997 and the 2001 amendments could impact this case. Neither amendment made any change to paragraphs (d)(1)(A-F). There is nothing to indicate any change in the relevant law between the murder in 1996 and Jones's sentencing on the murder conviction at issue in this case. There is no issue of *ex post facto* application of any law.

Affirmed.

Raymond E. ALLEN, Winner's Circle,
and Bob Eubanks *v.* Angela D. GREENLAND,
Donald Greenland, Donna Hutchinson,
Kathy Peery, and Bill Peery

01-447 65 S.W.3d 424

Supreme Court of Arkansas
Opinion delivered January 31, 2002
[Petition for rehearing denied February 21, 2002.]

David Hodges, for appellants.

Jewell, Moser, Fletcher & Holleman, a Professional Association, by: *John T. Holleman, IV*, and *Paul Pfeifer*, for appellees.

W.H. "DUB" ARNOLD, Chief Justice. Appellants, Raymond E. Allen, Winner's Circle, and Bob Eubanks, bring this interlocutory appeal challenging the Faulkner County Circuit Court's order granting appellees Donna Hutchinson, Eric

Hutchinson, Kathy Peery, and Bill Peery's motion to strike, second motion for sanctions against Bob Eubanks, and appellees Angela D. Greenland and Donald Greenland's motion to strike amendment to answer. We affirm in part and reverse and remand in part. We affirm appellee Greenland's motion to strike amendment to answer. However, we reverse and remand the trial court's order granting the motion to strike and second motion for sanctions against Bob Eubanks.

We are first faced with the question of whether appellants can appeal to this court. Appellees argue in their motion to strike for frivolous appeal that the appeal should be (1) dismissed because the circuit court's order was not final for purposes of appeal, or (2) affirmed because the order was within the trial court's discretion. Appellees contend this appeal is in direct violation of Rule 54(b) of the Arkansas Rules of Civil Procedure, stating appellant is attempting to appeal an order of discovery sanctions issued by the trial court which involves multiple claims or parties which is not final and, therefore, not appealable, unless it disposes of all the parties and all of the claims. However, this court does possess jurisdiction to hear this appeal because the trial court's order strikes out an answer and an amended answer. Arkansas Rule of Appellate Procedure—Civil 2(a)4 directly asserts an appeal may be taken from a circuit court to the Arkansas Supreme Court from "an Order which strikes out an answer, or any part of an answer, or any pleading in an action." Ark. R. App. P.—Civ. 2(a)4. This Court has held that Arkansas Rule of Appellate Procedure—Civil 2(a)4 controls over Rule 54(b) of the Arkansas Rules of Civil Procedure. *Arnold Fireworks Display v. Schmidt*, 301 Ark. 316, 820 S.W.2d 444 (1991). In *Arnold*, we held that a trial court's order striking defendant's answers and amended answers is not a final judgment, but Ark. R. App. P.—Civ. 2(a)4 expressly provides for an appeal to the Arkansas Supreme Court. *Id.* at 319. We hold that Ark. R. App. P.—Civ. 2(a)4 expressly provides for this appeal because appellant's answer and amendment to an answer was stricken.

Turning to the facts from which this appeal stems, on June 28, 1999, Raymond Allen was driving northbound in a one-ton, dual-wheeled, Chevrolet pickup owned by Winner's Circle and Bob Eubanks, individually. Allen's vehicle rear-ended Robert Brookshire, who was driving at a slow rate of speed on the shoulder of the road, absent brake or hazard lights. After this collision with Brookshire, Allen lost control of his vehicle and crossed to the southbound lane, hitting Donna Hutchinson, the driver of a 1999 GMC

Suburban. Hutchinson had a number of passengers in the Suburban, including Kathy Peery and Angela Greenland.

Two lawsuits were filed against separate defendant Robert Brookshire and appellants Raymond Allen, Winner's Circle, and Bob Eubanks. Appellees Donna and Eric Hutchinson and Kathy and Bill Peery filed their complaint and attached the first set of interrogatories and requests for production on October 5, 1999, against Brookshire and appellants. The appellees in the second lawsuit, Angela and Donald Greenland, filed their first complaint on December 3, 1999, against the same parties.

On November 8, 1999, Brookshire filed a timely answer to the Hutchinson and Peery complaint. On November 12, 1999, Winner's Circle and Eubanks filed an untimely *pro se* answer to the complaint, with a certificate of service signed by Bob Eubanks and addressed to plaintiffs' attorney, denying effectively each and every allegation claimed, including the allegation of negligence against Allen. However, appellees argue this answer was never sent to any of the parties until June 21, 2000. Allen did not file an answer to the Hutchinson and Peery complaint, stating that once he had received the documents, he gave them to Eubanks, who assured Allen he would provide an attorney for him. Allen stated in depositions that he had a learning disability and did not understand the papers served on him.

Appellees Hutchinson and Peery filed an amended complaint on January 20, 2000, adding State Farm Mutual Automobile Insurance Company (hereinafter State Farm), Hutchinson's insurance carrier, as a separate defendant. State Farm filed a timely answer and interrogatories and requests for production of documents on February 8, 2000. State Farm's answer denied each and every material allegation for all defendants set forth in the plaintiffs' first amended and substituted complaint. Greenland also filed an amended complaint on February 8, 2000, which also added State Farm as a separate defendant, who again filed a timely answer denying negligence on the part of all defendants, as well as interrogatories and requests for production of documents on March 3, 2000. As well as denying each and every material allegation in both complaints, State Farm also denied that Allen's vehicle rear-ended Brookshire's. State Farm further denied that Allen lost control of his vehicle and crossed the center lane hitting plaintiffs head on and denied plaintiffs suffered injuries as a result of the negligence of the defendants. State Farm denied negligence on the part of Brookshire, Allen, Winner's Circle, and Eubanks.

A motion to consolidate the Hutchinson and Peery complaint and the Greenland complaint was filed by Brookshire. In support of its motion, Brookshire cited Rule 42 of the Arkansas Rules of Civil Procedure, which permits the consolidation of actions involving a common question of law or fact pending before the same court. On February 23, 2000, the two cases were consolidated.

On May 19, 2000, appellees Hutchinson and Peery filed a motion to compel answers to the first set of interrogatories stating appellants never answered their initial complaint nor any discovery. Appellants responded to the motion to compel on June 1, 2000, stating that Hodges, attorney for appellants, had recently entered an appearance in the case, and should have additional time to answer the discovery since previous pleadings were filed *pro se.* Appellants requested a hearing on this matter and objected to attorney's fees and all other sanctions.

On June 6, 2000, Hutchinson and Peery filed a motion to strike defendants' answer as untimely, alleging that Allen, Winner's Circle, and Eubanks failed to answer the complaint or the amended complaint until May 30, 2000. However, although they argued that the answer was untimely, appellees failed to allege any prejudice to their case due to the amount of time it allegedly took the defendants to answer. Appellants argued Brookshire and State Farm filed a timely answer to the complaint, which was not challenged by Hutchinson and Peery's motion to strike. The Brookshire answer denied the complaint generally as to himself, as well as the liability of Winner's Circle and Eubanks, but was inconsistent as to the liability of Allen. However, State Farm's timely answer denied each and every allegation in the complaint as to all defendants.

Eubanks filed his responses to interrogatories on July 21, 2000, which included a financial statement prepared by Bob Eubanks dated November 8, 1998, indicating he had a negative net worth of -$155,013. Eubanks stated in these interrogatories that he had prepared this personal financial statement in order to obtain a loan from Regions Bank in Harrison, Arkansas. Hutchinson and Peery issued a subpoena *duces tecum* on August 4, 2000, to Regions Bank to verify Eubanks' interrogatory responses regarding his financial statement. The personal assistant to the president of Regions Bank indicated to appellees that there was no November 8, 1998 financial statement, but a previous financial statement, dated June 22, 1998, stated that Eubanks had a net worth of $2.5 million.

On August 14, 2000, Hutchinson and Peery filed a second motion for sanctions, stating responses to interrogatories submitted by Eubanks were fraudulent concerning Eubanks's financial statement. Hutchinson and Peery attached an affidavit with the motion stating they incurred $3,300.00 in costs in bringing such motion and that a monetary sanction in that amount should immediately be awarded. Eubanks responded to such motion for sanctions on August 21, 2000, denying he submitted any false information in responding to discovery and requested a hearing on the matter.

Allen, Winner's Circle, and Eubanks filed an amendment to answer in order to amend all previous pleadings to assert that Greenland did not have a seatbelt attached and that this proximately caused her injuries and damages. Therefore, they contended that Greenland was guilty of contributory negligence and pled the defense of comparative negligence on the part of Greenland. Greenland filed a motion to strike amendment to answer based on the untimeliness of when it was filed. Greenland contended appellants had months to raise such defense and failed to do so until only two weeks before the trial date. Greenland, who was a passenger in the backseat of the Hutchinson vehicle, also relied on Ark. Code Ann. § 27-37-702, which provides that every driver and front-seat passenger in a motor vehicle operated on a street or highway shall wear a properly adjusted and fastened seatbelt. Ark. Code Ann. § 27-37-702 (Repl. 1994). In appellant's response, counsel requested a hearing on the motion to strike amended answers.

On February 28, 2001, Allen, Winner's Circle, and Eubanks wrote the trial court a letter requesting a hearing on the outstanding motions. Hutchinson and Peery replied stating a hearing would not need to be held to take up such items. In a letter dated March 16, 2001, the trial court stated it had reviewed the case file with all pending motions and briefs in support of said motions and compiled a "laundry list" of such motions with corresponding decisions to grant or deny. Hutchinson and Peery's counsel prepared the order which was filed on April 9, 2001. On April 11, 2001, appellants filed an objection of entry of order and renewal of request for hearing on pending motions. The notice of appeal and designation of record was filed on April 16, 2001, by appellants.

Motion to Strike Answer

The first issue we address on the merits of the case is whether the State Farm answer inures to the benefit of all the appellants. We

agree that Brookshire's answer does not inure to the benefit of Allen due to the inconsistency of his answer regarding negligence. However, State Farm's answer does deny negligence on the part of all defendants and presents a common defense; therefore, we hold that it does inure to appellant's benefit. Therefore, we reverse and remand the trial court's order granting Hutchinson's and Peery's motion to strike.

Arkansas has long recognized the common-defense doctrine, which provides that an answer that is timely filed by a codefendant inures to the benefit of a defaulting codefendant. *Sutter v. Payne*, 337 Ark. 330, 989 S.W.2d 887 (1999); *Richardson v. Rodgers*, 334 Ark. 606, 976 S.W.2d 941 (1998); *Arnold Fireworks Display, Inc. v. Schmidt*, 307 Ark. 316, 820 S.W.2d 444 (1991); *Southland Mobile Home Corp. v. Winders*, 262 Ark. 693, 561 S.W.2d 280 (1978). The test for determining if an answer will inure to a codefendant's benefit is whether the answer of the nondefaulting defendant states a defense that is common to both defendants, because then "a successful plea . . . operates as a discharge to all the defendants, but it is otherwise where the plea goes to the personal discharge of the party interposing it." *Sutter, supra; Richardson, supra; Southland Mobile Home Corp., supra.*

In *Sutter*, Luther S. Sutter died testate leaving appellees, Mary Lou Sutter Payne and Cora Sutter West, as the co-executors of his estate, who, in turn, filed a declaratory judgment action on December 26, 1996, naming certain defendants including William Howard Payne, Joshua Sutter, De'Shawn Robinson, Luther Sutter, and Clayla Hicks. Luther Sutter filed a *pro se* motion to dismiss based on the trial court not having jurisdiction, venue being improper, and plaintiffs failing to state a claim upon which relief could be granted. Luther also filed an answer which included a general denial of each and every material allegation set forth in the petition for declaratory judgment. Sometime thereafter, Luther settled his claim, and on December 27, 1997, filed a motion to withdraw his answer and all other pleadings filed on his behalf. Joshua Sutter filed an answer to the original and amended petition on December 22, 1997. On January 27, 1998, Clayla Hicks filed a motion to strike Joshua Sutter's answer as untimely. She stated Joshua was served with the petition on January 4, 1997, and the amended petition on June 23, 1997; thus, the December 22, 1997, answer was untimely. Joshua asserted the common-defense doctrine by claiming that he could benefit from Luther Sutter's timely-filed response. The trial court found Joshua Sutter could not benefit from Luther Sutter's timely-

filed responses because they had been withdrawn. We reversed the case.

This court held that it appeared that the common-defense doctrine did apply to the Sutter case. This court found that Luther's answer did inure to the benefit of Joshua because Luther's answer contained a general denial of all material allegations in the petition even though Luther had withdrawn from the petition.

In the case before us today, there is no dispute that appellants did not comply with the Arkansas Rules of Civil Procedure. "A defendant shall file his answer within twenty (20) days after the service of summons and complaint upon him. . . ." Ark. R. Civ. P. 12(a). It is clear from the facts before us that Allen did not file an answer at all and that Winner's Circle and Eubanks filed a *pro se* answer that was nine days late and filed other answers which were also untimely.

However, State Farm's answer clearly inures to the benefit of appellants because State Farm states a defense that goes to the merits of the whole case and answers allegations directed at and common to all defendants. The State Farm answer denied each and every allegation of the appellees' complaint. State Farm also denied that Allen's vehicle rear-ended Brookshire's; denied Allen lost control of his vehicle and crossed the center lane hitting plaintiffs head-on; denied plaintiffs suffered injuries as a result of the negligence of the defendants; and denied negligence on the part of Brookshire, Allen, Winner's Circle, and Eubanks. Allen, Winner's Circle, and Eubanks raised this issue to the trial court in their response to plaintiff's motion to strike defendants' answer. Appellants stated the "answers filed by the other defendants, in this case, which were timely filed inure to the benefit of Raymond E. Allen, Winner's Circle and Bob Eubanks, individually, because they all contain similar allegations. Thus, the answers of co-defendants inure to the benefit of these respondents." Furthermore, Allen, Winner's Circle, and Eubanks stated "[n]ot only did Bob Eubanks file an answer, early on in the litigation, but other defendants, as well, filed timely answers, all of which inured to the benefit of Bob Eubanks and Raymond Allen" in appellant's amendment to memorandum brief in support of response to motion to strike answers.

■ This case is more obvious than *Sutter*. Here, State Farm filed an answer to the complaint and is a current defendant in the case. State Farm presents to the court a common defense for all defendants and stands ready to defend such suit. In *Sutter*, Joshua

Sutter was relying on Luther's answer, who had been dismissed from the case. In the instant case, it is clear that State Farm's answer should inure to the benefit of all defendants including Allen, Winner's Circle, and Eubanks. Therefore we reverse and remand the trial court's order granting appellees Hutchinson and Peery's motion to strike.

Second Motion for Sanctions against Bob Eubanks

Another issue we address in this appeal is the trial court's order granting appellees Hutchinson's and Peery's second motion for sanctions against Bob Eubanks, individually. This motion claimed that Eubanks committed perjury and fraud in his interrogatory responses and sought costs of bringing said motion in the amount of $3,300.00, the amount filed through an affidavit related to their time spent in having to file the motion. We reverse and remand the trial court's order granting appellees' second motion for sanctions and the granting of $3,300.00 monetary sanctions.

Eubanks filed his responses to interrogatories on July 21, 2000, and attached various exhibits, which included a personal financial statement dated November 8, 1998, which showed a total net worth of -$155,013. Upon receipt of Eubanks's responses, appellees filed a notice of deposition and subpoena *duces tecum* to the president of Regions Bank. Regions submitted a financial statement to Hutchinson and Peery stating a net worth of $2.5 million for Eubanks, but this financial statement was dated June 22, 1998. Regions Bank stated this was the most current personal financial statement for Eubanks it had on record.

Hutchinson and Peery argue Eubanks committed perjury and fraud in his interrogatory responses, because the financial statement submitted by Eubanks and the financial statement submitted by Regions Bank stated extremely differing amounts. They argued in their second motion for sanctions that the financial statement submitted by Regions was a true and correct financial statement and that the one submitted by Eubanks in response to interrogatories was fraudulent.

Eubanks contends there is absolutely no evidence that the discrepancy in his net worth on the two statements is caused by anything more than the two different time periods the statements address. Similarly, there was no evidence introduced in the trial

court demonstrating whether or not Eubanks provided the November statement to Regions. Likewise, there was no evidence clarifying the inconsistencies of the two financial statements. There is simply no evidence that one statement is true and correct and the other fraudulent. In response to the second motion for sanctions, Eubanks requested a hearing on the matter to determine such discrepancies, but no such hearing was held. Furthermore, the order issued by the trial court did not state reasons for granting the motion but, rather, generally granted the second motion for sanctions.

We have 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. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *Parker v. Southern Farm Bureau Cas. Ins.*, 326 Ark. 1073, 935 S.W.2d 556 (1996); *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992). We have found an abuse of discretion where there has been an undue limitation of substantial rights of the appellant under the prevailing circumstances. *Dodson, supra; Rickett v. Hayes*, 251 Ark. 395, 473 S.W.2d 446 (1971). Likewise, Arkansas Rule of Civil Procedure 37(a)(4)(A) states, "If the motion is granted, or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party of deponent, whose conduct necessitated the motion or the party or attorney advising such conduct or both of them, to pay the moving party the reasonable expenses incurred in making the motion unless the court finds that the motion was filed without movant's first making a good faith effort to obtain the discovery without court action. . . ." Ark. R. Civ. P. 37(a)(4)(A). This court has upheld sanctions when a party has failed to timely respond to a discovery request and when the order contained notice of the possible imposition of sanctions for failure to comply. *Viking Insurance Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992).

In this case, the trial court granted appellee's second motion for sanctions against Eubanks and granted monetary sanctions of $3,300.00, the cost of bringing such motion. We reverse and remand because, under these circumstances, it was an abuse of discretion not to hold a hearing on this matter as appellants had requested.

Eubanks requested a hearing on the basis that it was impossible to determine which financial statement was fraudulent. This is not to say that a hearing need be held in all cases where discovery

sanctions are ordered. Nevertheless, in this case, other than the "laundry list" order, there was no order entered requiring Eubanks to answer the interrogatories. Eubanks was unaware that the trial judge was considering sanctions without having conducted a hearing. Accordingly, there is no proof in the case that is supportive for the trial court to decide which financial statement was correct. The order issued by the trial court simply stated "Plaintiffs' Second Motion for Sanctions against defendant Bob Eubanks is granted and monetary sanctions are entered in the amount of $3,300.00." We hold that some opportunity should have been afforded Mr. Eubanks to explain the difference between the two conflicting financial statements. The simple fact that there were two different amounts and two different dates is not per se fraud on the part of Eubanks. Consequently, a hearing should have been held under these particular facts and circumstances to determine the validity of the financial statements.

Motion to Strike Amended Answer

Finally, appellants argue the trial court erred when it granted appellee Greenland's motion to strike amended answer. We find this argument without merit and, therefore, affirm the trial court's order regarding this point. Allen, Winner's Circle, and Eubanks amended their previous pleadings on July 5, 2000, to assert appellee Angela Greenland, at the time of the incident, failed to have her seatbelt fastened and that this was the proximate cause of her injuries and damages. Appellants pled the defense of contributory negligence and proximate cause. Appellee Greenland filed a motion to strike amendment to answer arguing the amendment was not timely filed and citing Ark. Code Ann. § 27-37-702 (Repl. 1994), which provides that every driver and front seat passenger must wear a seatbelt. Greenland was a passenger in the back seat of the Hutchinson vehicle and thrown to the front seat where she sustained injuries. The trial court granted appellee Greenland's motion.

We affirm the trial court on this point. The facts indicate Greenland was a passenger in the back seat of the vehicle, not the front seat. Ark. Code Ann. § 27-37-703(a)(1) states that "the failure of an occupant to wear a properly adjusted and fastened seatbelt shall not be admissible into evidence in a civil action." We have upheld this statute stating that the prejudicial effect of evidence of not wearing a seatbelt at time of accident outweighed any probative value of the evidence. *Grummer v. Cummings*, 336 Ark. 447, 986

S.W.2d 91 (1999). Therefore, we affirm the order of the trial court granting the motion to strike amended answer.

For the reasons set forth, while affirming the trial court's ruling on appellee Greenland's motion to strike amended answer, we reverse and remand the trial court's order granting appellees Hutchinson and Peery's motion to strike and second motion for sanctions against defendant Bob Eubanks with monetary sanctions in the amount of $3,300.00.

Affirmed in part; reversed and remanded in part.

IMBER, J., not participating.

Kevin MAYBERRY *v.* Dorothy FLOWERS
and Michael Flowers

00-1460 65 S.W.3d 418

Supreme Court of Arkansas
Opinion delivered January 31, 2002

Tripcony Law Firm, P.A., by: *James L. Tripcony* and *Scott A. Scholl*, for appellant.

Gordon, Caruth & Virden, P.L.C., by: *Ben Caruth*, for appellee Dorothy Flowers.

Scott Adams, for intervenor Michael Flowers.

DONALD L. CORBIN, Justice. This case raises the question of what notice must be given to a natural parent before the parent's right to his or her child may be terminated through adoption. Appellant Kevin Mayberry appeals the judgment of the Conway County Probate Court setting aside his adoption of James Walter Flowers, the minor child of Appellee Michael Flowers and the late Reneé Flowers Mayberry. This case was certified to us from the Arkansas Court of Appeals as presenting an issue of significant public interest. Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(b)(4). The sole issue on appeal is whether Michael received notice of the pending adoption, in compliance with the requirements of due process. We conclude that he did not, and we affirm the probate court's ruling.

The record reflects that James was born on August 28, 1991, to Reneé and Michael Flowers. Reneé and Michael divorced on October 9, 1992, and Reneé was awarded custody of James. Approximately one year later, Reneé married Kevin Mayberry. Reneé brought two children to the marriage, John and James, and three children were subsequently born to the Mayberrys. Kevin and Reneé filed a joint petition to adopt James on June 14, 1996. In the petition, Reneé gave her consent for James's adoption. The petition alleged that Michael's consent was not necessary because he had failed, without justifiable cause, to communicate with James and to contribute to James's support. Despite those allegations, the probate court appointed an attorney *ad litem* for Michael. In a report filed with the probate court, the attorney *ad litem* stated that on August 14, 1996, she had mailed a copy of the adoption petition by certified mail to Michael at his last known address. The letter was returned unclaimed. Thereafter, a warning order was published in the *Petit Jean County Headlight* on February 19, and 26, 1997.

Michael made no appearance in the matter, and on June 16, 1997, the probate court granted a temporary order of adoption.

Only months after the adoption order was entered, Kevin and Reneé separated. Reneé filed for divorce on November 10, 1997. She also filed a motion to dismiss the adoption proceeding. While the divorce was pending, Reneé was granted temporary custody of the five children, including James. She also applied for and was granted an order of protection from Kevin.

At some point in February 1998, Reneé telephoned Michael and told him that Kevin was trying to adopt James, and that Michael needed to be at the courthouse for a hearing on February 13, 1998. On the date of the hearing, Michael arrived at the courthouse just as Reneé was leaving. Reneé informed him that Kevin had not shown up for the hearing and that the judge had dismissed the adoption. Michael asked Reneé if he needed to do anything or fill out any paperwork to prevent the adoption. Reneé assured him that the matter was finished.

Two months later, on April 28, 1998, Reneé died. Following her death, Michael contacted Kevin and told him that he would be coming to get James, but that he would allow James to stay with Kevin until the 1998 school year was finished. That summer, Michael took custody of James. Since that time, James has lived with either Michael or Michael's mother, Appellee Dorothy Flowers.

On December 14, 1998, ten months after the adoption was dismissed and eight months after Reneé died, Kevin filed a petition for writ of habeas corpus in the Conway County Chancery Court seeking custody of James. Kevin claimed that he was the adoptive father of James by virtue of the order entered on June 16, 1997. He asserted that the June 16 order was a final order that declared James to be the child of Kevin and Reneé. He argued that the order dismissing the adoption was void because it was entered more than ninety days after the decree that it purported to dismiss, in violation of Ark. R. Civ. P. 60(b). The chancery court denied Kevin's petition.

Kevin appealed to the court of appeals, which reversed the chancery court and upheld the adoption. *See Mayberry v. Flowers*, 69 Ark. App. 307, 12 S.W.3d 652 (2000). The court of appeals concluded that the June 16, 1997 decree, though styled "Temporary

Order of Adoption," was actually a final order because it contemplated no further action by the probate court. Thus, the court of appeals held that the probate court's dismissal of the adoption petition, which was entered more than ninety days after the final decree, was void because the probate court lost jurisdiction to do so under Rule 60(b).

On April 17, 2000, approximately one month after the court of appeals's ruling, Michael filed a petition to set aside the adoption. In his petition, Michael asserted that he had not received notice prior to the order of adoption. He alleged that Reneé had committed a fraud upon him and upon the probate court because she had knowledge of Michael's correct address at the time of the adoption. He further alleged that since the entry of the adoption decree, Kevin had not taken custody of James, and that the child had remained in Michael's custody for the previous two years. Michael asked that the adoption be declared void.

A hearing was held on May 15, 2000, after which the probate court issued an order setting aside the adoption on the grounds of fraud and a lack of notice to Michael. Relying on this court's decision in *McKinney v. Ivey*, 287 Ark. 300, 698 S.W.2d 506 (1985), the probate court found that the service of process did not meet the requirements set forth in Ark. R. Civ. P. 4(e). The court found that the warning order published in the local newspaper did not constitute valid service, because it was not accompanied by an affidavit stating that a diligent inquiry had been made and that the defendant's whereabouts were unknown. *See* Rule 4(f). Indeed, the court found that there was clear and convincing evidence showing that Kevin and Reneé had practiced fraud upon Michael and the probate court by intentionally failing to serve notice on Michael, even though they knew his correct address and whereabouts. The court found further that, contrary to the assertions in the adoption petition, at no time had Michael abandoned the child, such that he would not have been entitled to notice prior to the adoption.

For reversal, Kevin argues that Michael's petition to set aside the adoption was untimely under Ark. Code Ann. § 9-9-216(b) (Repl. 1998), because it was not brought within one year from the date of the adoption decree. Although he does not argue that the warning order published in the local newspaper complied with the notice and service requirements in Rule 4 and Ark. Code Ann. § 9-9-212(f) (Repl. 1998), he contends that Michael had actual notice of the adoption within one year from the date of the decree. Thus, Kevin asserts that once the one-year period expired, Michael was

barred from challenging the adoption on any ground, including fraud and lack of notice.

We review probate proceedings *de novo*, but we will not reverse the decision of the probate court unless it is clearly erroneous. *Dillard v. Nix*, 345 Ark. 215, 45 S.W.3d 359 (2001); *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (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.* Similarly, we review issues of statutory construction *de novo*, as it is for this court to determine what a statute means. *Burch v. Griffe*, 342 Ark. 559, 29 S.W.3d 722 (2000). Thus, we are not bound by the trial court's construction; however, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Id.* We begin our analysis of this appeal by viewing the relevant statutes.

Section 9-9-212 provides in pertinent part:

> (a) Before any hearing on a petition, the period in which the relinquishment may be withdrawn under § 9-9-220 or in which consent may be withdrawn under § 9-9-209, whichever is applicable, must have expired. No orders of adoption, interlocutory or final, may be entered prior to the period for withdrawal. After the filing of a petition to adopt a minor, the court shall fix a time and place for hearing the petition. At least twenty (20) days before the date of hearing, notice of the filing of the petition and of the time and place of hearing shall be given by the petitioner to (1) any agency or person whose consent to the adoption is required by this subchapter but who has not consented; . . . .
>
> (f) *Notice shall be given in the manner appropriate under rules of civil procedure for the service of process in a civil action in this state* or in any manner the court by order directs. Proof of the giving of the notice shall be filed with the court before the petition is heard. Where consent is not required, notice may be by certified mail with return receipt requested. [Emphasis added.]

Section 9-9-216(b) provides:

> Subject to the disposition of an appeal, *upon the expiration of one (1) year after an adoption decree is issued, the decree cannot be questioned by any person* including the petitioner, *in any manner upon any ground, including* fraud, misrepresentation, *failure to give any required notice*, or lack of jurisdiction of the parties or of the subject

> matter unless, in the case of the adoption of a minor, the petitioner has not taken custody of the minor or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period. [Emphasis added.]

Kevin contends that because of the great need for finality in adoption cases, the one-year limitations period provided in section 9-9-216(b) outweighs any due process rights the natural parent may have where the parent has received actual notice of the adoption. Thus, Kevin asserts that even though Michael was not provided with legal notice, as required under section 9-9-212, he was nonetheless required to bring any challenge to the adoption by June 16, 1998, one year from the date that the decree was entered. Kevin's entire argument is based on his contention that Michael had timely actual notice of the adoption. We disagree.

Notice of a petition for adoption must be provided in a timely manner to afford the natural parent an opportunity to be heard before any action is taken that would deprive the parent of his or her parental rights. This court recognized in *McKinney*, 287 Ark. 300, 698 S.W.2d 506, that such notice is a requirement of due process. There, the child's father did not receive any prior notice of the adoption proceeding. In fact, he did not become aware of the adoption until more than a year after it had been finalized. The father subsequently filed a petition to set aside the adoption on the grounds that he had received no notice and that the child's mother and purported adoptive parents had fraudulently concealed his name from the probate court and made fraudulent statements regarding his status as the father of the child. The trial court dismissed the father's petition, and this court reversed. While recognizing the importance of the considerations that led the legislature to create the one-year limitations period in section 9-9-216, this court concluded that such considerations did not outweigh the father's fundamental right of due process. This court reasoned that "it would be a denial of due process of law for the courts to hold that the adoption decree is absolutely protected from challenge." *Id.* at 302, 698 S.W.2d at 507.

The *McKinney* court relied primarily on the Supreme Court's landmark decision in *Armstrong v. Manzo*, 380 U.S. 545 (1965), wherein the Court held that a natural father cannot be deprived of his parental rights without due process of law.

> It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of

> due process of law. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." "*An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.*"

Id. at 550 (citations omitted) (emphasis added).

Kevin acknowledges the holdings in *McKinney* and *Armstrong*, but he argues that those cases are factually distinguishable from this case, because Michael had "actual notice" of the adoption within the one-year limitations period. We disagree with this argument. Kevin is confusing notice with knowledge. It is true that Michael had knowledge of the adoption within one year from the date of the decree, but not until his parental rights had been terminated through a final decree of adoption. Such knowledge after the fact is not notice as required by due process or our adoption statutes.

This point is well illustrated in *Armstrong*, wherein the Court rejected the notion that the failure to give the father notice as contemplated by the Constitution was cured by the subsequent hearing afforded to him on his motion to set aside the adoption. The Court based its determination on the fact that the burden of proof had shifted once the adoption had been granted. The Court explained that had the natural father received notice of the pending adoption, the adoptive parents, as the moving parties, would have had the burden of proving their case, as against whatever defenses the father may have raised. Instead, because he did not receive proper notice, the father bore the burden of trying to get the judge to set aside the adoption. The Court held:

> A fundamental requirement of due process is "the opportunity to be heard." It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.

Id. at 552 (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

Consistent with the Court's holding in *Armstrong*, this court recognized in *Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979), that due process is not afforded where notice is given after a judgment has been entered. In that case, the child's natural mother, Brenda Pender, attempted to set aside the adoption on the ground that she had not been properly served with notice prior to the adoption hearing. The evidence revealed that there were defects in the service of process. Notwithstanding, the undisputed evidence demonstrated that Brenda had been notified of the pending adoption *prior* to the time that the hearing was held. Because she had received actual notice of the pending adoption, this court rejected her argument that her due process rights had been violated:

> The requirements of due process of law under [*Armstrong*, 380 U.S. 545,] were that she have notice reasonably calculated to apprise her of the pendency of the action and to afford her an opportunity to present her objections. These requirements of due process were met.
>
> We have heretofore recognized that *one who was apprised of the pendency of an action and aware of the nature of the relief sought before a judgment was rendered*, was not entitled to have the judgment vacated, whether process was served on him or not.

Id. at 36-37, 582 S.W.2d 929, 938 (citation omitted) (emphasis added).

It is clear from the foregoing holdings that notice of a pending adoption must be provided to the child's natural parents, when their consent is required, in a manner reasonably calculated to apprise them of the proceeding at a time prior to the entry of a judgment or decree. That was not done here. It is undisputed that Michael did not have knowledge of the adoption until after a final decree had been entered, which forever terminated his rights as James's father. Knowledge that an adoption has already occurred is not the same as notice and an opportunity to be heard prior to parental rights being terminated. Because Michael was not provided with the kind of notice contemplated by section 9-9-212 and the due process requirements of both the United States and Arkansas Constitutions, the one-year limitations period provided in section 9-9-216(b) did not bar his petition to set aside the adoption.

In holding as we do in this case, we are not unmindful of the need for finality in adoptions and the strict construction that must be accorded the one-year limitations period in section 9-9-216. *See In Re: Adoption of Martindale*, 327 Ark. 685, 940 S.W.2d 491 (1997); *Martin v. Martin*, 316 Ark. 765, 875 S.W.2d 819 (1994). We are, however, equally aware that the right of a natural parent to the custody of his or her child is "one of the highest of natural rights." *Olney v. Gordon*, 240 Ark. 807, 811, 402 S.W.2d 651, 653 (1966) (quoting *Woodson v. Lee*, 221 Ark. 517, 521, 254 S.W.2d 326, 329 (1953) (quoting 2 C.J.S. *Adoption of Persons* § 57 [(1972)])). Due process requires, at a minimum, notice reasonably calculated to afford a natural parent the opportunity to be heard before his or her parental rights are terminated through adoption. Thus, before actual notice may be deemed an adequate substitute for the notice required by section 9-9-212 and Rule 4, it must be gained prior to the entry of the adoption decree. Knowledge after the decree is entered, even if it is gained within the one-year limitations period, will not suffice.

Finally, we cannot ignore the fact that for almost four years, since the summer of 1998, James has been in the custody of his natural father, Michael, and has lived with either Michael or Michael's mother, Dorothy. Accordingly, the need for finality in this case does not weigh in favor of upholding the 1997 adoption decree. We thus affirm the probate court's judgment in this matter.

Rhonda FORD *v.* Jon D. FORD

01-554 65 S.W.3d 432

Supreme Court of Arkansas
Opinion delivered January 31, 2002

Sharp & Sharp, P.A., by: *J. Baxter Sharp III*, for appellant.

Richard L. Proctor, for appellee.

ANNABELLE CLINTON IMBER, Justice. In December 1998, Appellee Jon Ford filed for divorce from Appellant Rhonda Ford. In an order filed on February 5, 1999, the chancellor placed the children temporarily in the custody of Rhonda and, at Jon's request, ordered drug testing of both parties. On March 1, 1999, the chancellor changed custody of the children to Jon "until further orders of the Court" because Rhonda had tested positive for the use of drugs. The divorce decree entered on May 15, 2000, awarded custody of the two children to Jon, established child support and visitation for Rhonda, but reserved all issues of property division until the court received additional information. In a document entitled "Supplemental Decree" and filed on October 27, 2000, the chancellor addressed the issues of property division.

On November 27, 2000, Rhonda filed a notice of appeal "from a Divorce Decree entered in this Court on March 3, 2000 and from a Supplemental Decree entered in this Court on September 12, 2000." She raises three points on appeal: 1) the court erred in awarding custody to the father rather than granting joint custody; 2) the court erred in setting visitation; and 3) the court erred in setting the amount of the child support and in establishing the date to which it was made retroactive. This case also raises the issue of whether the appeal was timely, thereby granting jurisdiction to this court under our Rule of Appellate Procedure—Civil 2(d) (2001). The Arkansas Court of Appeals certified the case to this court as an issue of first impression, a significant issue needing clarification or development of the law, and a substantial question of law concerning the interpretation of a rule of this court. Thus, our jurisdiction is pursuant to Ark. R. Sup. Ct. 1-2(b)(1, 5, and 6) (2001). We hold that the appeal was timely filed and affirm the chancellor's rulings.

I. Jurisdiction

[1-3] The first question is whether Rhonda's appeal is properly before this court. Neither party raised the issue of jurisdiction based on the timeliness of the appeal; however, "it is well settled that it is our duty to determine that this court has jurisdiction." *Haase v. Starnes*, 337 Ark. 193, 194-95 987 S.W.2d 704, 705 (1998). The question of jurisdiction centers around a possible conflict between Ark. R. App. P.—Civ. 2(d) (2001) and the requirement of a final

appealable order. Arkansas Rule of Appellate Procedure—Civil 2(a)(1) (2001) limits our appellate review to final orders to avoid piecemeal litigation. *Larscheid v. Arkansas Dept. of Human Services*, 343 Ark. 580, 36 S.W.3d 308 (2001). Rule 2 establishes a number of exceptions, including Rule 2(d) that provides: "All final orders awarding custody are final appealable orders." The potential conflict is with Rule 54(b), which provides that "[a]bsent the executed certificate required by paragraph (1) of this subdivision, any . . . order . . . which adjudicates fewer than all the claims . . . shall not terminate the action. . . ." Ark. R. Civ. P. 54(b) (2001). We have held that the exceptions identified in Rule 2 specify circumstances in which an issue is appealable even though the order of the chancellor was not final. *East Poinsett City Sch. Dist. #14 v. Massey*, 317 Ark. 219, 876 S.W.2d 573 (1994).

The issue here is whether Rule 2(d) permitted Rhonda to appeal directly from the May 15, 2000 divorce decree, and, if so, was she required to appeal within thirty days or forfeit her right to appeal. The resolution of this issue requires us to decide whether the phrase "final orders awarding custody" as used in Rule 2(d) means a final order as to all issues as required by Rule 54(b), or merely any order that is final in terms of custody. We hold that Ark. R. App. P.—Civ. 2(d) permits an appeal from any order that is final as to the issue of custody, regardless of whether the order resolves all other issues. Therefore, Rhonda could have appealed directly from the May 15, 2000 divorce decree under Rule 2(d) because it was final as to the award of custody.

Having determined that the divorce decree met the requirements of Rule 2(d), the issue then becomes whether Rhonda was required to file her appeal within thirty days of the divorce decree or lose her right to appeal. The resolution of this issue is found in Rule 2(b) that provides: "An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment." Ark. R. App. P.—Civ. 2(b) (2001). In the instant case, while the May 15, 2000 divorce decree was a final award of custody, it was only an intermediate order with reference to property division issues, which were not addressed by the chancellor until the supplemental decree was entered on October 27, 2000. As such, the issues resolved in the divorce decree, as an intermediate order, were brought up for review along with the appeal from the supplemental decree. In summary, while Rhonda could have appealed directly from the May 15, 2000 divorce decree under Rule 2(d), she was not barred from raising the issues resolved in the divorce decree in her appeal

from the October 27, 2000 supplemental decree. Therefore, Rhonda's notice of appeal, filed on November 27, 2000, was timely filed, and this court has jurisdiction.[1]

II. Custody

We review chancery cases *de novo*, but will only reverse if the chancellor's findings were clearly erroneous or clearly against the preponderance of the evidence. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001). A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.* We give due deference to the chancellor's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Id.* In cases involving child custody, great deference is given to the findings of the chancellor. "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." *Taylor v. Taylor*, 345 Ark. 300, 304, 47 S.W.3d 222, 224 (2001). "The best interest of the child is the polestar in every child custody case; all other considerations are secondary." *Id. See also, Norwood v. Norwood*, 315 Ark. 255, 866 S.W.2d 398 (1993).

For her first point on appeal, Rhonda argues that the chancellor erred in awarding custody to Jon rather than joint custody because (1) the chancellor gave too much weight to her failed drug test while giving too little weight to her husband's former drug use; (2) the chancellor awarded custody without a home study for Rhonda; and (3) the chancellor did not factor in Jon's propensity for violence. After awarding temporary custody to Rhonda, the trial court ordered both parties to submit to drug tests. Jon's test results were negative, whereas Rhonda's test results were positive for amphetamines and methamphetamine. Rhonda first moved into her mother's home, and then into the home of her boyfriend. Jon's home study was favorable, and the Department of Human Services (DHS) attempted to conduct a home study for Rhonda. The DHS worker, Pat Nordan, testified that Rhonda asked that the home

[1] November 27, 2000 was a Monday. The deadline would have fallen on Sunday, November 26, 2000. Because the 27th was the next business day following the deadline, the appeal was timely filed. *Watanabe v. Webb*, 320 Ark. 375, 896 S.W.2d 597 (1995).

study not be conducted until she was in a more permanent environment. This testimony was disputed by Rhonda. Rhonda, Ms. Nordan, and Rhonda's mother all testified that Rhonda's living in her boyfriend's home was not in the children's best interest. The only independent witness to any violence between Jon and Rhonda observed Rhonda hitting Jon while he was holding one of their children.

Rhonda's final argument under this point is that the court should have given greater weight to her role as the primary caretaker of the children, relying on *Milum v. Milum*, 49 Ark. App. 3, 894 S.W.2d 611 (1995). In *Milum*, the chancellor awarded temporary custody to James Milum because Marcia Milum was not working and could not support the children. The chancellor also ordered Marcia to pay child support. *Id.* Marcia testified that she had never worked but had stayed home with the children at James's parents' house where they lived. She changed the children's diapers and was the primary caregiver at the mother-in-law's request. *Id.* Marcia, however, did get a job and paid child support as directed by the court. *Id.* The chancellor in awarding custody to Marcia found that her role as the primary care giver should be given greater weight than the superior financial condition of the father, and the Arkansas Court of Appeals affirmed. *Id. Milum* provides little support for Rhonda's argument. Unlike the instant case, there were no issues of drug use or inappropriate living conditions in *Milum*. Furthermore, unlike Marcia Milum, Rhonda Ford did not get a job and made no effort to pay child support.

The chancellor explained her reasons for awarding custody to Jon and emphasized Rhonda's decision to move into her boyfriend's home when she knew it was a situation that was not in the best interest of her children. Rhonda's failed drug test and her failure to pay child support were also factors influencing the chancellor's decision. Giving deference to the trial judge's superior position to evaluate the credibility of the witnesses and the evidence, we cannot say the chancellor was clearly erroneous or that her findings were clearly against the preponderance of the evidence. Thus, we affirm the chancellor's award of custody to Jon.

III. Visitation

Rhonda next argues that because Jon works during the day and the children are placed in day care while she neither works nor pursues further education, the trial court erred by not allowing her

to care for the children when Jon is at work and the children are not in school. She also argues that the court erred in eliminating Wednesday evening visitation. The chancellor established standard visitation according to Schedule "A" of the Chancery Court Visitation Schedule and specifically prohibited overnight visitation at the home of Rhonda's boyfriend. The trial court also required a home study before overnight visits would be allowed at Rhonda's residence. Both parties were prohibited from having non-relatives of the opposite sex staying overnight while the children were present. The chancellor removed Wednesday night visitation because the oldest child was in school but permitted such visits when the children were not in school.

Rhonda's argument is without merit. First, she did not pay child support because she chose not to get a job even though she had marketable skills. Remarkably, Rhonda now argues that because she does not work and does not support her children, she should be allowed to care for the children while Jon is at work. Furthermore, Rhonda does not explain how the trial court erred in granting standard visitation. As far as Wednesday visitation is concerned, the chancellor simply held that it was not appropriate while the oldest child was in school. We affirm the chancellor on the issue of visitation as well.

IV. Child Support

For her final point on appeal, Rhonda claims that the chancellor erred in both the computation of her income for child support and in making the child support retroactive. The trial court calculated her 1999 income as $7500 from farm rent, $3000 from grandparents, $3000 from a certificate of deposit, and $700 from retirement. Rhonda argues that the gift from her grandparents, the certificate of deposit, and the one-time retirement payment should not have been calculated as income because they would not be available as income in the future. She also argues that child support should not have been applied retroactively because in the March 1999 order the chancellor stated: "The Defendant will not be ordered to pay support at this time but will provide employment information to the Plaintiff's attorney when she is employed and child support will commence according to the chart." Rhonda suggests that she had no reason to know or expect that she would have to pay child support prior to the letter opinion dated March 8, 2000.

According to the letter opinion, the chancellor calculated Rhonda's income as $14,200 and used the child-support chart to determine that her child-support obligation should be $263 per month. In applying the child support retroactively to June 1999, the trial court explained: "It would have been reasonable for the Defendant to have become employed within four (4) months of entry of that order. By her admission there are no barriers to her employment and she has marketable skills. There is no reason then the child support should not be retroactive." In the supplemental decree, Rhonda was given credit toward her child-support obligation for one-half of the parties' AIM investment fund and one-half of the parties' tax refund. She was also given credit for one month's child support as a result of her marital interest in personal property awarded to Jon. After noting Rhonda's concern about the amount of child support and Jon's concern about the high cost of medical insurance, the court concluded that "[i]t is agreed that either party may ask for a modification of child support in the future."

The amount of child support lies within the sound discretion of the chancellor, and the chancellor's finding will not be reversed absent an abuse of discretion. *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *Smith v. Smith*, 337 Ark. 583, 990 S.W.2d 550 (1999). The chancellor is required to reference to the child-support chart, and the amount specified in the chart is presumed to be reasonable. *Smith v. Smith, supra.* However, the presumption that the chart is correct may be overcome if the chancellor provides written findings that the chart amount is unjust or inappropriate. *Id.*

A. Calculation of Income.

For the calculation of child support, "income" is statutorily defined as:

> (4)(A) "Income" means any periodic form of payment due to an individual, regardless of the source, including wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest.
>
> (B) The definition of "income" may be expanded by the Arkansas Supreme Court from time to time in the Guidelines for Child Support Enforcement, § 9-99-901;

Ark. Code Ann. § 9-14-201(4) (Supp. 2001). In Administrative Order No. 10, we expanded the definition of "income" as follows:

"Income means *any form of payment, periodic or otherwise*, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, worker's compensation, disability, payments pursuant to a pension or retirement program, and interest. . . ." *In re: Administrative Order Number 10: Arkansas Child Support Guidelines § II*, 331 Ark. 581 (1998) (emphasis added).[2] Factor 12 of the sources of income is also very broad: "Other income or assets available to support the child *from whatever source*." *Id.*, § V(a)(12) (emphasis added). The definition is intentionally broad and designed to encompass the widest range of sources consistent with this State's policy to interpret "income" broadly for the benefit of the child. *McWhorter v. McWhorter, supra* (allowing the inclusion of gambling winnings and losses in the calculation of sources of income for child-support purposes).

We have, however, held that a salary bonus was not an appropriate source of income where the chancellor was unable to reduce the amount to a sum certain. *Kelly v. Kelly, supra.* As Rhonda points out, the Arkansas Court of Appeals has held that past farm income did not constitute a source of income once the farm was sold. *Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997). Likewise, in *Rowlett v. Burton*, 68 Ark. App. 228, 6 S.W.3d 336 (1999), the court of appeals reversed a chancellor's decision to include an inheritance as income for child-support purposes and order a lump-sum payment of 15% as child support. *Id.* The appellate court noted that it had previously held that inheritance was not income because the definition of income under federal tax laws excluded gifts and inheritances. *Id.* (citing *Halter v. Halter*, 60 Ark. App. 189, 959 S.W.2d 761 (1998)).

In 1997, this court expanded the definition of "income" for child-support purposes to include "any form of payment, periodic or otherwise . . . from whatever source." *Administrative Order Number 10, supra.* As noted above, the definition is intentionally broad to encompass the widest range of sources consistent with this State's policy to interpret "income" broadly for the benefit of the child. As such, the gift from Rhonda's grandparents, the certificate of deposit, and the retirement payment all fall within the broad range of Rhonda's sources of income for child-support purposes. A chancellor is not without discretion to deviate from the guidelines if

[2] This definition of "income" was adopted by *per curiam* order on October 1, 1997. *In re: Administrative Order Number 10: Arkansas Child Support Guidelines*, 329 Ark. 668 (1997). The current version of Administrative Order No. 10 retains this definition. *In re: Administrative Order Number 10: Arkansas Child Support Guidelines*, 331 Ark. 581 (1998).

the chancellor determines that non-periodic payments do not represent the noncustodial parent's ability to pay child support. In this case, however, the chancellor noted that there were no barriers to Rhonda's employment, that she had marketable skills, and that she had testified finances would not be a problem for her. Under such circumstances, the trial court correctly found that Rhonda's non-periodic sources of income could be included for determination of child support. Furthermore, the trial court did not require Rhonda to pay child support for a period of time so that she could find employment. In the supplemental decree, the chancellor invited the parties to request a modification of child support at any time.

Because we have purposely provided a very broad definition of income in Administrative Order No. 10, we affirm the chancellor's decision to calculate Rhonda's income by including all sources, periodic or otherwise. In so holding, we overrule all prior decisions by the Arkansas Court of Appeals to the extent that they are inconsistent with this opinion.

B. Retroactive Award of Child Support.

A parent has a legal obligation to support a minor child regardless of the existence of a support order. *Fonken v. Fonken*, 334 Ark. 637, 976 S.W.2d 952 (1998). This court has upheld a child's right to sue for past child support even though there was no support order. *Id.* We further affirmed the chancellor's award of retroactive child support. *Id.*

Rhonda asserts that she received no notice and that she neither knew nor could she expect child support to be awarded retroactively. This argument is without merit. As Rhonda admits in her brief, the trial court made it clear in the February 1999 hearing that the court expected her to find employment, at which point child support would be set according to the chart. Thus, Rhonda was put on notice that she would be expected to pay child support. When the trial court awarded child support in March 2000, it allowed Rhonda four months to find employment and only made the award retroactive to June 1999. As previously stated, Rhonda had a legal obligation to support her minor children. Although she had been informed by the trial court that she would be expected to pay child support once she was employed, Rhonda chose not to seek employment. We hold that the chancellor did not abuse her discretion by making the initial child-support award retroactive to June 1999.

Affirmed.

Jerry SHORT *v.* WESTARK COMMUNITY COLLEGE

01-753 65 S.W.3d 440

Supreme Court of Arkansas
Opinion delivered January 31, 2002

Walters, Hamby & Verkamp, by: *Michael Hamby*, for appellant.

Smith, Maurras, Cohen, Redd & Horan, PLC, by: *S. Walton Maurras*, for appellee.

JIM HANNAH, Justice. Appellant Jerry Short appeals the dismissal of his civil-rights case against Appellee Westark Community College (Westark) due to the Sebastian County Circuit Court's finding that Westark was immune from suit under sovereign immunity. Short filed suit in Logan County Circuit Court on January 1, 2001, against Westark claiming that Westark violated his civil rights by removing or failing to provide reasonable work accommodations for his physical disability of bilateral carpal tunnel syndrome. According to Short's complaint, Westark hired him on August 21, 1997, fully knowing of his disability, but after a year or two changed his job and removed certain accommodations, causing him to have to either attempt work outside of his restrictions or refuse to perform required work. Short alleged that on April 20, 2000, Westark terminated him because he was unwilling and unable to perform the work assigned to him. Short's complaint alleged a violation of the Arkansas Civil Rights Act for negligent or intentional acts of discrimination.

After being served with the summons and complaint, Westark filed a motion to dismiss the action, arguing that it is entitled to sovereign immunity because it is an arm of the State and is protected by both constitutional and statutory sovereign immunity. Westark argued that because the State provides the bulk of its financing and operating expenses, any judgment against the school would be tantamount to a judgment against the State. Westark offered the affidavit of Mark Horn, Vice President for Planning and Accountability at Westark, and attached graphs detailing the financial breakdown of income sources to the school. Furthermore, Westark noted that the venue of the lawsuit was improper in that the action should have been filed in Sebastian County Circuit Court, Fort Smith District, because the school is located in that district.

Short answered the motion to dismiss on March 9, 2001, arguing that the legislature waived sovereign immunity for Westark when it enacted the Arkansas Civil Rights Act. Furthermore, Short argued that Westark is similar to a local school district, and that the Arkansas Supreme Court has recognized that school districts are not entitled to sovereign immunity. Short also argued that statutory sovereign immunity does not apply because the legislature carved out an exception to such immunity. Finally, regarding venue, Short argued that although he believed venue was proper, he preferred the case to be transferred rather than be dismissed.

By letter filed April 2, 2001, the Logan County Circuit/Chancery Court transferred the case to Sebastian County Circuit Court, Fort Smith District, and the complaint was refiled on April 11, 2001. On April 24, 2001, Westark again filed a motion to dismiss prior to answering the complaint, and attached the same brief in support and supporting affidavit and documentation. Short filed the same response on May 10, 2001.

On May 16, 2001, the court issued its order granting Westark's motion to dismiss the complaint based on sovereign immunity. Specifically, the court found that the main issue is whether Westark is "an arm of the State," and, if so, whether the State treasury would be tapped by a judgment against Westark. The court reviewed statutes and constitutional provisions establishing the college and creating funding for its operation, and noted that the State provided from 69.94% to 73.77% of the funding to Westark from 1994 to 2000. The court also considered that the State retained substantial control over Westark's operations through the State Community College Board and the Arkansas Higher Education

Coordinating Board. As such, Westark is both financially and operationally dependent upon the State, and a judgment against Westark would have to be satisfied from the State treasury. Therefore, the court concluded that sovereign immunity exists. Short filed his notice of appeal on May 29, 2001.

While the circuit court dismissed the case pursuant to a motion to dismiss, the court's action was actually one of summary judgment due to its consideration of Horn's affidavit and the attached financial documentation. Pursuant to Ark. R. Civ. P. 12(b) and (c), a motion to dismiss is converted to a motion for summary judgment when matters outside of the pleadings are presented to and not excluded by the court. *Francis v. Francis*, 343 Ark. 104, 31 S.W.3d 841 (2000); *McQuay v. Guntharp*, 331 Ark. 466, 963 S.W.2d 583 (1998); *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996). Because it is clear from the wording of the order that the trial court considered matters outside of the pleadings, we review this appeal as one from summary judgment.

In reviewing a summary-judgment case, we need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Aka v. Jefferson Hospital Assoc.*, 344 Ark. 627, 42 S.W.3d 508 (2001). Notably, the moving party always bears the burden of sustaining a motion for summary judgment. All proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party. However, the moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ark. R. Civ. P. 56 (2000); *Robert D. Holloway, Inc. v. Pine Ridge Add'n Resid. Prop. Owners*, 332 Ark. 450, 453, 966 S.W.2d 241, 243 (1998) (citing *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997)). Once the moving party makes a *prima facie* showing that it is entitled to summary judgment, the opponent must meet proof with proof by showing a material issue of fact. *Dillard v. Resolution Trust Corp.*, 308 Ark. 357, 359, 824 S.W.2d 387, 388 (1992).

On appeal, Short expounds on his argument that Westark is "more in the nature of a school district rather than a branch of the State" so that it cannot claim protection from suit through sovereign immunity. Short also asserts for the first time on appeal that Westark

is comparable to a housing authority, which does not enjoy sovereign immunity. Short addresses Horn's affidavit for the first time on appeal, arguing that his assertions indicate that Westark is controlled by a local board, much like a local school board, and that the State's Higher Education Coordinating Board acts more as an advisor than as a regulator. Because Westark has "the power to tax, acquire, use, and own property in the College's name, and to govern itself locally," it has more autonomy than schools in the University of Arkansas system and does not enjoy sovereign immunity. Short argues that on the funding issue, Westark is within a constitutionally created district that can levy taxes to fund the school. Therefore, although the State provides financing to Westark, Westark's district can levy taxes to pay for school operations, and the school has great discretion in how it uses bequests, gifts, and donations to the school. Short argues that the district could levy a millage earmarked in a general fund to pay for such money judgments, and that this would relieve the State from making up the shortfall. In all, Short argues that a money judgment against Westark does not necessarily implicate the State treasury, and that other funding sources could pay such a judgment, thus rendering sovereign immunity an inapplicable protection.

Westark responds first by noting that Short has expanded his argument on appeal and has argued issues that were not addressed below. Particularly, Westark points out that Short's argument that the private endowment funds could be used to pay a judgment was not raised below, that this argument is not supported by proof presented below, and therefore, the argument is speculative. Furthermore, Short's proposition that the Westark district could "raise revenue" by levying a millage for paying judgments is meritless in that millage assessments must be voted on by people in the district, and such millage assessments may only be raised to retire bonds issued to fund capital construction. Westark also notes that the voters in Sebastian County voted to repeal the entire assessed millage for Westark and to dissolve the district in order to merge Westark into the University of Arkansas system as the "University of Arkansas at Fort Smith." In addition, Westark argues as it did below that this case is similar to *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437 (8th Cir. 1996), in which the Eighth Circuit Court of Appeals found that North Arkansas Community Technical College (NACTC) enjoyed sovereign immunity under the Eleventh Amendment to the U.S. Constitution in a 42 U.S.C. § 1983 discrimination/employment termination case. Westark notes that that court analyzed the case both on the funding issue and on

the control issue, and determined that, although Arkansas community colleges had elements of local funding and control, the majority of the funding and control rested with the State. Therefore, because the Arkansas Civil Rights Act did not waive immunity, sovereign immunity applies. Finally, Westark argues that it also benefits from statutory sovereign immunity created in Ark. Code Ann. § 21-9-301 (Supp. 2001).

At issue is whether Westark is immune from this lawsuit under the protection of the doctrine of sovereign immunity. We must determine whether Westark is "an arm of the State" subject to the protections of sovereign immunity and, if so, whether the legislature has somehow waived that immunity. Sovereign immunity is jurisdictional immunity from suit. *State v. Goss*, 344 Ark. 523, 42 S.W.3d 440 (2001); *Milberg, Weiss, Bershad, Hynes, & Lerach, LLP v. State*, 342 Ark. 303, 28 S.W.3d 842 (2000); *State Office of Child Support Enforcem't v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997). This defense arises from Article 5, Section 20, of the Arkansas Constitution, which provides: "The State of Arkansas shall never be made a defendant in any of her courts." This court has consistently interpreted this constitutional provision as a general prohibition against awards of money damages in lawsuits against the state and its institutions. *See, e.g., Cross v. Arkansas Livestock & Poultry Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997); *Fireman's Ins. Co. v. Arkansas State Claims Comm'n*, 301 Ark. 451, 784 S.W.2d 771, *cert. denied*, 498 U.S. 824 (1990). The doctrine of sovereign immunity is rigid and may only be waived in limited circumstances. *Mitchell, supra.* This court has recognized only two ways in which a claim of sovereign immunity may be surmounted: (1) where the state is the moving party seeking specific relief; and (2) where an act of the legislature has created a specific waiver of immunity. *Id.*

As we stated long ago in *Pitock v. State*, 91 Ark. 527, 535 (1909), "[A] sovereign State cannot be sued except by its own consent; and such consent is expressly withheld by the Constitution of this State." *See also, Arkansas Tech University v. Link*, 341 Ark. 495, 17 S.W.3d 809 (2000). Recently, we reiterated this express prohibition in *Brown v. Arkansas State HVACR Lic. Bd.*, 336 Ark. 34, 984 S.W.2d 402 (1999). In *Brown*, we pointed out that sovereign immunity is jurisdictional immunity from suit, and where the pleadings show the action is one against the State, the trial court acquires no jurisdiction. However, unlike subject-matter jurisdiction, sovereign immunity can be waived. *Newton v. Etoch*, 332 Ark. 325, 331, 965 S.W.2d 96 (1998); *State v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996); *Cross, supra; Department of Human Servs. v.*

Crunkleton, 303 Ark. 21, 791 S.W.2d 704 (1990). The doctrine makes no distinction between actions in equity and actions at law. *Id.* Furthermore, a suit against a state official in his or her official capacity is not a suit against that person, but rather is a suit against that official's office. *Brown, supra.* A suit against the board of trustees of a state university is a suit against the State, and is barred by the doctrine of sovereign immunity. *State Comm'r of Labor v. University of Ark.*, 241 Ark. 399, 407 S.W.2d 916 (1966).

The decisive issue is whether the State's financial obligations would increase if the plaintiffs prevail in their suit. *Link, supra; Commission on Judicial Discipline and Disability v. Digby*, 303 Ark. 24, 792 S.W.2d 594 (1990). If so, the action is barred by the doctrine of sovereign immunity. *Id.* As the rule has been more commonly stated, if a judgment for the plaintiff will operate to control the action of the State or subject it to liability, the suit is one against the State and is barred by the doctrine of sovereign immunity. *Grine v. Board of Trustees,* 338 Ark. 791, 2 S.W.3d 54; *Fireman's Ins. Co. v. Arkansas State Claims Comm'n*, 301 Ark. 451, 784 S.W.2d 771 (1990); *Page v. McKinley*, 196 Ark. 331, 118 S.W.2d 235 (1938).

As the initial consideration, we must consider whether Westark is "an arm of the State" or a State entity subject to the protections of the sovereign-immunity doctrine. While Short raises several arguments here in support of his position that Westark is not a State agency, only one of those arguments was raised below at the trial level. It is well settled that this court does not consider arguments raised for the first time on appeal. *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999). Preserved for this appeal is Short's assertion that Westark is more akin to a school district, which does not enjoy sovereign immunity, *see Dermott Special School District v. Johnson*, 343 Ark. 90, 32 S.W.3d 477 (2000), rather than a State university and its employees acting in their official capacity, which do, *see Grine, supra.* Short is correct that Westark is within a legislatively established district created to oversee the operations of Westark. The creation of this district stems from Arkansas Constitutional Amendment 52, §§ 1 and 2, allowing the General Assembly to authorize the State Board of Higher Education to formulate criteria for establishing community colleges, and to propose the creation of the district to the qualified voters in the proposed district, who then may vote to create the district. *See also*, Ark. Code Ann. §§ 6-61-505 to -510, -513 (Repl. 1996) (Supp. 2001). Once that district is created, the voters may levy a property tax to

help fund the operation of the district for the "acquisition, construction, reconstruction, repair, expansion, operation, and maintenance of facilities therefor." Arkansas Const. Amend. 52, §§ 1 and 2. The voters may also vote to repeal or eliminate any millage previously assessed. *Id.* Funding is also provided by the State for the "general operation of an adequate comprehensive educational program." Ark. Code Ann. § 6-61-601 (Repl. 1996). This statute further states:

> The amount of state revenues to be recommended for the general operation of each community college shall be the difference between the recommended budget and the total of income for general operation, including student fees and any other income except local taxes. The recommended budget for general operation shall be sufficient to provide an adequate comprehensive educational program which serves the needs of the state and the community college's service area as determined by the State Community College Board.

Ark. Code Ann. § 6-61-601(c)(2). Furthermore, because Westark receives funds from the State as a state-supported institution of higher learning, the General Assembly considers it a "State agency." Ark. Code Ann. § 19-4-801(1) (Repl. 1996).

The evidence presented in Westark's motion indicates that from 1994 to 2000, Westark averaged over 70% in state-appropriated funds, approximately 25% in funds from tuition and fees, and about 3% in funds from interest, rental, library, fines, student fees, etc. Most notably, Westark received no fees during this time from local tax levies. These facts make this case quite similar to *Hadley, supra*, in which the Eighth Circuit Court of Appeals considered whether the North Arkansas Community Technical College, another Arkansas community college, enjoyed Eleventh Amendment sovereign immunity as a State agency in a federal discrimination lawsuit. The court determined that it did. In coming to this conclusion, the Eighth Circuit Court of Appeals considered the Arkansas constitutional and statutory provisions noted above, and found that during the 1993-1994 fiscal year, NACTC's operating expenses totaled 75.1% in state-appropriated funds, 22.1% in tuition payments, and 2.8% in federal grants and private donations. NACTC also received approximately 3% of its total budget from local tax revenues specifically earmarked to finance new acquisitions. Clearly, the numbers here are on par with those in *Hadley*, and, in fact, do not include any levied taxes to complete the total operating budget as NACTC received in *Hadley*.

As in *Hadley*, Short argues here that money to pay the judgment could come from other sources within Westark's budget than those monies received from the State. However, as the *Hadley* court explained, that is not the proper inquiry. The court stated:

> In these circumstances, we conclude that Hadley's claim "is in reality a suit against the state," *Sherman*, 16 F.3d at 863, because "the funds to pay any award will be derived from the state treasury," *Dover Elevator*, 64 F.3d at 446. Hadley argues that he seeks damages of less than $250,000 and therefore any award could be paid from other sources, such as future local tax increases, tuition, federal grants, or other discretionary funds. However, while there is dictum in *Sherman* suggesting it is relevant "whether a judgment against the University can be paid from non-state funds under the University's discretionary control," 16 F.3d at 865 (emphasis added), traditional Eleventh Amendment cases did not require a speculative analysis of whether a college largely funded by the State might be able to pay a judgment in the first instance from other revenue sources, and *Greenwood* and *Sherman* were not departures from prior Eleventh Amendment jurisprudence. *See Treleven v. University of Minnesota*, 73 F.3d 816, 818-19 (8th Cir.1996). *Mt. Healthy* directs us to examine "the nature of the entity," 429 U.S. at 280, 97 S.Ct. at 572, not the nature of the relief the plaintiff seeks.
>
> Arkansas calls NACTC a state agency and has made its daily operations financially dependent upon the state treasury. The district's never-exercised authority to supplement NACTC's operating budget with limited local tax revenues does not change the fact that the State has created an institution of higher learning "that is dependent upon and functionally integrated with the state treasury." *Kashani v. Purdue Univ.*, 813 F.2d 843, 846 (7th Cir.), *cert. denied*, 484 U.S. 846, 108 S.Ct. 141, 98 L.Ed.2d 97 (1987). The relevant funding inquiry cannot be whether NACTC enjoys some non-state funding, such as user fees (tuition), because then most state departments and agencies, and all state universities, would be denied Eleventh Amendment immunity. Here, even if NACTC could initially satisfy a judgment from other operating revenues, such as tuition payments or federal grants, the judgment would produce a higher operating budget shortfall that must, by state law, be satisfied by an appropriation from the state treasury. Thus, Hadley's action "is in essence one for the recovery of money from the state." *Ford Motor*, 323 U.S. at 463-64, 65 S.Ct. at 350.

Hadley, 76 F.3d at 1440-1441. Such is the case here in that if Westark were not immune from suit merely because it receives

money for general operating expenses from sources other than the State treasury, such as funding from tuition, tax levies, or private grants, the State by law would be statutorily required to make up the difference. Therefore, any money pulled from Westark's operating funds would necessarily have to be replaced with State money to cure the shortfall. As such, a suit against Westark is a suit against the State.[1]

Because Westark is a State agency subject to sovereign-immunity protection, we move to the second leg of the inquiry to determine whether the State waived immunity for Westark by enacting the Arkansas Civil Rights Act. As noted above, this court has recognized only two ways in which a claim of sovereign immunity may be surmounted: (1) where the state is the moving party seeking specific relief; and (2) where an act of the legislature has created a specific waiver of immunity. *Mitchell, supra.* Clearly, here the State is not the moving party seeking specific relief. Therefore, unless the legislature has waived immunity, both the constitutional and statutory guarantees of immunity stand.

Short argued below that the General Assembly waived sovereign immunity for the State in the Arkansas Civil Rights Act, codified at Ark. Code Ann. §§ 16-123-101—16-123-108 (Supp. 2001). However, the legislature specifically stated in Section 16-123-104 that "[n]othing in this subchapter shall be construed to waive the sovereign immunity of the State of Arkansas." Therefore, Short's argument has no merit. Furthermore, Short offers no other source to show that the legislature waived the State's immunity in any manner.

Affirmed.

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[1] While our inquiry into sovereign immunity under Arkansas law ends with a determination that the State treasury would be tapped if the pending lawsuit were successful, the Eighth Circuit Court of Appeals in *Hadley* continued its inquiry into Eleventh Amendment sovereign immunity by considering the amount of control the State had over NACTC. The court found that the State's "ultimate control" of NACTC also contributed to the court's determination that NACTC, as a State agency, was immune from federal suit under Eleventh Amendment sovereign immunity.

Ray DANSBY *v.* STATE of Arkansas

CR 00-1218 65 S.W.3d 448

Supreme Court of Arkansas
Opinion delivered January 31, 2002

David W. Talley, Jr., for appellant.

Mark Pryor, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

PER CURIAM. This is an appeal by appellant Ray Dansby from the denial of his petition for postconviction relief under Ark. R. Crim. P. 37.5 in connection with his capital murder convictions and death sentences. Dansby raises multiple issues in his Rule 37.5 appeal, including (1) trial counsel was ineffective in pretrial preparation; (2) trial counsel was ineffective in conducting *voir dire* of the jury panel; (3) trial counsel was ineffective in failing to secure the presence of a witness, Calvin Paschal; (4) trial counsel was ineffective in failing to move to suppress Dansby's statement given to law enforcement; and (5) trial counsel was ineffective in preparing mitigation evidence for the penalty phase of the trial. Counsel for Dansby in this Rule 37.5 appeal has failed to abstract the testimony and rulings from the underlying trial which give rise to his claims of ineffective assistance of counsel. Therefore, we order counsel to refile his brief within thirty days in compliance with Ark. Sup. Ct. R. 4-2(a)(5).[1]

Just last year, this court advised appellant's counsel in a Rule 37.5 death case to correct a flagrantly deficient abstract. *See McGehee v. State*, 344 Ark. 602, 43 S.W.3d 125 (2001). In *McGehee*, we referred to our "heightened standard of review in death cases." *McGehee*, 344 Ark. at 604, 43 S.W.3d at 127. We further referred to our longstanding doctrine that we would not go to the record to reverse a trial court and concluded that an affirmance of the trial court because of an abstract deficiency in this death case would be too harsh.

A proper abstract, which includes material portions of the underlying trial, is essential to this court's review of Rule 37.5 decisions. Without it, we are unable to perform a comprehensive review of Dansby's claim for postconviction relief. When this court adopted Rule 37.5 in 1997, we noted that we were doing so in response to Act 925 of 1997 and the federal Antiterrorism and Effective Death Penalty Act of 1996. Later, we noted the purpose behind Rule 37.5:

> Rule 37.5 evolved from Act 925 of 1997, now codified at Ark. Code Ann. §§ 16-91-201 to -206 (Supp. 1999), where the

[1] By *per curiam* order, previous Supreme Court Rule 4-2(a)(6) became Rule 4-2(a)(5). *See In Re: Modification of the Abstracting System - Amendments to Supreme Court Rules 2-3, 4-2, 4-3, and 4-4*, 345 Ark. Appx. (May 31, 2001).

> General Assembly expressly noted that *the intent of the Act is to comply with federal law by instituting a comprehensive state-court review. See* section 16-91-204; *Porter v. State*, 332 Ark. 186, 964 S.W.2d 184 (1998) (*per curiam*). *The purpose of a meaningful state review is to eliminate the need for multiple federal habeas corpus proceedings in death cases. Id.* Thus, "in death cases where a Rule 37 petition is denied on procedural grounds, great care should be exercised to assure that the denial rests on solid footing." *Id.* at 188-89, 964 S.W.2d at 185.

Echols v. State, 344 Ark. 513, 517, 42 S.W.3d 467, 469 (2001) (quoting *Wooten v. State*, 338 Ark. 691, 695-96, 1 S.W.3d 8, 10-11 (1999) (emphasis added)).

The State suggests that this court should go to the record of the underlying trial and read those portions of the trial that pertain to Dansby's claims on appeal. In other words, the State suggests that this court should do appellate counsel's work and engage in the cumbersome process of passing a record back and forth among seven judges in an attempt to find the relevant portions of the record. We decline to do that. Proper abstracting of the record was the obligation of Dansby's attorney.

Dansby's counsel, accordingly, is given thirty days to revise the abstract and submit to this court a substitute brief so that we can engage in a meaningful review of his issues on appeal. The argument section of the brief should remain the same as that currently included in the brief before this court. Because the argument portion of the appellant's brief will be unchanged, a response by the State should be unnecessary, unless the State objects in some way to the compilation of the revised abstract.

Rebriefing ordered.

IMBER, J., not participating.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. I agree with the court that, in death cases where a Rule 37 petition is denied on *procedural* grounds, great care should be exercised to assume that the denial rests on solid footing. Here, that assurance exists without rebriefing, because this case can be decided on its merits, not on procedural grounds.

While the appellant here failed to abstract the record, the State has gone to the transcript to argue and discuss the merits of appellant's points. Our court has held repeatedly that it may go to the record to affirm, *see McGehee v. State*, 344 Ark. 602, 42 S.W.3d 474 (2001), and the State asks our court to do so here. Appellant Dansby is in no way prejudiced by our considering his and the State's arguments in these circumstances, since appellant had every opportunity to review the record, as the State did, and argue in reply. The only one prejudiced, if you can call it that, is this court, which is called on to review those few portions of the record relevant to an understanding of appellant's and the State's arguments. Although this court always retains the discretion to require an appellant to abstract the record to cure a deficiency, it need not require such abstracting, if the court can reach the issues on their merits and judicial economy can be served. *Cf. In re: Supreme Court Rules 2-3, 4-2, and 4-4*, 346 Ark. Appx., *per curiam* delivered September 20, 2001.

For the above reasons, I would proceed to consider this appeal on its merits rather than waste time making the appellant abstract a record which in no way is going to help his case, but will serve only to increase attorney's fees and costs and will end in an unnecessary delay of this court's decision.

Charles Anthony MARTIN *v.* STATE of Arkansas

CR 01-1072 64 S.W.3d 755

Supreme Court of Arkansas
Opinion delivered January 31, 2002

Wilson & Associates, P.L.L.C., by: *Patrick J. Benca*, for appellant.

No response.

PER CURIAM. On October 2, 2001, petitioner Charles Martin moved to file a belated appeal, and, on October 25, 2001, this court issued a *per curiam* remanding this case to the trial court to settle the record in order to determine whether Martin had requested his then attorney, Dale Finley, to file a notice of appeal. The trial court complied with our *per curiam* on November 27, 2001, and the trial court's order was subsequently filed with our clerk's office on December 5, 2001. The trial court concluded that Martin had directed Finley to file a motion, but Finley failed to do so in violation of Rule 16 of the Rules of Appellate Procedure—Criminal.

On January 2, 2000, Martin's motion for belated appeal was resubmitted, but, because the court was not apprised of the trial court's November 27, 2001, order settling the record, we requested compliance with the October 25, 2001, be done. Now, being knowledgeable of the trial court's order settling the record, we grant Martin's motion for belated appeal. We also refer the matter concerning Mr. Finley to the Professional Conduct Committee.

Terrance ROBINSON and Tamagum Antonio Robinson *v.* STATE of Arkansas

CR 01-351 64 S.W.3d 754

Supreme Court of Arkansas
Opinion delivered January 31, 2002

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[redacted]

Roy Lewellen, for appellants.

Fred Thorne, for appellee.

PER CURIAM. On October 11, 2001, this court issued a *per curiam* directing the Supreme Court Clerk to accept a substituted copy of the trial transcript in this matter when all of the attorneys of record certify to the Clerk by affidavit that the trial transcript is true, accurate, and complete. *Robinson v. State*, 346 Ark. 266, 57 S.W.3d 162 (2001) (*per curiam*). We further directed the attorneys of record to reconstruct the record in the appeal, including trial exhibits, and certify in the same affidavit that the full record with the transcript and exhibits was accurate and complete. *Id.*

On October 26, 2001, attorney for the appellants filed a "Certification" and stated that the trial transcript was complete but that the thirteen trial exhibits are "presumed lost." On November 7, 2001, the deputy prosecuting attorney filed an affidavit approving the trial transcript and stating in part: "If requested, I will attempt to reconstruct the trial exhibits."

On December 6, 2001, we again directed counsel of record to reconstruct the trial exhibits, as they appeared pertinent to this appeal, and certify the same to this court by affidavit. We stated that this must be done within thirty days from the date of this *per curiam*. *Robinson v. State*, 347 Ark. 231, 60 S.W.3d 484 (2001) (*per curiam*).

On January 3, 2002, the deputy prosecuting attorney, Fred Thorne, filed his affidavit with a packet of reconstructed exhibits with this court. To date, defense counsel, Roy Lewellen, has again failed to comply with this court's order concerning reconstruction of the exhibits for purposes of his clients' appeal.

[redacted] We order Mr. Lewellen to appear before this court at 9:00 a.m. on February 14, 2002, to show cause why he should not be held in contempt for failing to comply with this court's order regarding certification of the reconstructed exhibits.

Bruce Earl WARD *v.* STATE of Arkansas

CR 00-1322 65 S.W.3d 451

Supreme Court of Arkansas
Opinion delivered January 31, 2002

[redacted]

William A. McLean, for appellant.

Mark Pryor, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

PER CURIAM. Appellant Bruce Earl Ward appeals the order of the Pulaski County Circuit Court denying his petition for postconviction relief under Ark. R. Crim. P. 37. A jury convicted Ward of capital murder and sentenced him to death. This court affirmed his conviction on direct appeal, but reversed and remanded for resentencing in *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110, *cert. denied,* 506 U.S. 841 (1992). Ward was again sentenced to death, but this court ordered the case to be remanded for resentencing, due to an error by the court reporter. *See Ward v. State*, 321 Ark. 659, 906 S.W.2d 685 (1995) (*per curiam*). Ward was then sentenced to death a third time, and this court affirmed that sentence in *Ward v. State*, 338 Ark. 619, 1 S.W.3d 1 (1999).

Rule 37.5 provides the postconviction procedure to be applied in death-penalty cases in which the defendant became eligible to file a Rule 37 petition on or after March 31, 1997. *See* Rule 37.5(k). This court issued the mandate affirming Ward's conviction and sentence on October 19, 1999. On February 10, 2000, Ward filed a timely petition for postconviction relief, asserting that he was denied the effective assistance of counsel during his trial. Thus, Rule 37.5 governs this appeal, as Ward became eligible to file his petition under Rule 37.2(c) after March 31, 1997.

[redacted] In his petition to the circuit court, Ward raised six allegations of ineffective assistance of counsel. A hearing was held on the petition, and the circuit court entered a written order denying relief on July 20, 2000. Ward now appeals the denial of his petition, but limits his appeal to only two of the allegations raised in his original petition. First, Ward argues that he is entitled to relief under Rule 37, because his trial counsel failed to object to the admission of hearsay testimony introduced through State's witness Dale Danzeisen. Second, Ward argues that his counsel was ineffective for failing to seek recusal of the judge who presided over his trial. We are unable to reach the merits of Ward's arguments because the

abstract presented to this court is flagrantly deficient. Specifically, the abstract does not comply with Ark. Sup. Ct. R. 4-2(a)(5),[1] because it does not consist of an impartial condensation of the material proceedings necessary to an understanding of the issues presented to this court.

When this court is presented with a deficient abstract, we may summarily affirm the judgment for noncompliance with our rule. *See* Ark. Sup. Ct. R. 4-2(b)(3). Where such a disposition would be unduly harsh, however, this court also has the option to order Appellant's counsel to revise the brief at his own expense. *Id.*; *McGehee v. State*, 344 Ark. 602, 43 S.W.3d 125 (2001). We believe that summarily affirming for a deficient abstract in the present case would be an unduly harsh result, particularly in light of the underlying policy of Rule 37.5.

This court has stated that Rule 37.5 requires a heightened standard of review in death cases. *Echols v. State*, 344 Ark. 513, 42 S.W.3d 467 (2001) (citing *Jackson v. State*, 343 Ark. 613, 37 S.W.3d 595 (2001). We have also recognized that death-penalty cases are different from other criminal cases, due to the obvious finality of the punishment. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976); *American Civil Liberties Union v. State*, 339 Ark. 314, 5 S.W.3d 418 (1999); *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988), *modified on other grounds*, *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999). Furthermore, as this court stated in *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999), the purpose of the exacting requirements of Rule 37.5 is to provide a comprehensive state-court review of a petitioner's claim, thus eliminating the need for multiple postconviction actions in federal court. *See also Echols*, 344 Ark. 513, 42 S.W.3d 467. Summarily affirming this case due to a deficient abstract would deny Appellant his right to a comprehensive state-court review.

In light of the foregoing, we order Appellant's counsel, at his own expense, to abstract relevant portions of Appellant's trial, including the complete testimony of witness Dale Danzeisen, as well as any portions of the trial that would support Appellant's argument that counsel was ineffective in failing to seek recusal of the trial judge. The argument portion of Appellant's brief is to remain unchanged. Counsel will have thirty days from the date of

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[1] By *per curiam* order, previous Supreme Court Rule 4-2(a)(6) became Rule 4-2(a)(5). *See In Re: Modification of the Abstracting System — Amendments to Supreme Court Rules 2-3, 4-2, 4-3, and 4-4*, 345 Ark. Appx. (May 31, 2001).

this opinion to rebrief this matter and file it with the clerk of this court.

Rebriefing ordered.

GLAZE, J., dissents. *See Dansby v. State*, 347 Ark. 509, 65 S.W.3d 448 (January 31, 2002) (*per curiam*).

IMBER, J., not participating.

Thomas Edmond BRADLEY *v.* STATE of Arkansas

CR 01-681 65 S.W.3d 874

Supreme Court of Arkansas
Opinion delivered February 7, 2002
[Petition for rehearing denied March 14, 2002.]

Phillip A. McGough, P.A., for appellant.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

W.H. "DUB" ARNOLD, Chief Justice. This case involves the revocation of a suspended sentence. Appellant Thomas Bradley pled guilty to breaking or entering, two counts of burglary, and three counts of theft of property in 1997. Imposition of appellant's sentences were suspended on several conditions, one of which was that appellant live a law-abiding life, be of good behavior, and not violate any state, federal, or municipal law. On February 20, 2001, the State filed a revocation petition based on alleged violations of the conditions of appellant's suspended sentences, particularly the alleged violation of Ark. Code Ann. § 5-64-1301 (Supp. 2001), which states:

> Any person who knowingly possesses anhydrous ammonia in a container which does not comply with the regulations of the Boiler Inspection Division of the Department of Labor for the containment of anhydrous ammonia is guilty of a Class B felony.

The trial court revoked appellant's suspended sentences, and the appellant now appeals that revocation. We affirm.

Appellant was a passenger in a vehicle driven by a friend. The vehicle was stopped for speeding, and the odor of ammonia coming from the trunk was so strong that two police officers and a police dog were overcome. The officers obtained permission to search the vehicle, and found hypodermic needles in the door pocket of the driver's door. The trunk key initially could not be found; however, access to the trunk was gained through the back seat, and the anhydrous ammonia was found there, leaking from a red nonconforming container.

The trunk key was later found under the appellant's passenger seat, and the trial court found that, from all of the circumstances, appellant was in constructive possession of the anhydrous ammonia found in the trunk in the nonconforming container. The court found that while there might not be enough evidence to convict the appellant of violating the statute, there was sufficient evidence to revoke his suspended sentences. On appeal, appellant challenges the court's denial of his motions for directed verdict, alleging that the State did not sufficiently prove that appellant constructively possessed the contraband found in the trunk of the automobile.

I. Standard of Review

We have held that to revoke probation or a suspended sentence, the burden is on the State to prove the violation of a condition of probation or suspended sentence by a preponderance of the evidence. *See* Ark. Code Ann. 5-4-309(d) (Supp. 1999); *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992); *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986); *Pearson v. State*, 262 Ark. 513, 558 S.W.2d 149 (1977). On appellate review, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Hoffman, supra*. Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation revocation. Thus, the burden on the State is not as great in a revocation hearing. *Lemons, supra*; *Gordon v. State*, 269 Ark. 946, 601 S.W.2d 598 (1980). Since determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the trial judge's superior position. *Id.*

II. Merits

At trial, West Memphis Police Officer Joseph Applegate testified that on October 12, 2000, at 2:39 a.m., he stopped a white Ford Thunderbird on Interstate 40 for speeding. He testified that upon approaching the vehicle, he smelled a strong odor of ammonia coming from inside the car. The driver gave Officer Applegate permission to search the vehicle. Both the driver and appellant, who was a passenger in the car, were placed in Office Applegate's patrol car while he performed the search. Officer Applegate first attempted to use a drug dog to search the car; however, the dog had an abnormal alert and ran away from the car and the smell of ammonia. Officer Applegate then began conducting the search by accessing the trunk through the upper part of the back seat because the trunk key was "missing," although it was later found underneath the passenger seat in which appellant had been sitting. Officer Applegate testified that the parties acted very nervous — more nervous than is normal during a traffic stop for speeding. When Officer Applegate opened the trunk, the strong ammonia odor caused him to vomit on the side of the road.

West Memphis Detective Vance Plumhoff testified that he arrived to assist Officer Applegate. Detective Plumhoff is certified to recognize dismantled clandestine methamphetamine laboratories.

Located inside the trunk was a red plastic gas tank, which contained anhydrous ammonia. Detective Plumhoff testified that the tank was leaking, causing the ammonia to evaporate, which would indicate that the trunk had recently been opened in order to place the ammonia inside it. The red plastic container is not the approved type for transportation of anhydrous ammonia in Arkansas. Detective Plumhoff further testified that antifreeze and windshield washer fluid containers were also located in the trunk and that although carrying these items in one's automobile trunk is in no way illegal, given the circumstances and other findings in the trunk, these items were suspicious, as antifreeze may be used to manufacture methamphetamine or transport other chemicals and the methanol in certain brands of windshield washer fluid can be used in certain forms of manufacturing methamphetamine. Additionally, an empty silver pressurized tank and sixty-six Dilantin capsules were found in the trunk, although Detective Plumhoff testified that the pills would not have been used in the manufacture of methamphetamine. Appellant's objections to Detective Plumhoff's testimony relating how they *were* used were sustained by the court.

Based on the evidence presented at the revocation hearing, we cannot say that the trial court erred in finding that the State had proved by a preponderance of the evidence that appellant had constructively possessed anhydrous ammonia in an unlawful container and, therefore, violated the conditions of his suspended sentences. We have held that the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession of a controlled substance if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is, constructively possessed. *Darrough v. State*, 330 Ark. 808, 957 S.W.2d 707 (1997). We have further held that while constructive possession can be implied when the contraband is in the joint control of the accused and another, joint occupancy of a vehicle, *standing alone*, is not sufficient to establish possession or joint possession. *Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000). Other factors to be considered in cases involving automobiles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion or control over it; and (5) whether the accused acted suspiciously before or during the arrest. *Id.* Possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused

and subject to his dominion and control. *See Wade v. State*, 267 Ark. 1101, 594 S.W.2d 43 (1980); *see also Crossley v. State*, 304 Ark. 378, 902 S.W.2d 459 (1991).

In this case, the trial court placed substantial emphasis on the fact that the trunk key was found underneath the seat where appellant was sitting. Since the ammonia was evaporating, the trunk would have recently been opened in order to place the ammonia inside it. As such, the fact that the key was found underneath appellant's seat led the trial court to believe that appellant placed it there in order to delay the officer's access to the trunk, and thus, that appellant had knowledgeable possession of anhydrous ammonia in an unlawful container. Moreover, other factors considered are the plain *smell* of ammonia, which was obviously so powerful that it was basically in "plain view," and the testimony of the officers that the driver and the appellant acted "very nervous — more than is normal during a traffic stop for speeding."

Because this was a revocation proceeding, and the burden of proof was by a preponderance of the evidence, we hold that even if there was not enough evidence to sustain a conviction for violation of the anhydrous ammonia statute, the trial court's finding by a preponderance that appellant was in constructive possession of anhydrous ammonia being transported in an unlawful container is clearly sufficient to revoke his suspended sentences.

Affirmed.

STATE of Arkansas *v.* Tiffany ASHLEY

CR 01-774 66 S.W.3d 563

Supreme Court of Arkansas
Opinion delivered February 7, 2002

Mark Pryor, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellant.

Hurst Law Office, by: *Q. Byrum Hurst, Jr.*, for appellee.

W.B. "DUB" ARNOLD, Chief Justice. The appellee, Tiffany Ashley, was charged and convicted of public sexual indecency in Garland County Municipal Court. She appealed the municipal court conviction to Garland County Circuit Court, where the trial court granted Ashley's order for dismissal. The State appeals from the circuit court's order granting Ashley's motion to dismiss. Here, the State questions the trial court's application of Ark. Code Ann. § 5-14-111(b) (Repl. 1997) to the facts at hand and not its interpretation, so the appeal must be dismissed. In so holding, it is unnecessary to reach the State's argument that the trial court erred in ruling that the establishment has taken itself out of the statutory definition of public place or public view by hanging a bead curtain where the proscribed acts occurred.

Appellee, Tiffany Ashley, worked as an exotic dancer at Centerfold Club in Hot Springs. In May 2000, the Hot Springs Police Department conducted undercover investigations of various night clubs, including Centerfold Club. The interior of the Centerfold Club has a stage where most of the dancers employed there dance topless. The club, also, has another area that is surrounded by a curtain of beads. Ashley was arrested and charged with public sexual indecency based on an arrest warrant alleging that an undercover officer observed, at a particular angle, Ashley and another individual, inside the beaded area, as she performed a lap dance for the patron.

Prior to trial in circuit court, Ashley filed a motion to dismiss the charge of public sexual indecency against her. Following a hearing, the trial court granted her motion to dismiss the charge based on the evidence presented, and found "all acts of sexual contact, as defined by the Code, occurred in a separate area or room within which only the participants were present. The view from the main club area into the separate area or room was substantially or totally obscured." The State contends that the trial court erred in ruling that the offense of public sexual indecency be dismissed. The State claims that the evidence presented to the trial court was sufficient to constitute consideration as a public place or in public view and, as such, the trial court should not have dismissed the charge of public sexual indecency. The State argues that because Centerfold Club is a public place, the trial court erred in ruling that

the establishment's beaded curtain area had taken itself out of the statutory definition of public place or public view. The State requests this court to vacate the circuit court's order of dismissal, reverse, and remand the case back to Garland County Circuit Court for trial on the charge of public sexual indecency.

We must first raise the question of whether this appeal is properly before this court. Specifically, we must determine whether the correct and uniform administration of justice requires us to review this appeal. Ark. R. App. P.—Crim. 3(c). *State v. Guthrie*, 341 Ark. 624, 19 S.W.3d 10 (2000). In criminal cases, we accept appeals by the State in limited circumstances. *State v. McCormack*, 343 Ark. 285, 34 S.W.3d 735 (2000). This court has held our review of a State appeal is not limited to cases that would establish precedent. *State v. Gray*, 330 Ark. 364, 955 S.W.2d 502 (1997). Moreover, there is a significant and inherent difference between appeals brought by criminal defendants and those brought on behalf of the State. The former is a matter of right, whereas the latter is not derived from the Constitution, nor is it a matter of right, but is granted pursuant to Rule 3. *State v. Guthrie, supra*; *State v. McCormack; supra*. 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, 909 S.W.2d 634 (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. Stephenson*, 330 Ark. 594, 955 S.W.2d 518 (1997); *State v. Spear and Boyce*, 123 Ark. 449, 185 S.W. 788 (1916). Thus, where the resolution of the issue on appeal turns on the facts unique to the case, the appeal is not one requiring interpretation of our criminal rules with widespread ramification, and the matter is not appealable by the State. *State v. Guthrie, supra; State v. Howard*, 341 Ark. 640, 19 S.W.3d 4 (2000); *State v. Gray*, 330 Ark. 364, 955 S.W.2d 502 (1997); *State v. Edwards*, 310 Ark. 516, 838 S.W.2d 356 (1992) ("Here, the State questions the trial court's application of our rule to the facts at hand and not its interpretation, so the appeal must be dismissed."). This court will not even accept mixed questions of law and fact on appeal by the State. *State v. Gray, supra; State v. Edwards, supra; State v. Hart*, 329 Ark. 582, 952

S.W.2d 138 (1997) ("Because the issue presented in this appeal involves a mixed question of law and fact, an interpretation of our rules with widespread ramifications is simply not at issue here."). Likewise, where an appeal raises the issue of application, not interpretation, of a statutory provision, it does not involve the correct and uniform administration of the criminal law and is not appealable by the State. *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995); *State v. Mazur*, 312 Ark. 121, 847 S.W.2d 715 (1993).

Here, the State's argument is based entirely on the application of the law to the facts and in no way raises an issue of statutory interpretation. The trial court held a hearing on Ashley's motion to dismiss, during which the parties offered a proposed stipulation. This stipulation contained the following information:

> Once inside, the Defendants, or most of them would dance topless on a stage. Located on the inside of a club would be another area which in the instance of Playmates and Centerfold is surrounded by beads as a curtain to make the area private where a dancer can perform a "lap dance." Defendants would contend that it is difficult to observe anyone in this area; however, State's witnesses would testify that it was possible at some angles to see from the outside what was occurring on the inside of this area.

At the hearing on Ashley's motion to dismiss, Ashley asserted two main arguments for dismissal of the public sexual indecency charge. First, Ashley cited the definition of sexual contact being "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs or buttocks or anus of a person or the breast of a female." Ark. Code Ann. § 5-14-101(6) (Repl. 1997). Ashley contended that the Legislature specifically said a sex organ and the breast of a female, thus implying buttocks or anus of a person or the breast of a female are not sex organs. Second, Ashley declared the beaded area of the club was private, therefore she did not violate Ark. Code Ann. § 5-14-111(c). Ashley argued that the Legislature, in referring to a public place, does not mean the exact location of the place as it is referring to the general public protection from the possibility of being exposed to the viewing or to the viewing of acts that they do not want to be exposed to. Here, the beaded area is set up as a private area within the club, therefore the general public is not exposed to the area, nor do substantial numbers of people have access to the area.

The trial court also heard arguments from the prosecutor asserting that the beaded area was not a private place. The prosecutor introduced the affidavit of an undercover police officer setting out probable cause for an arrest warrant on the charge of public sexual indecency for Ashley. The affidavit included "[t]he affiant observed the defendant perform what is called a 'private dance' with another patron of the establishment. The defendant took the patron to a room surrounded by tassels which were being suspended by the ceiling area. . . ." The State maintains that because the undercover officer could view the acts inside the beaded area, so could other members of the general public.

After the hearing, the trial court found the acts performed by Ashley occurred in a separate area or room within which only the participants were present. The view from the main club area into the separate area or room was substantially or totally obscured, therefore the sexual contact did not occur in a public place or public view. Therefore, the trial court dismissed the public sexual indecency charge against Ashley. It is from this dismissal order that the State seeks an appeal with this court. The State argues in its brief to this Court that "[t]he circuit court clearly misapplied the law in finding that the portion of the nightclub where the lap dances were being performed was not a 'public place'. . ."

However, it is clear under Arkansas law that the trial court acted within its discretion in making an evidentiary decision based on the motions, briefs in support of motions, stipulations, and oral arguments. This appeal by the State turns on the facts unique to this particular case, therefore it does not require interpretation of criminal rules with widespread ramifications. Accordingly, this Court does not accept this appeal by the State under Ark. R. App. P.—Crim. 3(c). The trial court's order to dismiss was within its discretion, therefore we do not accept this appeal because it does not involve the correct and uniform administration of the law, only the application of the law.

Appeal dismissed.

GLAZE, J., dissents.

TOM GLAZE, Justice. If this court is unable to review this State appeal under Ark. R. App. P.—Crim. 3(c), then we might as well remove the rule from our Rules of Appellate Criminal Procedure because no State appeal will qualify. Simply stated, Rule 3 provides that if the Attorney General is satisfied that error

has been committed to the State's prejudice and that the correct and uniform administration of the criminal law requires review, the Attorney General may appeal. Here, the Attorney General has satisfied himself that error in this case has occurred, and all he needs to show is that the uniform administration of the criminal law requires review. Both the State and the defendant Tiffany Ashley stipulated to the facts in this case, which leaves our court only to interpret the applicable law covering Arkansas's public sexual indecency statute, Ark. Code Ann. § 5-14-111(a)(3) (Repl. 1997).

Ms. Ashley is an exotic dancer who performs a striptease and other acts at the Centerfold Club, a private business in Hot Springs, Arkansas. Based on the stipulated facts, the circuit court found that Ashley had performed a "lap dance" for a patron of the establishment that satisfied the offense's requirement that an "act of sexual contact" had occurred. However, the circuit court held that the acts occurred in a separate area or room within which only the participants were present and the view was substantially or totally obscured. The trial court erroneously concluded the sexual contact did not occur in a public place or public view.

Section 5-14-111(a)(3), in pertinent part, defines public sexual decency when a person, in a public place or public view, engages in an act of sexual contact. Ark. Code Ann. § 5-14-101 (Repl. 1997) defines public place, public view, and sexual contact as follows:

> "Public place" means a publicly or privately owned place to which the public or substantial numbers of people have access;
>
> "Public view" means observable or likely to be observed by a person in a public place;
>
> "Sexual contact" means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, or buttocks, or anus of a person or the breast of a female.

In short, the trial court misinterpreted the foregoing statute in ruling Ashley's acts were not in public view or in a public place. The commentary to § 5-14-101 states in relevant part as follows: " 'Public place' is defined broadly to include any locality to which substantial numbers of people have access. . . ." Moreover, the commentary provides that " 'public view' includes all that can be seen by a person in a public place . . . and it is the location of the viewer, not the situs of the activity viewed, that determines the public character of the view."

Ashley stipulated she engaged in topless dancing at the Centerfold Club where patrons paid a cover charge to enter the common area. It was from this public place that patrons could view Ashley engage in "lap dancing" with a patron behind a beaded curtain. Ashley stipulated that State witnesses would testify that it was possible for people to see the "lap dancing" act through the curtain.

Apparently, this court chooses not to interpret Arkansas's public sexual indecency statutes. In doing so, this court tacitly allows such clubs, open to the public, to continue to operate contrary to law. This court should assume jurisdiction of this appeal and enunciate its clear interpretation of these laws.

For the above reasons stated, I would assume jurisdiction of this appeal and reverse the trial court.

Perry Burton HOLMES *v.* STATE of Arkansas

CR 01-1057 65 S.W.3d 860

Supreme Court of Arkansas
Opinion delivered February 7, 2002
[Petition for rehearing denied March 14, 2002.]

[redacted]

Frank E. Shaw, for appellant.

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

TOM GLAZE, Justice. Perry Holmes was charged with possession of methamphetamine, possession of drug paraphernalia, and possession of marijuana after police, responding to a call involving another individual, entered Holmes's house and found drugs and drug paraphernalia inside. After the trial court denied his motion to suppress the items seized from his home, Holmes entered a conditional plea of guilty to the three charges; he then appealed to the court of appeals, and that court reversed his conviction. The State filed a petition for review in this court, and we accepted jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(b)(3), as the appeal involves issues of federal constitutional interpretation. We likewise reverse Holmes's conviction.

On a petition for review, this court reviews the case as if the appeal had originally been filed in this court. *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999). On review of a trial court's denial of a motion to suppress, this court makes an independent examination based on the totality of the circumstances, and will reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Burris v. State*, 330 Ark. 66, 71, 954 S.W.2d 209 (1997). In making that decision, the court reviews the evidence in the light most favorable to the State. *Id.*

On April 23, 1999, the Faulkner County Sheriff's Department responded to a domestic violence call involving a man named David Ellis. Officer David Srite located Ellis at Holmes's house, and as Srite pulled into Holmes's driveway, Holmes and Ellis came outside. Because Srite had information that Ellis might be armed, he performed a pat-down search. Other officers arrived at the

scene, and Srite asked them to take Ellis and Holmes to the squad cars to interrogate them.

Srite then saw a woman, later identified as Rosa Beth Allen, standing in the doorway of the house and decided to question her about Ellis. Srite testified that, when he asked her if there was anywhere that they could talk, Allen opened the door and stepped back.[1] Interpreting Allen's gestures as an invitation to come into the house, Srite stepped inside, whereupon he immediately smelled the strong odor of recently burned marijuana. He asked Allen where the marijuana was, and she pulled out a tray containing marijuana and drug paraphernalia. Srite then asked to whom the marijuana belonged, and Allen replied, "Perry."

Srite then went outside to talk to Holmes, and Deputy Ursula Westmoreland entered the house to stay with Allen. Srite read Holmes his *Miranda* rights, and then asked Holmes to sign a consent-to-search form. After Holmes signed the consent, Srite took him inside, cleared off the couch to make sure it did not have any weapons hidden in it, and then searched the house. Srite and Westmoreland found roaches (the butts of marijuana cigarettes), seeds, and marijuana; after Holmes said there was methamphetamine in a refrigerator, the police retrieved that as well.

Holmes moved to suppress these items, but the trial court denied his motion, finding that Holmes freely consented to the search and that the police were justified in entering the residence and searching it out of concern for their own safety. On appeal, Holmes argues that the trial court erred in ruling that the officers' concern for their safety justified the warrantless entry into his home. He also asserts that Rosa Beth Allen did not consent to the officers' entry, and even if she had, she did not have the authority to do so.

We agree with Holmes's argument that the trial court erred in denying his motion to suppress on the basis of the officers' safety. Rules 3.1 and 3.4 of the Arkansas Rules of Criminal Procedure are relevant here. Ark. R. Crim. P. 3.1 (2001) covers the detention of persons and reads as follows:

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[1] On redirect examination, Srite further testified that "[e]veryone else was *outside* except her, and that was the problem. I was running out of space to do a one-on-one investigation." The context of Srite's testimony reflects he wanted to go inside the house to talk to Allen.

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

Rule 3.4, which governs a police officer's search for weapons, provides:

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

Under Rule 3.1, Officer Srite was entitled to stop and detain David Ellis, and because Srite had reason to believe that Ellis had a weapon, he was justified in searching Ellis's outer clothing. However, as the last sentence of Rule 3.4 states, "[i]n no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer." At the time of the search, Ellis was outside, and was promptly taken to a waiting squad car for further questioning. There was no evidence to show that entry into Holmes's house was necessary or required to protect the officers' safety. Thus, once Srite determined that Ellis either was or was not a danger to Srite's safety, the search should have been terminated. Rules 3.1 and 3.4 did not authorize Srite's entry into Holmes's house, and the trial court erred in ruling otherwise.

Holmes's second point on appeal is that the trial court erred in basing its denial of the motion to suppress on Allen's "consent" to Srite's search of the house. In response, the State contends that Srite did not go into the house to "search" for anything, but merely went in to question Allen about how long Ellis had been at that location. In resolving this issue, we first must

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[2] As already mentioned, the police were looking for David Ellis because they had received a report that he had violated a protective order and was possibly carrying a gun.

consider what constitutes a "search." Ark. R. Crim. P. 10.1 (2001) defines a search as follows: "[*A*]*ny intrusion other than an arrest, by an officer under color of authority, upon an individual's* person, *property*, or privacy, *for the purpose of* seizing individuals or things or *obtaining information by inspection or surveillance*, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state." (Emphasis added.) The commentary to Rule 10.1 notes that "[t]he key word in the definition is 'intrusion,' a term sufficiently broad to encompass any legally cognizable interference with an individual's right to privacy. . . . [T]he definition of 'search' is extended to cover any intrusions upon the privacy of an individual." Srite's entry into Holmes's house clearly amounted to a search, within the meaning of this rule.

We next consider whether or not the search was reasonable. On this subject, the United States Supreme Court wrote, in *Payton v. New York*, 445 U.S. 573 (1980), the following:

> [T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.
>
> * * *
>
> It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.
>
> * * *
>
> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." [Citation omitted.] In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton, 455 U.S. at 585-86, 589-90. Further, the Court has noted that, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27 (2001).

Consistent with the above principles, this court has likewise held repeatedly that warrantless searches in private homes are presumptively unreasonable. *See, e.g.*, *McFerrin v. State*, 344 Ark. 671, 42 S.W.3d 529 (2001); *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999); *Williams v. State*, 327 Ark. 213, 939 S.W.2d 264 (1997). The burden is on the State to prove that the warrantless activity was reasonable. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). However, the presumption of unreasonableness may be overcome if the law-enforcement officer obtained consent to conduct a warrantless search. *See* Ark. R. Crim. P. 11.1 (2001); *see also Hillard v. State*, 321 Ark. 39, 900 S.W.2d 167 (1995).

In the present case, the State argues that because Holmes consented to the search of his home in writing, the search was constitutionally permissible. We cannot agree with this assessment. Holmes did not sign the consent-to-search form until after the initial intrusion had taken place and marijuana had been found. In *Evans v. State*, 33 Ark. App. 184, 804 S.W.2d 730 (1991), the court of appeals correctly recited the "fruit of the poisonous tree" doctrine, which provides that evidence obtained by the exploitation of a primary illegality must be excluded. *See Wong Sun v. United States*, 371 U.S. 471 (1963). In applying this doctrine to the facts in the instant case, we must determine the propriety of Officer Srite's initial intrusion, since if that entry was illegal, Holmes's subsequent consent cannot validate Officer Srite's initial warrantless entry into the Holmes home.

In turning to the validity of Srite's initial warrantless entry permitted by Allen, the State argues that Allen's actions in opening the door to Srite constituted a valid "third-party consent" that rendered his intrusion into the home reasonable. Ark. R. Crim. P. 11.2 (2001) provides that "[t]he consent justifying a search and seizure can only be given, in the case of: . . . (c) [a] search of premises, by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent." The State contends that Srite could have reasonably relied on Allen's apparent authority to consent to his entry into Holmes's house.

We first address the question of whether or not Allen consented to the search. This court has held that consent to an

invasion of privacy must be proved by clear and positive testimony, and this burden is not met by showing only acquiescence to a claim of lawful authority. *See, e.g.*, *Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997); *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980). The concept of "implied consent" was examined in *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999), where this court looked to *United States v. Gonzales*, 71 F.3d 819 (11th Cir. 1996), and wrote as follows:

> The question of "implied consent" . . . was more closely examined recently in *U.S. v. Gonzalez*, *supra*. In *Gonzalez*, the officer approached an individual outside her home and asked if she would consent to a search of her home. Following a conversation with her daughter, she told the officer she wanted to go inside and get a drink of water. The officer then told her he "wanted to go in" with her, and when she did not bar him from going in, he followed her inside. The Eleventh Circuit held that there was no consent to enter:
>
> > We have previously noted our hesitancy to find implied consent (*i.e.* consent by silence) in the Fourth Amendment context, and we agree with our colleagues in the Ninth Circuit that *whatever relevance the implied consent doctrine may have in other contexts, it is inappropriate to 'sanction entry into the home based upon inferred consent.'*
>
> *Gonzalez* then quoted from *U.S. v. Shaibu*, 920 F.2d 1423 (9th Cir. 1990), to which it had referred above:
>
> > The government may not show consent to enter from the defendant's failure to object to the entry. To do so would be to justify entry by consent and consent by entry. "This will not do." *Johnson v. United States*, 333 U.S. at 17. *We must not shift the burden from the government — to show "unequivocal and specific" consent — to the defendant, who would have to prove unequivocal and specific objection to a police entry, or be found to have given implied consent.*
>
> *Gonzalez*, 71 F.3d at 830.

Norris, 338 Ark. at 409 (emphasis in original).[3]

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[3] Although the dissent emphasizes that Officer Srite's objective was only to interrogate Allen about the alleged domestic violence incident, it nevertheless *ignores the oft-repeated*

While we do examine the evidence in the light most favorable to the State when we review a trial court's denial of a motion to suppress, we are unable to conclude that the State met its burden of proving by clear and positive testimony that Allen "consented" to Srite's entry. When he testified at the suppression hearing, Srite conceded that Allen did not say "come on in," or otherwise verbally invite him to enter. Rather, she opened the door and stepped back; she may have nodded. As the court of appeals noted, Allen could have been inviting Srite in, or she could have been "reacting to the command of a law enforcement officer who . . . was accompanied by at least two other officers who had already taken away the person who resided in the house." To conclude that Allen's actions amounted to an invitation to Srite's entry would be to "sanction entry into the home based upon inferred consent," which we are loath to do. Also, Srite conceded that Allen "appeared to be under the influence," which added to the uncertainty and lack of clarity of what Allen intended by her actions. Based on the totality of the circumstances, we conclude that the trial court erred in denying Holmes's motion to suppress.

Because we believe the State failed to prove by clear and positive testimony that Allen consented to Srite's entry into the home, we need not consider whether or not Allen possessed apparent authority to give consent.[4] Because the warrantless entry into Holmes's house was unreasonable, we hold the trial court erred in denying Holmes's motion to suppress.

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rule that a warrantless entry into a private home is per se *unreasonable. Welsh v. Wisconsin*, 466 U.S. 740 (1984); *McFerrin v. State*, 344 Ark. 671, 42 S.W.3d 529 (2001); *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992). Further, the dissent appears to take no notice of our emphasis on what, under Rule 10.1, constitutes a "search." As discussed above, a search is defined as "any intrusion . . . *upon an individual's* person, *property*, or privacy, *for the purpose of* . . . *obtaining information*[.] . . . The definition of 'search' is extended to cover *any intrusion upon the privacy of an individual.*" (Emphasis added.) Clearly, Officer Srite's intrusion into Holmes's house, without clear evidence of Allen's consent, constituted an improper search.

[4] We do briefly address the State's contention that, once inside, Srite's detection of the odor of marijuana constituted reasonable cause to conduct a search. In support of this argument, the State cites *McDaniel v. State*, 337 Ark. 431, 990 S.W.2d 515 (1999). That case, however, dealt with a vehicular search, not a warrantless search of a private home. It is well established that warrantless searches of automobiles may be reasonable when, under the same circumstances, a search of a home, place of business or other structure would not be because of the mobility of the automobile and the diminished expectation of privacy in an automobile. *See, e.g., Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980); *Williams v. State*, 26 Ark. App. 62, 760 S.W.2d 71 (1988). Here, however, the initial warrantless entry into the home was unreasonable, and as such, the State's argument that the discovery of the marijuana was the result of a "logical progression of events," is without merit, as that theory depends on the initial stop being valid. *See Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935 (1982); *Adams v. State*, 26 Ark. App. 15, 758 S.W.2d 709 (1988).

Reversed and remanded.

CORBIN and BROWN, JJ. dissent.

ROBERT L. BROWN, Justice, dissenting. I am at a loss to know what Officer David Srite did wrong in this case. He was responding to a domestic violence call involving David Ellis. After patting Ellis down for weapons outside the house, he went to the front door and asked Rosa Beth Allen if he could talk to her about the matter. She opened the door, stepped back, and nodded. I view that as specific and unequivocal consent to *enter*. At this point, possession of illegal drugs by Perry Holmes was not even on Officer Srite's radar screen. Everyone agrees that as he entered the house, his sole interest was domestic violence. After entering, he smelled marijuana.

My first problem with the opinion is that the majority analyzes this case as a consent-to-search case. It clearly is not. A consent to enter the house to talk is all that was involved. Other jurisdictions have recognized this important distinction between a consent to enter and a consent to search when there is no showing that the police officers gained entry by subterfuge to investigate another crime. *See, e.g.*, *State v. Pamer*, 70 Ohio App.3d 540, 591 N.E.2d 801 (1990); *Bell v. State*, 676 S.W.2d 219 (Tex. Ct. App. 1984); *Davis v. United States*, 327 F.2d 301 (9th Cir. 1964). In *Pamer*, the facts are almost identical to this case. The sheriff's deputies were responding to a domestic disturbance and the appellant's daughters let them inside the house at 1:30 a.m. Once inside, the officers saw marijuana in plain view. In refusing to suppress the marijuana, the Ohio Court of Appeals underscored the fact that the only intent of the deputies in entering the house was to assure that the daughters were safe — not to search for marijuana.

In *Bell v. State*, *supra*, the police officers were at the house to serve a protective custody order. A police officer knocked and a voice said, "come in." The police officer entered and saw a woman injecting herself with a hypodermic needle. Next to where the woman was sitting was a plate of heroin. The Texas Court of Appeals refused to suppress the heroin and distinguished a consent to enter from a consent to search. The court specifically emphasized that there had been no showing that the police officers entered by fraud or deceit.

I distinguish these cases and the case before us from a situation where police officers have received a complaint of illegal activity

and go to a residence with investigation or a search in mind without a search warrant. *See, e.g., State v. Kennedy*, 107 Wash. App. 972, 29 P.3d 746 (2001) (police investigating narcotics complaint saw plastic baggie with methamphetamine after consent to enter; drugs suppressed); *State v. Buzzard*, 194 W.Va. 544, 461 S.E.2d 50 (1995) (police investigating breaking and entering went to motel room where consent to enter given; court suppressed shoes in plain view used in the crime on basis consent not voluntarily given). Those fact situations are not the case before us.

What should Officer Srite have done differently? Should he have said, "I want to talk to you about Ellis and domestic violence, but if you have any illegal activity going on inside, don't let me in." That seems a highly unreasonable test for this court to invoke. Should he have had Ms. Allen sign a waiver of all rights before entering to talk, much like a *Miranda* waiver, or advised her that she did not have to consent? That approach might have more validity if this were a "knock-and-talk" case where consent to search was the issue from the beginning. *See, e.g., State v. Ferrier*, 136 Wash. 2d 103, 960 P.2d 927 (1998). But it is not. Again, the police officer only wanted to talk to her about Ellis and domestic violence, not Holmes and drugs. A consent to search for drugs was not on Officer Srite's mind, when he was standing on the threshold of the house. I would not suppress the marijuana and drug paraphernalia under these facts.

For that reason, I respectfully dissent.

CORBIN, J., joins.

MISSISSIPPI RIVER TRANSMISSION CORPORATION *v.*
Richard A. WEISS, Director of the
Department of Finance and Administration
of the State of Arkansas

01-527 65 S.W.3d 867

Supreme Court of Arkansas
Opinion delivered February 7, 2002

Horne, Hollingsworth & Parker, A Professional Association, by: *Michael O. Parker*, for appellant.

Michael J. Wehrle, for appellee.

ROBERT L. BROWN, Justice. This is an illegal-exaction case. The appellant is Mississippi River Transmission Corporation (MRT). The appellee is Richard A. Weiss, in his official capacity as the Director of the Arkansas Department of Finance and Administration (DFA). Both parties moved for summary judgment, and summary judgment was entered in favor of DFA. MRT appeals the trial court's grant of summary judgment to DFA on the issue of whether certain natural gas is taxable under the Arkansas use tax. MRT essentially raises two points on appeal: (1) whether an amendment to the statutory come-to-rest requirement is best left to the General Assembly; and (2) whether the come-to-rest requirement was complied with in this case. We agree with MRT on both points and reverse the order of summary judgment in favor of DFA. We further direct the trial court to enter summary judgment in favor of MRT.

The facts of this case are stipulated to by the parties. MRT is a natural gas pipeline company incorporated in Delaware with its principal place of business in St. Louis, Missouri. MRT owns and operates roughly 2,000 miles of natural gas pipeline and has four pipelines that pass through Arkansas, comprising approximately 300 miles of pipeline. Almost all of the gas transported by MRT's lines originates outside of Arkansas.

At eight points along MRT's Arkansas pipelines, compressor stations provide the force necessary to move the natural gas through the pipelines. These compressor stations consist of combustion engines, called compressor units, with various piping to facilitate the movement of the natural gas in and around the compressor units. The compressor units are fueled by natural gas diverted from the pipeline into the units. This gas is in constant motion until it reaches the combustion chamber of the compressor unit, where it is immediately ignited and fuels the engine. The compressor gas residue is discharged into the air as exhaust. The compressor unit pressurizes the natural gas not used to fuel the units and then sends the pressurized gas back into the pipeline.

Prior to November 1, 1993, MRT owned almost all of the natural gas that ran through its pipeline. However, pursuant to Federal Energy Regulatory Commission regulations, after November 1, 1993, MRT was prohibited from transporting its own natural gas through its pipelines. Instead, it contracted with its customers to provide gas-shipment services though its pipelines. These customers, in turn, provided the compressor gas in kind, the cost of which was deducted from their shipping contracts.

When MRT owned the natural gas, DFA taxed the gas used in the compressor units as a gross receipts or sales tax. This sales tax was predicated on MRT's ownership of the natural gas. *See* Ark. Code Ann. § 26-52-103(a)(4)(B)(i) (Supp. 2001). This court upheld the levy of a comparable sales tax on compressor gas in *Pledger v. Arkla, Inc.*, 309 Ark. 10, 827 S.W.2d 126 (1992), and concluded that the tax was not a burden on interstate commerce. After MRT ceased owning the gas, DFA decided it could no longer tax the gas used in the compressor units as a sales tax. DFA then began taxing the owners of the gas used in the compressor units as a use tax. In 1996, this court held that a use tax could not be levied against the gas owners, because the right to use the gas arose outside of Arkansas, and, thus, any taxable use occurred outside of the state. *See Boral Gypsum, Inc. v. Leathers*, 325 Ark. 272, 924 S.W.2d 805 (1996).

After the *Boral Gypsum* decision, DFA decided it could no longer hold MRT's customers responsible for the use tax, because they were out-of-state owners. Instead, DFA opted to hold MRT responsible for the use tax on the compressor gas as the pipeline owner. DFA conducted a use tax audit of MRT from January 1, 1992, through December 31, 1994, and the audit resulted in an assessment of taxes against MRT for a variety of items. One item in the proposed assessment was a use tax on the compressor fuel for the fourteen-month period from November 1, 1993, to December 31, 1994. DFA's final assessment for the use tax owing on the compressor gas for this period was $111,744.70 with $28,185.23 as added interest.

On May 26, 1999, MRT filed its complaint and alleged that the imposed use tax was contrary to the statute, Ark. Code Ann. § 26-53-106(b) (Repl. 1997), because its compressor gas never came to rest in Arkansas within the meaning of the statute. Both parties then filed cross motions for summary judgment and entered into a stipulation of facts. The trial court held that the compressor gas was removed from commerce and sufficiently ended. The court, accordingly, entered summary judgment in favor of DFA.

MRT raises essentially the same issue under two of its points on appeal: is an amendment to the come-to-rest requirement under § 26-53-106(b) solely a matter for legislative action and not judicial interpretation?

The come-to-rest test grew out of a case handed down by the United States Supreme Court in 1929. *See Helson v. Kentucky*, 279 U.S. 245 (1929). In *Helson*, the Commonwealth of Kentucky sought to tax gasoline used to propel a ferryboat across the Ohio River between Kentucky and Illinois. The Court recited the basic principles of the interstate commerce clause as they relate to a state's power to tax or regulate interstate commerce:

> Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation or otherwise constitutes a regulation beyond the power of the state under the Constitution. It is likewise settled that transportation by ferry from one state to another is interstate commerce and immune from the interference of such state legislation. The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on. A state cannot lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on. While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce.

Helson, 279 U.S. at 248-49 (citations and quotations omitted). Without establishing a clear test, the Court went on to hold that Kentucky could not impose the tax on ferryboat gasoline, because the tax would discourage interstate transportation. Eight years later, the Court revisited the issue and developed the come-to-rest test. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). In the *Silas Mason Co.* case, Justice Cardozo wrote on behalf of the Court: "A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. . . . The tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them." *Silas Mason Co.*, 300 U.S. at 583.

Arkansas enacted its first use tax statute in 1949. *See* "The Arkansas Compensation Tax Act of 1949," 1949 Ark. Acts 487. At the time, the Act conformed to the prevailing jurisprudence handed down by the United States Supreme Court regarding use taxes and the limitations put on states by the interstate commerce clause of the United States Constitution. *See* U.S. Const. Art. I, § 8, cl. 3; *Henneford v. Silas Mason Co.*, *supra*; *Helson v. Kentucky*, *supra*. The Act required that any item of tangible personal property not subject to the Arkansas sales tax was subject to the Arkansas use tax, so long as "the transportation of such article has finally *come to rest* within this State or until such article has become *commingled* with the general mass of property of this State." Act 487, § 5(a), now codified as Ark. Code Ann. § 26-53-106(b) (Repl. 1997) (emphasis added).

The come-to-rest principle prevailed for constitutional purposes until 1977, when the United States Supreme Court visited the issue once more. *See Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977). The *Complete Auto Transit* Court quoted with approval the Mississippi Supreme Court's analysis of the tax at issue:

> It will be noted that Taxpayer has a large operation in this State. It is dependent upon the State for police protection and other State services the same as other citizens. It should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states. There is no possibility of any other state duplicating the tax involved in this case.

Complete Auto Transit, 430 U.S. at 277. The four factors set out by the Mississippi Supreme Court have become the prevailing constitutional test for whether a tax burdens interstate commerce: (1) whether the activity sought to be taxed has a substantial nexus to the taxing state; (2) whether the tax is fairly apportioned with taxes paid to other states (*e.g.*, whether there is a mechanism to avoid double taxation such as a setoff of taxes paid to other states); (3) whether the tax discriminates against interstate commerce (*e.g.*, whether the tax is born of economic protectionism, calculated to encourage buyers to buy only in-state goods or services); and (4) whether the tax is fairly related to services provided by the taxing state. *See D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988) (employing the four *Complete Auto Transit* factors). Since 1977, the Arkansas General Assembly has not amended the come-to-rest language in the use tax statute (§ 26-53-106(b)) to reflect the changes

in commerce clause jurisprudence announced in *Complete Auto Transit.*[1]

This court has applied the *Complete Auto Transit* factors to our sales tax statute when a sales tax was levied on compressor gas. *See Pledger v. Arkla, Inc., supra.* However, the sales tax statute at issue in *Pledger*, Ark. Code Ann. § 26-53-301(Repl. 1991), had no come-to-rest language as does the use tax statute. Thus, the fact that this court used the *Complete Auto Transit* test in *Pledger* has no application to the case at hand.

We decline to adopt the *Complete Auto Transit* factors and substitute them for the come-to-rest test, when our General Assembly has enacted the come-to-rest requirement and that test is still part of the statute. We observe in this regard that the *Complete Auto Transit* decision was decided by the Court in 1977, and the General Assembly has had twelve opportunities since that time to amend the use tax statute and substitute the less stringent substantial nexus test set out in *Complete Auto Transit.* It has not done so. For these reasons, we agree with MRT that we should apply the come-to-rest standard in the use tax statute just as we find it codified at § 26-53-106(b) and not amend it by judicial decision to substitute the *Complete Auto Transit* test.

We turn next to the issue of whether the compressor gas in question meets the come-to-rest test. MRT argues that its compressor gas does not stop within the meaning of § 26-53-106(b), before it is ignited and consumed at the compressor stations. As such, it claims that the gas cannot be taxed by DFA under the use tax provision of the Tax Code. DFA responds that the compressor gas does come to rest at the same time it ignites in the combustion chambers of the compressor units and is consumed. The trial court, in upholding the tax, agreed with DFA and cited the *Complete Auto Transit* factors. The court further recognized that our statute still imposes the come-to-rest test but concluded that when the compressor gas was consumed, it came to rest within the meaning of the statute. Thus, it was taxable.

This case presents an issue of statutory interpretation within the context of a grant of summary judgment. We have repeatedly held that summary judgment is to be granted by a trial court only

[1] In the 1999 Legislative Session, Senate Bill 445 was introduced which would have removed the come-to-rest language from the use tax statute. The bill was withdrawn by its sponsor.

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. *See, e.g., Worth v. City of Rogers,* 341 Ark. 12, 14 S.W.3d 471 (2000); *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). In this case, the facts are undisputed and were stipulated to by the parties. There were also cross motions for summary judgment. As such, the case was decided purely as a matter of statutory interpretation.

We review issues of statutory interpretation *de novo*, as it is for this court to decide what a statute means. *Fewell v. Pickens*, 346 Ark. 246, 57 S.W.3d 144 (2001); *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. *Harris v. City of Little Rock*, 344 Ark. 95, 40 S.W.3d 214 (2001); *Norman v. Norman,* 342 Ark. 493, 30 S.W.3d 83 (2000). 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. *Raley v. Wagner,* 346 Ark. 234, 57 S.W.3d 683 (2001); *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. *Stephens v. Arkansas Sch. for the Blind,* 341 Ark. 939, 20 S.W.3d 397 (2000); *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997). When 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. *Stephens v. Arkansas Sch. for the Blind, supra* (citing *State v. McLeod,* 318 Ark. 781, 888 S.W.2d 639 (1994)). 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); *Kildow v. Baldwin Piano & Organ,* 333 Ark. 335, 969 S.W.2d 190 (1998). An additional rule of statutory construction in the area of taxation cases is that when we are reviewing matters involving the levying of taxes, any and all doubts and ambiguities must be resolved in favor of the taxpayer. *Barclay v. First Paris Holding Corp.*, 344 Ark. 711, 42 S.W.3d 496 (2001); *Central and Southern Cos. v. Weiss,* 339 Ark. 76, 3 S.W.3d 294 (1999).

Although our court has never directly addressed the issue before us today, other jurisdictions have. The Tennessee Supreme

Court, in a pre-*Complete Auto Transit* case directly on point with this one, held that natural gas used to power compressor units does not come to rest for purposes of the use tax. *See Texas Gas Transmission Corp. v. Benson*, 223 Tenn. 279, 444 S.W.2d 137 (1969). In so holding, the court noted:

> The undisputed proof is the fuel gas does not come to rest after it leaves the mains and enters the compressor engines. It is in a continuous flow and never stops moving until consumed by the engines.
>
> Thus, the fuel gas does not come to rest in this State, nor does it become a part of the mass of property within this State. It furnishes energy to operate the compressors which maintain the constant flow of gas through this State in interstate commerce. It is, therefore, a necessary and integral part of the interstate operation.
>
> The fuel gas being one of the means by which the commerce is carried on, it is exempted from the use tax under the statute.

Texas Gas Transmission Corp., 223 Tenn. at 284, 444 S.W.2d at 138. The Tennessee Supreme Court interpreted the come-to-rest provision in the statute literally in holding that the natural gas did not cease movement, and, thus, was not subject to the use tax. The Michigan Court of Appeals followed *Texas Gas Transmission Corp.* and reached the same conclusion in *Michigan Wisconsin Pipe Line Co. v. State*, 58 Mich. App. 318, 227 N.W.2d 334 (1975). In that case, the Michigan Supreme Court, in denying the use tax, emphasized that the fact the compressor gas was in transit when consumed was uncontested.

While *Michigan Wisconsin Pipeline Co., supra*, and *Texas Gas Transmission Corp. v. Benson, supra*, were statutory interpretation cases, both opinions relied on the United States Supreme Court's interstate commerce clause jurisprudence. Both were written before the *Complete Auto Transit* decision, and both cited favorably the Supreme Court's reasoning in *Helson v. Kentucky, supra*, in holding that the natural gas should not be taxed as that would be taxing an instrumentality of interstate commerce.

An examination of the plain language of § 26-53-106(b) supports the same conclusion as that reached by the appellate courts in *Texas Gas Transmission Corp. v. Benson, supra*, and *Michigan Wisconsin Pipeline Co. v. State, supra*. Section 26-53-106(b) reads:

> (b) This tax will not apply with respect to the storage, use, distribution, or *consumption* of any article of tangible personal property purchased, produced, or manufactured outside this state until the transportation of the article has finally *come to rest* within this state or until the article has become commingled with the general mass of property of this state.

Ark. Code Ann. § 26-53-106(b) (Repl. 1997) (emphasis added). The emphasized portions of this statute clearly reveal that under its plain language, the General Assembly did not intend for consumption of a product to be the equivalent of its coming to rest. Rather, the statute contemplates that property must first come to rest *before* it is consumed in order for it to be taxable. Otherwise, the come-to-rest requirement would be meaningless. In this case, the parties have stipulated to the fact that the gas remains in continuous motion until it is ignited.

Only one court has held to the contrary. In *Columbia Gulf Transmission Co. v. Broussard*, 653 So. 2d 522 (La. 1995), the Louisiana Supreme Court stated:

> When the natural gas compressor fuel is consumed, it comes to rest and becomes a part of the state's property. Fuel must necessarily come to rest as it is consumed. It ceases to exist; it is terminated; it is used in Louisiana; it cannot be taxed in another state. Thus, the natural gas is subject to tax when it is consumed in the state under the language of the statute.

Columbia Gulf Transmission Co., 653 So. 2d at 523-24. The Louisiana Supreme Court was construing a use tax statute written exactly like the Arkansas use tax statute, and the facts of the Louisiana case are virtually indistinguishable from the case at hand. The Louisiana court, however, applied the *Complete Auto Transit* factors. We simply disagree with the interpretation of the Louisiana court and do so on the basis of the plain language of the Arkansas statute, which requires that the natural gas come to rest prior to consumption.

We hold that the compressor gas at issue in this case, which the parties agreed was in constant motion, did not come to rest before consumption, as the statute requires. Accordingly, the trial court erred in its statutory interpretation. We reverse the judgment of the trial court and remand the case with directions that the court enter judgment in favor of MRT.

Reversed and remanded.

ARKANSAS DEPARTMENT of HUMAN SERVICES
v. Rose HUFF

00-1357 65 S.W.3d 880

Supreme Court of Arkansas
Opinion delivered February 7, 2002

Dana McClain, for appellant.

Paul R. Post, for appellee.

ANNABELLE CLINTON IMBER, Justice. This case is on appeal from the August 16, 2000, order of the Chancery Court of Sebastian County, Fort Smith District, Juvenile Division, wherein the trial court returned seven children to their mother and closed the case. The questions before us are whether a Colorado home study was properly excluded from evidence by the trial court and whether the Interstate Compact on the Placement of Children (ICPC), Ark. Code Ann. §§ 9-29-201 *et seq.* (Repl. 1998), applies to court-ordered placement of children with an out-of-state parent. Based upon the trial court's authority under Ark. R. Evid. 403 to weigh the relevance of the evidence against the potential for prejudice and the plain language of the ICPC, we affirm the trial court.

Rose Huff requested assistance from the Arkansas Department of Human Services (ADHS) in July 1998. Ms. Huff had seven young children, the youngest of which had just been born prematurely and was still in the hospital. She was unemployed, homeless, and without transportation. Ms. Huff was walking around all day with six of the young children because they were not allowed to stay at the Salvation Army during the day. ADHS filed a petition for emergency custody of the children, requesting that the children be declared dependent-neglected. An *ex parte* order entered on July 31, 1998, placed the children in the custody of ADHS and appointed a guardian *ad-litem* for them.

On August 17, 1998, the trial court issued a probable cause order granting custody of the seven children to ADHS. Ms. Huff's oldest daughter had previously been sent to Colorado to live with some of Ms. Huff's family. After ADHS took custody of the other children and the trial court entered its adjudication order on September 21, 1998, finding the children dependent-neglected as defined in the Arkansas Juvenile Code, Ms. Huff moved to Colorado. The seven young children were subsequently placed in the homes of Ms. Huff's mother and aunt in Colorado through the ICPC. Due to a disruption, the children were returned to Arkansas less than three months later and placed in foster care. The case plan implemented called for reunification of the children with Ms. Huff. It required her to visit the children once per week by telephone and one weekend per month in person. ADHS provided air transportation for the monthly visits. Ms. Huff was ordered to maintain a stable income, maintain appropriate and stable housing, seek counseling, seek treatment for alcohol addiction, and visit with the children as ordered.

In September 1998, Ms. Huff found employment in Colorado, which she maintained through the August 2000 hearing. She also obtained housing. Ms. Huff attended nine of fifteen scheduled counseling appointments and then was dropped from the counseling program due to non-attendance. She also attended five of twelve drug and alcohol screenings before being dropped from the screening program due to missed appointments. Ultimately, she obtained reports reflecting that no further counseling was necessary. She completed a parenting class and visited her children each month. On July 22, 1999, after concluding that Ms. Huff had made progress in complying with the case plan, the trial court decided that the goal of reunification was still in the best interests of the children. On September 2, 1999, however, the court determined that continuation of custody with ADHS was necessary for the children's health and safety.

ADHS filed a petition for termination of parental rights on September 27, 1999, because the children had been out of the home for more than one year and reunification efforts had been unsuccessful. A termination of parental rights hearing was held on December 6, 1999. The trial court terminated the parental rights of the father, but denied ADHS's request to terminate the parental rights of Ms. Huff. In addition to existing requirements set by the court, Ms. Huff was ordered, as of May 8, 2000, to begin paying her own transportation expenses for her monthly visits with the children. At the December 6 hearing, ADHS proffered the results

of a home study conducted on Ms. Huff's home in Colorado pursuant to the ICPC. The study revealed that Colorado officials found the home to be inappropriate and would deny placement under the ICPC. The trial court refused to admit the home study into evidence based upon the fact that no witness was present to be cross-examined as to its findings.

Following a review hearing on August 8, 2000, the trial court concluded that Ms. Huff had complied with the case plan and prior orders of the court "by cooperating with the Department, maintaining stable employment and housing, [paying] for her own travel expenses to visit, [making] all visits, [having] phone contact with the children and [providing] two drug assessments at this hearing," and ordered that custody of the children be returned to her. Based upon its finding that the family required no further services, the trial court closed the case. ADHS now appeals from that order entered on August 16, 2000.

I. Jurisdiction

The appellant claims that the trial court erred by not admitting the Colorado home study into evidence. Ms. Huff argues that the issue of admissibility of the home study is not properly before this court. While the home study was proffered at the termination of parental rights hearing on December 6, 1999, Ms. Huff maintains that ADHS is barred from raising the issue on appeal because the study was not proffered at the August 8, 2000 hearing from which this appeal is taken.

Arkansas Rule of Appellate Procedure—Civil 2(c)(3) is determinative of which orders resulting from juvenile hearings are final appealable orders. Under that rule, orders resulting from termination of parental rights hearings (in juvenile cases where an out-of-home placement has been ordered) are final appealable orders. Ark. R. App. P.—Civ. 2(c)(3)(C). A notice of appeal must be filed within thirty days from entry of the judgment, decree, or order appealed from. Ark. R. App. P.—Civ. 4(a). Thus, Ms. Huff argues that ADHS should have appealed the court's ruling on the admissibility of the home study within thirty days following the trial court's entry of its order terminating parental rights and review order on December 13, 1999.

This court has held that, where an issue was not addressed below, we will not consider it for the first time on appeal.

See B.C. v. State, 344 Ark. 385, 40 S.W.3d 315 (2001). ADHS could have appealed the trial court's refusal to terminate parental rights under Ark. R. App. P.—Civ. 2(c)(3)(C), but it chose only to dispute the August 16 order returning custody of the children to Ms. Huff. While it is true that ADHS neither offered nor proffered the home study at the August 8 hearing, the issue of the home study was ruled on by the trial court at the August 8 hearing. ADHS attempted to introduce into evidence a "Court Report" which stated: "The Department recommends that all seven Huff children remain in foster care. The ICPC home study in Colorado on Rose Huff's home has been denied for the third time." Ms. Huff's counsel objected to the portion of the report referring to the home study, as the court had already decided at the December 6 hearing that the home study would not be admitted into evidence without the presence of someone who could be cross-examined as to its contents. The court then ordered that the portion of the report referring to the home study be stricken. In addition, at the conclusion the August 8 hearing, counsel for ADHS objected to placing the children in Colorado without an approved ICPC home study. The court replied: "I don't think it's required when the custody has been placed with the mother. We're not asking Colorado to provide a thing." The record shows that the admissibility of the home study was before the trial court at the August 8 hearing, and thus, the issue is properly before this court.

II. Admissibility of Home Study

ADHS asserts that the trial court abused its discretion in refusing to admit the Colorado home study into evidence as a business record under Ark. R. Evid. 803(6) or as a public record or report under Ark. R. Evid. 803(8). We review evidentiary errors under the abuse-of-discretion standard. *Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998). The trial court has broad discretion in its evidentiary rulings; hence, the trial court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. *Id.*

At the December 6 hearing, ADHS attempted to introduce the home study, and Ms. Huff's counsel objected based on the fact that the person who prepared the report was not going to be available to testify and be cross-examined. ADHS argued that the report was admissible under either Rule 803(6) or 803(8). The hearsay exceptions in Rule 803 include an exception for business records:

> (6) *Records of Regularly Conducted Business Activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses [sic], made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Ark. R. Evid. 803(6). This court has previously stated seven factors which must be present for the records to be admissible under Rule 803(6): (1) record or other compilation, (2) of acts or events, (3) made at or near the time the act occurred, (4) by a person with knowledge (or from information transmitted by such a person), (5) kept in the course of a regularly conducted business, (6) which has a regular practice of recording such information, (7) all as shown by the testimony of the custodian or other qualified witness. *Cates v. State*, 267 Ark. 726, 589 S.W.2d 598 (1979).

Rule 803 also includes an exception for public records and reports. Under Ark. R. Evid. 803(8), "records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, . . . or factual findings resulting from an investigation made pursuant to authority granted by law" are not excluded by the hearsay rule. However, the following are specifically excepted from the Rule and are considered to be hearsay: "(ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party . . . (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness." Ark. R. Evid. 803(8).

■■ We need not, however, address whether the Colorado home study is a business record or a public record or report. The fact that a piece of evidence falls within an exception to the rule against hearsay does not equate to automatic admissibility. *Lovell v. Beavers*, 336 Ark. 551, 987 S.W.2d 660 (1999). To prevent possible prejudice or confusion, a trial court must still have the authority to exclude a record under Ark. R. Evid. 403. *Id.* Rule 403 provides: "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. This court has held that the weighing under Rule 403 is left to the trial court's sound discretion and will not be reversed absent a showing of manifest abuse. *Lovell v. Beavers, supra.* We have quoted favorably from *McCormick on Evidence* § 293 (4th ed. 1992):

> [W]here there are indications of lack of trustworthiness, which may result from a lack of expert qualification or from lack of factual support, exclusion is warranted under [Rule 803]. Moreover, inclusion of opinions or diagnoses within [Rule 803] only removes the bar of hearsay. In the absence of availability of the expert for explanation and cross-examination, the court may conclude that probative value of this evidence is outweighed by the danger that the jury will be misled or confused. This is of particular concern if the opinion involves difficult matters of interpretation and a central dispute in the case, such as causation. Under these circumstances, a court operating under the Federal Rules, like earlier courts, is likely to be reluctant to permit a decision to be made upon the basis of an un-cross-examined opinion and may require that the witness be produced.

Lovell v. Beavers, 336 Ark. at 555, 987 S.W.2d at 662. Here, the trial court identified the problem with admissibility of the home study: "we don't have that person here to cross-examine and evaluate as to all of their motives and their thinking . . . you have to be able to weigh the credibility."

■ ■ Even prior to the enactment of the Arkansas Rules of Evidence, this court recognized the importance of cross-examination. In *Arkansas Game & Fish Comm'n v. Kizer*, 221 Ark. 347, 253 S.W.2d 215 (1952), this court held that landowners had a right to cross-examine the engineers who authored a survey regarding a lake at issue in the case. We said: "In a judicial investigation the right of cross-examination is absolute, and not a mere privilege of the one against whom a witness may be called. In a civil action a party has the right to cross-examine witnesses against him whether the evidence is given *ore tenus* or by deposition." *Id.* at 351, 253 S.W.2d at 218. Similarly, in *Trannum v. George*, 211 Ark. 665, 201 S.W.2d 1015 (1947), where a narrative report composed by a welfare worker was offered as evidence in a child custody case, this court stated: "Certainly the custody of a man's children ought not to be taken away from him on unsworn statements made out of court."

Id. at 671, 201 S.W.2d at 1018. *See also Roberts v. Roberts*, 216 Ark. 453, 226 S.W.2d 579 (1950).

The right of cross-examination is especially important in cases such as *Trannum v. George* where a fundamental liberty is at issue. The United States Supreme Court has commented on termination of parental rights:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753-54 (1982). In the case now before us, the central issue before the trial court was the potential termination of Ms. Huff's parental rights. A fundamental liberty interest was at issue, and the court concluded that introduction of the Colorado home study would be too prejudicial in the absence of someone who could be cross-examined as to its contents. The trial court did not abuse its discretion by refusing to admit the Colorado home study into evidence.

III. Application of ICPC

ADHS contends that the trial court violated the ICPC when it caused Ms. Huff's children to be sent to Colorado without Colorado's approval. The validity of this argument depends upon whether the ICPC applies in situations where a trial court is returning custody of children to an out-of-state natural parent. Appellate courts review chancery courts de novo on the record, but a decree is not reversed unless the chancellor's findings are clearly erroneous. *Terry v. Lock*, 343 Ark. 452, 37 S.W.3d 202 (2001).

At issue here, according to ADHS, is Article III of the ICPC, which describes the conditions for placement under the ICPC. Article III states, in relevant part:

> (a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.
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> * * * *
>
> (d) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

Ark. Code Ann. § 9-29-201(III) (Repl. 1998). As in *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991), the question before us is whether the ICPC applies when a court in one state directs that a child be taken from foster care and sent to a natural parent in another participating state.

ADHS incorrectly contends that this is an issue of first impression in Arkansas. This court addressed the applicability of the ICPC in *Nance v. Ark. Dep't Human Servs.*, 316 Ark. 43, 870 S.W.2d 721 (1994). In that case, a mother living in Arkansas appealed an order of the juvenile court placing custody of her daughter with her former husband in Texas. The question before this court was whether the juvenile court, having found a child to be dependent-neglected, had the authority to make an award of custody of the child as between two competing parents. *Id.* On appeal, Ms. Nance argued that the mandatory provisions of the ICPC were not complied with when custody was placed with her husband in another state. *Id.* This court held that subsection (a) of Article III of the compact "makes it clear that it is meant to deal with children who are sent from a sending state into a receiving state 'for placement in foster care or as a preliminary to a possible adoption.'" *Id.* at 52-A, 870 S.W.2d at 725.

Similarly, in *McComb v. Wambaugh, supra*, the United States Court of Appeals for the Third Circuit concluded that the ICPC does not apply when a court in one state directs that a child be taken from foster care and sent to a natural parent in another participating state. The *McComb* court focused on Article III(a) of the Compact, quoted above, and held that, by its plain language,

the scope of the Compact is limited to foster care or dispositions preliminary to an adoption.[1] *Id.* The federal appellate court noted the definition of "placement" in Article II(d):

> the arrangement for the care of a child in a family, free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility.

Id. at 480. *See* Ark. Code Ann. § 9-29-201(II)(d) (Repl. 1998). The court acknowledged that the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) adopted what is known as Regulation 3, stating that " 'placement' as defined in Article II(d) includes the arrangement for the care of a child in the home of his parent, other relative, or non-agency guardian in a receiving state when the sending agency is any entity other than a parent, relative, or non-agency guardian making the arrangement for care as a plan exempt under Article VIII(a) of the Compact." *McComb v. Wambaugh*, 934 F.2d at 481. A regulation contrary to the statute under which it was promulgated cannot be upheld . *See Yamaha Motor Corp., U.S.A. v. Richard's Honda Yamaha*, 344 Ark. 44, 38 S.W.3d 356 (2001). The *McComb* court concluded that the regulation expands the scope of the Compact beyond that set out in Article III.[2] *McComb v. Wambaugh, supra.* We agree.

Based upon this court's holding in *Nance v. Ark. Dep't Human Servs., supra,* and the federal appellate court's holding in *McComb v. Wambaugh, supra*, as well as the plain language of the statute, we hold that the Compact, read as a whole, was intended only to govern placing children in substitute arrangements for parental care, such as foster care or adoption.[3] As summarized by

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[1] The Court of Appeals for the Sixth District of California has likewise held that the ICPC is intended to apply only to interstate placements for foster care and those preliminary to a possible adoption, not to placements with a parent. *In re Johnny S.*, 47 Cal. Rptr. 2d 94 (1995).

[2] The *McComb* court also pointed out that "[t]o construe the return of a child to his or her parent as a 'placement' within the Compact would result in the anomalous situation of imposing a financial obligation upon a sending state that supersedes parents' duty to support their children." *McComb v. Wambaugh*, 934 F.2d at 480.

[3] While several courts have concluded that the ICPC applies to out-of-state placements with natural parents, we reject their interpretation of the ICPC and conclusion regarding its applicability. Such an interpretation is contrary to the plain language of the statute. *See, e.g., K.D.G.L.B.P. v. Hinds County Dep't of Human Servs.*, 771 So. 2d 907 (Miss. 2000); *Matter of Shaida W.*, 85 N.Y.2d 453, 649 N.E.2d 1179, 626 N.Y.S.2d 35 (1995); *In re Paula G.*, 672 A.2d 872 (R.I. 1996).

the *McComb* court: "the Compact does not apply when a child is returned by the sending state to a natural parent residing in another state. The language in Article III is unambiguous. . . ." *McComb v. Wambaugh*, 934 F.2d at 482. Accordingly, the trial court's finding that custody of the children should be returned to Ms. Huff without Colorado's approval was not clearly erroneous.

Affirmed.

Sedric Maurice SIMPSON *v.* STATE of Arkansas

01-141 65 S.W.3d 878

Supreme Court of Arkansas
Opinion delivered February 7, 2002

Lea Ellen Fowler, for appellant.

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

RAY THORNTON, Justice. Sedric Maurice Simpson was convicted and sentenced to death on two counts of capital murder, and we affirmed. *Simpson v. State*, 339 Ark. 467, 6 S.W.3d 104 (1999). Following the issuance of our mandate on January 4, 2000, the circuit court conducted a hearing as required by Ark. R. Crim. P. 37.5 (2001). At that hearing on January 24, 2000 the circuit court found Simpson indigent, and appointed counsel to represent Simpson in his postconviction proceedings. *See* Ark. R. Crim. P. 37.5(b)(2). Under the Provisions of Rule 37.5(e), it is provided that a "petition for relief under this rule shall be filed within ninety days after the entry of the order required in subsection (b)(2)." *Id.* Because the order under the provisions of subsection (b)(2) was entered on January 24, 2000, Simpson had ninety days from that date to file his petition for Rule 37 relief. His petition was timely filed on March 23, 2000, almost a month before the time for filing would expire. The state responded on April 27, 2000, and did not challenge the timeliness of Simpson's petition.

On October 27, 2000, an order dismissing Simpson's petition on the basis of Ark. R. Crim. P. 37.2(c) was entered by the circuit court. This order did not make any reference to the applicable time limit established by Rule 37.5(e) but erroneously relied upon a discrete section applicable generally to non-death cases as set out in Ark. R. Crim. P. 37.2(c), which provides in pertinent part:

> If an appeal was taken of the judgment of conviction, a petition claiming relief under this rule must be filed in the circuit court within sixty (60) days of the date the mandate was issued by the appellate court.

Id.

With reference to the question as to what rule is applicable, Ark. R. Crim. P. 37.5(a) states:

> *Purpose and scope.* This rule shall apply only to persons under a sentence of death. *Except as otherwise provided in this rule,* the provisions of Rules 37.1, 37.2, 37.3, and 37.4 shall apply to a petition for post-conviction relief by a person under sentence of death.

(Emphasis added.) Here, it is clear that the provision of Ark. R. Crim. P. 37.5(e), allowing ninety days after the appointment of counsel, is an exception to the sixty-day time limit imposed in non-death cases by 37.2(c). Appellant timely appealed the dismissal of his Rule 37 petition, and we agree that the circuit court erred in dismissing the petition under an inapplicable rule.

Accordingly, we reverse and remand with directions to reinstate the petition and conduct the hearing, make specific written findings of fact and conclusions of law, and to comply fully with the provisions of Ark. R. Crim. P. 37.5(h) and (i).

Reversed and remanded.

TYSON FOODS, INC. *v.* Don DAVIS

01-165 66 S.W.3d 568

Supreme Court of Arkansas
Opinion delivered February 7, 2002

Dover & Dixon, P.A., by: *Michael R. Johns*, *Thomas S. Stone*, and *Patrick E. Hollingsworth*, for appellant.

Lingle & Fulcher, PLLC, by: *H. Clay Fulcher* and *James G. Lingle*; *Lonnie Turner*; and *Mainard & McCain*, by: *James Mainard*, for appellee.

JIM HANNAH, Justice. Tyson Foods, Inc., appeals a judgment entered on a jury verdict in Franklin County Circuit Court finding Tyson liable to Don Davis for $891,660 in damages. The trial judge gave instructions to the jury on fraud, promissory estoppel, and negligence, and the matter was submitted to the jury on these issues on a general jury verdict form. Tyson alleges the fraud and promissory estoppel causes of action were precluded by the statute of limitations and should not have been submitted to the jury. Tyson also alleges that Don Davis knew or should have known of alleged misrepresentations by Tyson when he signed a contract that did not reflect what he alleges he was told. Tyson further argues that by signing the contract, Davis waived any claim of misrepresentations because the contract contained the full agreement between the parties. Tyson additionally asserts that Davis failed to present substantial evidence of justifiable reliance on the alleged misrepresentations of Tyson, that there was also a lack of substantial evidence of damages, that the jury was incorrectly instructed on damages, and finally that the amount of the verdict is not supported by substantial evidence. We disagree.

We hold Davis's claims were not precluded by the statute of limitations, that the issues submitted to the jury were supported by substantial evidence, that the directed verdict motions were properly denied, and that the case was properly submitted to the jury.

Facts

This case arises from a decision by Tyson to seek hog growers in Arkansas to raise hogs in a bedded-floor program.[1] Tyson argues that the bedded-floor program was never represented to be anything other than a stop-gap program that would only last a year or so until more traditional finishing units with concrete-slatted floors were built in Missouri to handle the feeder pigs coming off Tyson's sow operations in Oklahoma. Davis argues that Tyson was desperate for growers because of the delays with the completion of the Missouri

[1] A bedded-floor program is a process of raising hogs indoors on a dirt floor that is covered with sixteen to eighteen inches of "bedding" consisting of either wood shavings, wood shavings combined with straw, or rice hulls. The bedded-floor program could be implemented in empty poultry houses.

finishing units, that Tyson did not have enough capacity to handle their feeder pigs, and that Tyson represented to him the bedded-floor program was here for the long term just as the bedded-floor program is in Tyson's poultry business. He alleges that Tyson encouraged him to enter into the business, and that he was induced to assume substantial debt and invest substantial sums that Tyson knew he could never recoup in a year or two of operations. The equipment required by Tyson had a ten year expected life.

The facts put before the jury are as follows. Tom Johnson was Tyson's regional manager for the central region in 1994. He testified that Tyson decided to expand its hog operation in late 1990 or early 1991. They found the opportunities to expand in Oklahoma and Missouri to be the most attractive and commenced construction of sow units in Oklahoma and finishing units in Missouri. Johnson testified that the pigs are born at the sow units and raised to a weight of about forty pounds over a period of five-and-a-half to seven weeks. Then the feeder pigs are transferred to the finishing units where they reach a market weight of 240 to 280 pounds.

According to Johnson, problems arose in completing the finishing units in Missouri when another producer there got into pollution problems, and the State of Missouri stopped issuing permits to operate waste lagoon systems. Johnson testified that the finishing units in Missouri were built on slatted concrete floors with the waste flushed out into lagoons. The lack of environmental permits kept the finishing units from coming on line when expected and meant more feeder pigs were being produced in the Oklahoma sow units than Tyson had room for in Missouri. It appears that although the feeder pigs could have been sold, the market in finishing out the hogs was very attractive at that time. Tyson therefore set out to try and accommodate the feeder pigs elsewhere.

Johnson testified that a Tyson employee had been to Scotland and found they were finishing hogs out on bedded floors rather than the slatted concrete floors. Johnson characterized the bedded system as "pretty much" the way poultry is raised in the United States. The bedded system apparently did not require the environmental permits because in the bedded system animal waste mixes with the bedding and is periodically removed collectively as a solid waste and spread on fields. As such, no lagoon system of emulsified animal waste is involved.

Again, according to Johnson's testimony, Tyson began looking at the bedded-floor system and considered journal articles discussing it. Johnson and another Tyson employee named John Thomas then went to a Missouri farm to observe the operation of a bedded-floor operation there. The farmer in Missouri reported to them that the efficiency of the system was similar to the traditional method on slatted floors. Johnson reported this information to his superior at Tyson, Bill Moeller. In the beginning of 1994, Tyson placed its first batch of feeder pigs on a bedded-floor operation at a farm in Green Forest, Arkansas. This batch was finished successfully in May of that year. Johnson testified that they were "pleasantly surprised" at the results which were similar to that represented by the Missouri farmer, and that another batch was placed on the farm in Green Forest. At this point, according to Johnson, Tyson decided to go forward with a bedded-floor program as a "temporary stop-gap measure until we could get things built in Missouri." Tyson estimated it would be another year before the units in Missouri would be operating. It turned out to be longer.

Johnson then testified that in the summer of 1994 he traveled to the Arkansas Pork Producers meeting in Fayetteville with hog farmer Roger Hammond. On their return trip, they discussed the bedded-floor program. According to Johnson, he told Hammond it was a temporary program that would run until the concrete-floor facilities in Missouri were completed, and that Hammond expressed an interest in the program. It appears that as a consequence of this conversation, Hammond approached Davis. According to Davis's testimony, he was approached by Hammond about either letting Hammond use his empty turkey houses or going into partnership raising hogs for Tyson on bedded floors in Davis's turkey houses. Davis testified that Hammond told him the program for Tyson would only be short term, a year or two, and that he determined it was not financially feasible over such a short time. Davis testified that he nonetheless thought the bedded-floor method of finishing hogs might provide a use for his empty turkey houses. He thought there might be options other than raising hogs for Tyson. Davis went on to testify that he then called Tyson to see if he could look at one of their bedded units to understand how they were operated. According to Davis, when he called Tyson, he was connected with Johnson who then asked if he would be interested in raising hogs for Tyson. According to Johnson, Davis was the one that expressed an interest in raising hogs for Tyson.

In any event, according to both men, they later met on Davis's farm to discuss the possibility. From this point, the facts diverge

significantly. Johnson testified that when they met at Davis's farm, he viewed the facilities and wrote out the changes and listed the equipment that would be required if Davis wanted to raise hogs for Tyson. The equipment Tyson required had a ten-year life. Johnson further testified that he told Davis he had authority for a one-year contract and no more, that there might be batch-to-batch contracts for less than a year thereafter, but there was no promise of such because it depended on when the Missouri finishing units could handle the feeder pigs being produced. Johnson specifically denied ever telling Davis they would provide hogs for twenty years or for his life, or that the bedded-floor program was long term, but rather he testified that he told Davis the bedded-floor program was a temporary stop-gap program that would last until the units in Missouri could handle the hogs.

Reece Hudson, a Tyson employee, was also present at this first meeting at the Davis farm in 1994. He testified consistently with Johnson that Davis was told that the program was temporary until the Missouri finishing units could take the feeder pigs. He denied the representation asserted by Davis that Tyson was in the bedded-floor program for the long term.

Davis told quite a different story in his testimony. He testified that when Johnson arrived at his farm, the first thing he asked Johnson was whether the program was short term as Hammond reported to him. Davis testified that Johnson told him that was not the case. Davis then testified further that he made it clear to Johnson that he was not interested in raising hogs short term, that it would get him in financial trouble, and that he needed twenty years or better. Davis testified that when he said this, Johnson told him "we only give year-to-year contracts to everybody we deal with. All of our operations, it's a year-to-year contract, the same as chicken growers. All they get is a year-to-year contract." Davis testified that Johnson also said at this same time, "We don't plan on going out of business. We plan on being here." Davis then went on to further testify that Johnson told him Tyson had been in business for "a bunch of years," and that "we plan on staying in the business and don't plan on going out," and "well I don't see any reason it won't last twenty years or till death do us part."

J.D. Rice, a neighbor, who happened to be present because he was trying to sell a manure spreader to Davis, testified that he could not hear all of the conversation, but that he did hear a discussion about "the growin' of the hogs," and how long it would last, and that Johnson told Davis "he would be growing hogs all his life if he

wanted to." Rice believed the conversation he overheard was in 1994, but stated it might have been later in 1996. Davis's banker, Don Stimpson, from whom Davis obtained his funding, testified that he called Johnson to confirm what Davis had told him, and testified that Johnson told him, "Don Davis was going to be able to grow hogs as long as he wants." The bank had never financed a swine operation but had financed Tyson poultry growers operating on short-term contracts, and that one of the Tyson poultry growers had been growing poultry for Tyson for thirty-five years. The bank loaned the money to Davis. Davis purchased and installed the equipment as required by Tyson.

The initial contract provided to Davis was for one year as Johnson had told him it would be. Davis testified that this contract was what he was expecting. Tyson delivered a batch of feeder pigs to Davis, and Davis started raising the pigs successfully. He testified, however, that in the Spring of 1995, when Tyson brought some individuals by to observe the operation, he overheard the Tyson employee telling those observing that the bedded-floor program was only short term. Davis then testified that he called Johnson and confronted him with this, but that Johnson told him nothing had changed, and that he had only heard a rumor. Davis more specifically testified that Johnson told him he had heard nothing from the "big wigs" about anything like that. Davis testified further that he also told Johnson at this time that he had heard the rumor elsewhere, but that Johnson again assured him the program was not about to end. Johnson in his testimony denied making such representations.

Davis further testified that he continued to receive inquiries from Johnson about whether he knew of any other facilities in which hogs might be placed in the bedded-floor program. He then testified that in the summer of 1995, Johnson came to his farm after Davis began to consider purchasing more land to raise more hogs. Davis asserts that he expressed concern about a continued supply of hogs and that Johnson told him at that time, "I'm going to have hogs . . . hogs is no problem. You'll get plenty of hogs. You'll have hogs." Davis testified that based upon this representation, he purchased another farm and received a one-year contract on the new farm in October 1995, which was the same as he had received on the original farm. Davis's brother-in-law William Admeyer was visiting and present when Davis had this conversation with Johnson. Admeyer testified that he overheard Johnson tell Davis the relationship was long term, "and he could purchase additional space for hogs." Admeyer did not recall discussion of a one-year contract.

Time passed, and Johnson was promoted. He was replaced by Jack Gorely in 1996 as regional manager and about this same time Hudson was also assigned as liaison to Davis's farm. Hudson testified that in late 1996, Davis asked him again and again about receiving hogs in the future, stating that he was promised pigs forever by Johnson. Hudson testified that he told Davis he understood it was for a "certain length of time" under his contract. Davis testified about this conversation very differently, that Hudson rather told him that he and Bill Moeller of Tyson had been out looking at the bedded-floor operations and that "they were doing good and that they was gonna be around for years to come." Tyson did continue to provide hogs to Davis on batch-to-batch contracts. It appears this occurred because there was more difficulty than anticipated in getting the Missouri finishing units operational.

The Davis operation was not without its problems. In late 1996, a visit to Davis's operation by Environmental Specialities at the request of Tyson resulted in a report stating, "This farm was in as bad of a condition of any I have ever visited." The testimony showed that as a consequence of wet weather and inadequate ventilation, the hogs had nowhere to get out of the wet, and that many were literally swimming in waste. This report was received by Tyson in early 1997. Tyson then required Davis to install a system to evaporate the moisture and get the farm back into an acceptable condition. Davis installed the system. Davis testified that the ventilation system cost him $60,000 to $70,000 and he lost $60,000 to $70,000 because he was unable to grow hogs while he was installing the ventilation system. Davis testified Gorely told him Tyson was requiring all growers like him to install such a system. There had been significant problems with disease. Davis continued to have problems that he claimed was a result of the ventilation system being improperly designed. Tyson claimed the problems resulted not from an improperly designed ventilation system, but rather from the improper installation and operation of the ventilation system.

Davis then testified that in December of 1998 he was told there would be no more hogs. He was just finishing a batch at that time. Davis asserted that it was at this point that he recognized that Tyson had been misrepresenting the bedded-floor program, and that there would be no more hogs. Johnson testified that Tyson went out of the bedded-floor program at this time because it was not cost competitive. He denied it was because there was no longer a need for housing.

Davis asserted he had been led to believe Tyson intended to be in the bedded-floor hog program for the indefinite future as they had been in the poultry business. He testified that he understood he could anticipate receiving more hogs as long as he did a good job. He filed suit on February 24, 1999, slightly over two years after he asserts Hudson last assured him Tyson intended to remain in the bedded-floor program for the long term. This was within months of when he asserts he was told by Tyson that they would no longer provide him with hogs, and when he first learned that Tyson had misrepresented to him that the bedded-floor operation was a long-term program. These are the facts that were placed before the jury. The jury was instructed on negligence, fraud, and promissory estoppel. The jury received a general verdict form and returned it finding for Don Davis for damages in the amount of $891,660.

Contracts

Tyson attempts to analyze this case as a contract case, alleging that because the contracts did not reflect the obligation to provide hogs to Davis long term, its directed-verdict motion should have been granted. Davis's argument, however, is not that there was a contractual obligation to provide him personally with hogs long term, but rather that he was induced to enter into bedded-floor hog production for Tyson because of misrepresentations by Tyson of its market for such production.

The contracts and their contents cast no light on the issue of the representations made by Tyson because Davis was expecting precisely the short-term contracts he received. Tyson argues that Davis is asserting modification of the short-term contracts when he argues he was promised hogs long term. This is a red herring. Davis argues that he was misled and enticed to enter into significant debt and investment to Tyson's benefit based upon the representations they were going to be in the bedded-floor hog business long term. Such a manner of contracting by short-term contracts was the custom in Tyson's poultry business. The validity of this conclusion was born out by the testimony of Don Stimpson, Davis's banker. Davis alleged fraud or deceit was based on the representation that Tyson was in the bedded-floor program long term. The issue is a fraud cause of action, not a contract cause of action.

The allegation and instructions to the jury were on fraud and promissory estoppel, not contract. Davis alleges that Tyson represented to him that they were entering the bedded-floor production

of hogs in the same way they were in the poultry business and that the pigs would be on a year-to-year or a batch contract. Davis alleges that he was told Tyson would be needing growers raising hogs on bedded floors long term just as they needed growers in the poultry business. He further alleges that Tyson induced him to enter into the business and incur significant debt which Tyson knew was to his financial destruction, but which inured to Tyson's benefit in having a place to put its feeder hogs in the short term until their finishing units in Missouri came on line. Davis further alleges that based upon Tyson's representation of the market with Tyson, he purchased land, and expanded his operation when Tyson knew the bedded-floor program was short term and would be terminated as soon as the finishing units in Missouri were completed. The evidence on these issues was in substantial conflict as submitted to the jury, and the jury found for Davis.

This is a misrepresentation, fraud, or promissory estoppel cause of action, not a contract cause of action.

General Jury Verdict

Davis's complaint alleged negligence, fraud, and promissory estoppel. The jury was instructed on all three theories. However, the case was submitted to the jury on a general verdict form, which was returned by the jury, and states, "We the jury find for Don Davis on his claim for damages and award damages against Tyson Foods, Inc. in the amount of $891,660." Where the jury's verdict is rendered on a general verdict form, it is an indivisible entity or, in other words, a finding upon the whole case. *J. E. Merit Construction Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001); *Pearson v. Hendrickson*, 336 Ark. 12, 983 S.W.2d 419 (1999); *The Home Co. v. Lammers*, 221 Ark. 311, 254 S.W.2d 65 (1952).

We note that the negligence cause of action goes only to the ventilation system and that the award exceeds the amount both parties agree constitutes the damages allegations as to the ventilation system. Therefore, Tyson argues that if Tyson were to prevail on the statute of limitations argument on fraud or promissory estoppel, the award could not be sustained. However, this court has no means to determine how damages were assessed, whether based on negligence, fraud, promissory estoppel, or some combination thereof. Where a general jury verdict is used, this court will not speculate on what the jury found. *Primm v. U.S. Fidelity Guaranty Ins. Corp.*, 324 Ark. 409, 922 S.W.2d 319 (1996). To prevail in arguing that the

award is too great to be sustained on the negligence cause of action, Tyson must show that the statute of limitations ran as to both fraud and promissory estoppel.

This is the problem presented by a general verdict form in this case. When special interrogatories concerning liability or damages are not requested, we are left in the position of not knowing the basis for the jury's verdict, and we will not question nor theorize about the jury's findings. *Esry v. Carden*, 328 Ark. 153, 942 S.W.2d 846 (1997); *Jefferson Hosp. Assn. v. Garrett,* 304 Ark. 679, 804 S.W.2d 711 (1991).

Fraud

Fundamental to an understanding of this case is recognizing the distinctions between what each party asserts as the role the contracts play in this case. Tyson argues that Davis is asserting an oral modification to the one-year written contracts. Tyson asserts that this alleged modification is an agreement to provide Davis with feeder hogs for life. Based upon this theory, Tyson argues that at the latest in October 1995, Davis knew there was no such obligation because the one-year contract on the new farm executed at that time contained no such obligation. In essence, Tyson argues that the contract controlled the relationship between them and shows there was no such agreement to provide hogs for life. It is true that as a general proposition of the common law, in the absence of fraud, accident or mistake, a written contract merges, and thereby extinguishes, all prior and contemporaneous negotiations, understandings and verbal agreements on the same subject. *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 33 S.W.3d 128 (2000). That could mean that all understandings arising prior to the October 1995 contracts were merged within that document. However, this argument presupposes that this is simply a contractual dispute, which it is not.

Davis counters that the written contracts provided were precisely what Tyson represented they would provide, and what he expected, because Johnson represented to him that the bedded-hog program would be handled like the poultry programs where the contracts would be one year or less but where Tyson was in the business and provided poultry for the long term. The evidence showed some poultry growers had been raising poultry for Tyson for thirty years under such short-term contracts.

Davis asserts fraud or deceit in that Tyson misrepresented that they were going to be in the bedded-floor hog program indefinitely as they had been in the poultry business and in encouraging him to enter into the business and incur substantial debt and financial investment that the program could not sustain. Davis does not argue the promise of hogs for life was a contractual obligation. He testified he recognized he would not receive hogs if he was not successfully raising them, and thus acknowledged he did not believe he had an enforceable lifetime contractual right to hogs that he might enforce in court. Davis rather alleges he was induced to incur debt and set up his farm to raise hogs on a bedded-floor business, all to Tyson's benefit, because they lied to him to get him to start the business even though they knew the bedded-floor program would never last long enough to allow Davis to clear his debt.

It might be argued that Davis could have raised hogs for others. The evidence put before the jury showed this bedded-floor program was experimental, and Davis testified that other producers who utilized the bedded-floor program were not available. He also testified that he would have had to go to the lagoon system to receive hogs from other producers and that would require substantial alteration to the facilities and environmental permits. Thus, Davis asserted fraud or deceit, and the jury was so instructed.

The tort of fraud or deceit consists of five elements that the plaintiff must prove by a preponderance of the evidence: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Ultracuts Ltd., supra*; *Medlock v. Burden*, 321 Ark. 269, 273, 900 S.W.2d 552 (1995).

Thus, an element of fraud is damages. Davis suffered no injury from the alleged deceit until he was told by Tyson in 1998 that he would receive no more hogs. He was also then told for the first time by Tyson that contrary to what Tyson had been saying, Tyson was going out of the bedded-floor business. Damages are an essential element of fraud, and there must be an allegation of sufficient facts to satisfy those elements or the case is subject to a motion to dismiss. *McAdams v. Ellington*, 333 Ark. 362, 970 S.W.2d 203 (1998). False or fraudulent representations not resulting in injury are not actionable. *Harris v. Byers*, 210 Ark. 695, 698, 197 S.W.2d 730 (1946) (citing *Bankers Utilities Co. v. Cotton Belt Savings & Trust*

Co., 152 Ark. 135, 237 S.W. 707 (1922)). This has long been so. "[I]n equity as well as at law fraud and injury must concur to furnish ground for judicial action; a mere fraudulent intent unaccompanied by any injurious act is not the subject of judicial cognizance; and strong grounds for suspicion are not sufficient, for fraud ought not to be conceived, but it ought to be proved and expressly found." *Irons v. Reyburn*, 11 Ark. 385, 389 (1850).

In short, had Davis brought his action for fraud prior to Tyson denying him hogs and announcing they were going out of the bedded-floor hog business in 1998, he would have suffered a dismissal under Ark. R. Civ. P. 12. He had no contract action because he received the contract Tyson represented they would provide and the contract he was expecting, a short-term contract. The facts of this case are unusual. In this case, the facts are in the reverse order that facts under fraud are often seen. Typically, a party in a fraud action is injured and is unaware of who harmed him. In that case, where there is concealment, the concealed fraud suspends the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of reasonable diligence. *Seeco, Inc. v. Hales,* 341 Ark. 673, 22 S.W.3d 157 (2000); *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 68 (1999). In all due respect to the dissent, concealment is simply not an issue in this case, and contrary to the dissent's assertion that Davis had a duty to file an action complaining of fraud within three years of signing the contract in October, 1995, Davis could not have filed a complaint for fraud until 1998 when he was told by Tyson there would be no more hogs without suffering a dismissal under Ark. R. Civ. P. 12.

Davis argued that Tyson made a false representation of a material fact through Johnson that the bedded-floor hog program was a long-term program, and that Tyson would be needing hog growers like Davis for the indefinite future. He also argued that Johnson knew this representation was false because Tyson intended to send all its feeder hogs to its units in Missouri as soon as they came on line. Davis further asserted this representation was made to induce him to enter into substantial debt and engage in the business of raising hogs on bedded floors at a time Tyson desperately needed growers short term even though Johnson knew Davis could never make his investment back in the time hogs would be available. Davis finally argued that his reliance on the representations of a Tyson's regional manager was justifiable reliance and that he suffered damage as a consequence of the misrepresentation.

As discussed in the facts above, evidence of these elements was put on by Davis. The jury was then instructed on the five elements of fraud and asked to determine whether the five elements were met. The jury was also instructed on promissory estoppel. The jury found for Davis on a general verdict. The verdict in this case was a decision on the whole case or, in other words, indivisible. *J. E. Merit Construction Inc., supra.* We are left without recourse to determine whether the jury found liability on fraud, promissory estoppel, negligence, or on all of the theories. We will not question nor theorize about the jury's findings. *Esry, supra.* This court in *State v. Cherry*, 341 Ark. 924, 20 S.W.3d 354 (2000) cited *Watkins v. Taylor Seed Farms, Inc.*, 295 Ark. 291, 748 S.W.2d 143 (1988) for the proposition that the sanctity of jury deliberations is a fundamental precept of our adversary system, and cited *Borden v. St. Louis Southwestern Ry. Co.*, 287 Ark. 316, 698 S.W.2d 795 (1985) for the proposition that this court has shown a reluctance to invade the sanctity of the jury room in order to impeach a jury's verdict. We also note the testimony in this case was not consistent. We have long held that we do not pass upon the weight and the credibility of the evidence, as such determinations remain within the province of the jury. *Fayetteville Diagnostic Clinic v. Turner*, 344 Ark. 490, 42 S.W.3d 420 (2001).

The issues, including fraud, were put before the jury, and the jury found for Davis. That verdict may not be reached. The jury apparently believed the evidence put on by Davis rather than that put on by Tyson.

Statute of Limitations

Tyson asserts that the claims based on fraud and promissory estoppel were barred by the statute of limitations and that the trial court was in error in denying their motion for a directed verdict. The applicable statute of limitations on fraud and deceit is three years. *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994); Ark. Code Ann. § 16-56-105 (1987). Tyson argued that the last date on which Davis might reasonably argue he knew he had been lied to was in October 1995 when he signed a one-year contract on the new farm. By this act, Tyson argues, Davis had to know there was a problem because the contract did not reflect a long-term obligation to provide hogs. As already noted, however, Davis testified he expected short-term contracts. Davis argues he did not know of the fraud until Tyson declined to provide more hogs in 1998. He also argues that he last confirmed with Tyson

through Hudson in late 1996 that the bedded-floor program was there for the long term. The jury was asked to decide whether Davis could justifiably rely on these representations and apparently found he could. The complaint was filed February 24, 1999. These events all occurred within three years of the filing of this lawsuit. There is no merit to the statute of limitations claim.

Waiver

Tyson argues that Davis waived any claim for fraud or implied contract by signing and performing under new contracts after Davis admitted he knew there was no long-term contractual obligation to provide him with hogs. Professor Farnsworth has defined waiver as a term of art in the law of contracts as follows:

> The meaning of waiver has provoked much discussion. Although it has often been said that a waiver is "the intentional relinquishment of a known right," this is a misleading definition. What is involved is not the relinquishment of a right and the termination of the reciprocal duty but the excuse of the nonoccurrence of or a delay in the occurrence of a condition of a duty.

E. Allan Farnsworth, *Farnsworth on Contracts* § 8.5 at 540-541 (3rd ed. 1999) (footnotes omitted).

As discussed above, Davis has not asserted a contractual obligation to provide him with hogs long term. Davis testified he received the contracts Tyson represented would be provided, and that because the bedded-floor program was being run as the poultry business was run, he did not expect a long-term contract. Thus, there is no waiver under contract. Nor is there waiver by this conduct otherwise. Davis's execution and performance under the short-term contracts does not show he had knowledge of the misrepresentation or, in other words, that he knew Tyson intended to cut off the bedded-floor program once the Missouri finishing units were ready. There is no merit to the claim of waiver.

Reasonable Reliance/Substantial Evidence

Tyson argues that the trial court erred in denying its motion of a directed verdict on a lack of substantial evidence and particularly on a lack of evidence of reasonable reliance. Justifiable reliance is an element of fraud. Our standard of review of the denial

of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence. Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Eythl Corporation v. Johnson*, 345 Ark. 476, 49 S.W.3d 644 (2001).

The witnesses in this case contradicted each other on what was said and what representations were made. There was testimony by at least three witnesses that Johnson made the representations Davis asserts. At the time, Johnson was a regional manager for Tyson. Thereafter, he received a promotion. He thus held a position of significant authority with Tyson throughout the relevant years. Additionally, Davis testified that Tyson employee Hudson made substantial representations to him affirming Tyson's intent to remain in the bedded-floor business long term. Hudson denied making such representations. There were the disputed contracts that were in evidence as well as numerous other documents. Johnson and other Tyson employees testified at length refuting the claims of Davis.

However, although conflicting, there was substantial testimony and other evidence in this case that was sufficient to compel a conclusion one way or the other. This case was properly submitted to the jury to decide the issues including whether there was justifiable reliance. A strong argument is made that the collective rumors and information Davis knew of indicating the program was short term ought to have put him on notice and were sufficient to find he did not justifiably rely on the representations of regional manager Johnson. However, as noted, there is substantial evidence that was submitted to the jury. To decide this case on the issue of notice under these facts would require us to weigh the credibility of the witnesses, which we will not do. *Fayetteville Diagnostic Clinic, supra.*

Damages

Tyson brought a motion for a directed verdict arguing the evidence submitted on damages was fatally flawed in that a lost-profits analysis was improper, and that instead the measure of damages should have been under a reliance analysis, in other words, what Davis bought minus what he received. Tyson also asserts the jury was incorrectly instructed on damages.

The expert testimony by both sides was on loss of profits, but which also included losses associated with equipment, land purchase, and sale. In *Interstate Freeway Serv., Inc. v. Houser*, 310 Ark.

302, 308, 835 S.W.2d 872 (1992), this court stated as to damages in fraud:

> Two measures of general damages are generally applied in actions for fraud in recognition of the underlying elements of both tort and contract in those actions. The first measure is the benefit of the bargain measure, in which the injured party is entitled to the difference between the value of the property, business, or chattel as represented and its actual value at the time of the purchase. In essence, the injured party would receive his expectation. The second measure is the out-of-pocket measure, in which the injured party is to be made whole by being restored to the position he was in prior to the injury; this measure provides for the difference between the purchase price and the actual value of the goods received. H. Brill, *Arkansas Law of Damages*, 35-37 (1990).

The damages asserted by Davis were based upon the alleged false representations that Tyson would be in the bedded-floor hog business long term and that Tyson encouraged Davis to enter into the business to Tyson's advantage and then to expand the business in 1995 when Tyson knew it would not provide hogs long enough to support such an investment. Relying on these representations, Davis alleges he acquired the debt and made the expenditures necessary to meet Tyson's requirements to raise hogs on a bedded floor anticipating he would raise hogs indefinitely. Johnson testified the equipment Tyson required had a ten-year life span. It appears Davis's expert based his calculations on ten years. Tyson's expert based his calculations on four years based on Davis's retirement age. The total figure of damages proposed by the two experts were radically different, with Tyson alleging damages of about $100,000 if liability were found and Davis's expert alleging damages of about $1.1 million dollars.

The standard of review is whether there is substantial evidence. *Eythl Corporation, supra.* Although the expert testimony varies greatly, both sides were analyzing loss of profits as well as losses due to purchase and sale of real property and equipment. Both parties appeared to argue what they believed the total economic loss was. There was sufficient evidence. The evidence was presented to the jury, and the general verdict casts no light on what decision the jury reached other than liability and an amount of damages. No further analysis may be undertaken. Special interrogatories concerning damages were not requested. We are left in the position of not knowing the basis for the jury's verdict, and we will not question nor theorize about the jury's findings. *Esry, supra.*

We finally note Tyson complains of refusal of a jury instruction. In the course of discussing jury instructions, Tyson proposed a special jury instruction that defined lost profit and provided instruction on how it was to be calculated. The trial court found the existing instruction sufficient. The abstracted record shows Tyson made no objection. The failure to object to the jury instruction given constitutes a waiver. *Delta School of Commerce, Inc. v. Wood*, 298 Ark. 195, 766 S.W.2d 424 (1989). We also note that when instructions are requested which do not conform to AMI, they should be given only when the trial judge finds the AMI instructions do not contain an essential instruction or do not accurately state the law applicable to the case. *Precision Steel Warehouse v. Anderson-Martin*, 313 Ark. 258, 854 S.W.2d 321 (1993); *Newman v. Crawford Constr. Co.*, 303 Ark. 641, 799 S.W.2d 531 (1990). The model AMI instructions are to be used as a rule and non-AMI instructions should only be used "when an AMI instruction cannot be modified." *Parker v. Holder*, 315 Ark. 307, 311, 867 S.W.2d 436 (1993). Here the issue of modification of the AMI instruction was not raised. Rather, Tyson simply provided a special instruction that was rejected. There is no merit to the alleged error.

Affirmed.

IMBER, J., not participating.

GLAZE and THORNTON, JJ., dissent.

RAY THORNTON, Justice, dissenting. Today's decision by the majority court allows recovery for the breach of an oral promise allegedly made in 1994, more than five years before this litigation was filed and nearly four years after Davis signed a written contract for a one-year agreement that specifically stated, "This contract supersedes prior agreements between the parties hereto whether oral or written."

Davis admits that he had knowledge that the October 19, 1995 contract did not provide for a long-term commitment, which he contended had been fraudulently promised by Tyson. However, he chose to disregard the express language of the October, 1995 agreement and to rely on the oral agreement that he believed he had made with Tyson's employee, Tom Johnson. He testified:

> Yes that's the contract I signed on October 19, 1995. Yes this is another three grow-out one year contract. Yes I'll agree there's no language in here that says Tyson is obligated to place anymore pigs

> with me after the end of the three grow-outs that's talked about in here. . . . I saw it, the contract that I signed before I borrowed the money. Yes I saw it and signed it. I knew I had a three batch deal when I signed the contract that's what our agreement says when I signed the note. That's [what] the contract said, but the verbal agreement, too, I had with Tom Johnson was the one I went by.

The majority reasons that the recovery was correctly allowed because the matter is not governed by principles of contract law, but because the jury found that an act of fraud occurred in a fraudulent representation by Johnson that a series of one-year contracts would continue for twenty years "or until death do us part." Based upon this allegedly false promise made in 1994, Davis borrowed a substantial sum of money from the bank and modified his turkey houses to raise pigs. After completing these modifications, he entered into an initial one-year contract that he did not read, and commenced pig operations. During this contract year, Davis was told by Tyson that the arrangement was short-term.

However, the majority reasons that our three-year statute of limitations for allegations of fraud and promissory estoppel did not commence running when a Tyson employee specifically advised Davis that there was no long-term agreement. This encounter with Tyson caused Davis to believe that Tom Johnson "had lied" about the long-term nature of the promise of a lifetime supply of hogs. Davis testified that in May, 1995, he was given notice that the promise of a long-term commitment was false. He testified:

> Yes I overheard one of the Tyson guys say that the dry bed farms were going to be a short term deal. . . . I couldn't believe what I was hearing so I confronted this guy and said I was told it was a long term deal. That's what he was referring to he looked me in the eye and said well it's a short term deal just until we get something else going somewhere else. The next thing I did was call Tom Johnson. I called Tom Johnson cause I thought Tom had lied to me and I wanted to confront him. That's right Tom Johnson said nothing has changed . . . [.]

Not only was Davis told in May, 1995 that there was no long-term deal, he read and signed a written contract on October 19, 1995 expressing clearly that there was no long-term commitment. As previously stated, this contract was for three grow-out periods, aggregating approximately one year. The written contract specifically stated that it superseded prior agreements between the parties

"whether oral or written." Davis stated that he read and understood this contract, but relied on his verbal agreement with Johnson.

Until this case, the law in Arkansas has been clear. The statute of limitations for an action based on fraud is three years. Ark. Code Ann. § 16-56-105 (1987); *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994). The limitation period begins to run, in the absence of concealment of the wrong, when the wrong occurs, not when it is discovered. *Hampton, supra.* Accordingly, the running of the statute of limitations commenced when Johnson made the oral promise that Davis could have hogs as long as he lived, but was tolled during the time Davis had not discovered that it was false.

The running of the statute of limitations was suspended only until Davis discovered fraud or "should have discovered it by the exercise of reasonable diligence." *Talbot v. Jansen*, 294 Ark. 537, 744 S.W.2d 723 (1998). A concealed fraud suspends the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of reasonable diligence. *SEECO v. Hales*, 341 Ark. 972, 22 S.W.3d 157 (2000). No mere ignorance on the part of the plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996). There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed or perpetrated in such a way that it conceals itself. *Id.* If the plaintiff, by reasonable diligence, might have detected the fraud he is presumed to have had reasonable knowledge of it. *Id.*; *Smothers v. Clouette*, 326 Ark. 1017, 934 S.W.2d 923 (1996).

In the circumstances of this case, it is clear that Tyson did not conceal from Davis that the arrangement was short-term, but in fact specifically advised him that it was short-term, and then prepared and executed with Davis a short-term agreement. It is difficult to imagine a more open and complete disclosure that the arrangement was short-term in nature and that any representation that there was a long-term commitment was false. Upon his learning that the representation of long-term commitments was false, the statute of limitations commenced running, and Davis had the duty to file an action complaining of fraud within three years of his discovery of the misrepresentation. In fact, the evidence indicates that Davis considered filing such a complaint in 1996. Davis had suffered damages by borrowing money from the bank and in improving his

turkey houses to accept pigs in reliance upon a false long-term commitment. There was no evidence of any further act so furtively planned and secretly executed as to keep Davis's cause of action concealed. *See Chalmers, supra.*

Davis's own testimony shows that he knew or should have known at the time of his signature on the October 19th contract that the promise of a long-term agreement was false. Davis admits to understanding that the October, 1995 agreement did not contain the long-term commitment he claimed he had been promised. Upon his discovery that Johnson's promise was false, he knew of the fraud, and the limitations statute commenced running at or before October 19, 1995. The statute barred the filing of a complaint after more than three additional years had lapsed.

Once alerted to the false representation of the long-term agreement, and thereafter signing a one-year agreement extinguishing all oral agreements, it cannot be disputed that Davis had full knowledge that any cause of action that he had for fraud could have been filed at any time. In my view, the three-year statute of limitations for fraud and promissory estoppel commenced running when Tyson's employee advised Davis that there was no long-term commitment. Davis formally acknowledged this repudiation of any long-term commitment when he signed the written contract for one year in October of 1995, and testified that it did not contain his alleged long-term agreement. Nearly four years elapsed after he signed this contract, and before he filed this action. Clearly the statute of limitation had run.

However, the majority contends that an element of fraud, the injurious act, did not occur until 1998. I disagree. The majority is correct in stating that the tort of fraud consists of five elements that the plaintiff must prove by a preponderance of the evidence: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Golden Tee, Inc. v. Venture Golf Schools, Inc.*, 333 Ark. 253, 969 S.W.2d 625 (1998).

Here, Davis presented evidence that Tom Johnson's statement that Davis could have hogs "until death do us part" was false, satisfying the first element. Certainly, the second prong that there was insufficient evidence upon which to make such a representation

was shown. The third element, an intent to induce action in reliance upon the representations, was demonstrated when Davis's contracted with Tyson for the production of hogs, thereby satisfying the fourth element of justifiable reliance on Johnson's representations.

The fifth element requires a showing that Davis suffered damages as a result of his reliance upon Tyson's representation. It is clear that Davis suffered injury when he borrowed money from the bank to modify and improve his turkey houses so they could be used to grow hogs. As stated in the majority opinion, Davis contends that he was misled and enticed to enter into significant debt and investment to Tyson's benefit based upon Tyson's false representations. The five elements necessary to constitute an act of fraud were present when he borrowed money and invested in equipment needed to grow hogs. The act of fraud was complete at that point in time.

Subsequently, Davis was specifically told in May of 1995 that there were no long-term commitments by Tyson. Recognizing that he had been injured, Davis considered filing an action for fraud at that time. Reece Hudson testified, "Yes at that point some time after Mr. Johnson left[,] Mr. Davis threatened to sue. I don't know what — No this was in the latter part of 1996 this is not something that Mr. Davis just dreamed up for this lawsuit filed in '99." Contrary to the majority's observation in *obiter dictum*, I believe that such an action would not have been dismissed.

The majority next suggests that the statute was further tolled because of a colloquy in 1996. I believe that the statute had commenced running not later than October 19, 1995, and the majority cites no authority for the proposition that after the discovery of a fraud starting the running of the statute in October 1995, the running of the statute could be further tolled by an oral repetition of the promise that Davis had already discovered to be false.

Neither was any argument advanced by Davis that a new fraud was committed. According to Davis's testimony, there was a renewed assurance in 1996 that Tyson was going to stay in the hog business, using bedded floors, for a long time. Davis testified as follows:

> Q. Okay. What did Reece Hudson [Tyson employee] tell you that Moeller said about bedded floors in 1996?

> A. Well one day we were just having a conversation and he said he had spent all day with Bill Moeller riding around looking at hog houses and bedded floors and that Bill said that they were doing good and that they was gonna be around for years to come.
>
> Q. How did that make you feel?
>
> A. Made me feel pretty good.

It is worth noting that Davis was not privy to this alleged conversation between two Tyson employees. Reece Hudson, the Tyson employee quoted by Davis, testified to the contrary. He stated:

> I guess when I started going out there at the end of the batches, not before then but when I started going out there at the end of the batches, yeah, Mr. Davis and me had talked about his contract. . . . *I would go out there and he would always say, "Well he had a promise, pigs forever," and I would always [say,] "Well, Mr. Davis, I never heard that, I always heard a certain length of time on your contract"*; and he'd say, "Well, I wasn't there" and I'd say, "OK" and he would say specifically that Tom was the one. Tom Johnson.
>
> * * *
>
> *Yes I did use those words [that the program was temporary] with Mr. Davis. I would say, you know, this is a temporary deal. (R. 1340) Yes. I kept notes.* I didn't record everything that was said and I didn't record maybe every time I went out there; but I did keep notes.

(Emphasis added.)

The majority gives great weight to Tyson's general statement that they were going to remain in a bedded-floor hog business for a long time. The majority then concludes that the statute did not start running until 1998 when Tyson did not sign a new contract and stopped shipping hogs. In my view, the majority is simply wrong in failing to recognize that our three-year statute of limitations had run, and that Tyson's motion to dismiss as to the elements of fraud and promissory estoppel should have been granted.

I am authorized to state that Justice GLAZE joins in this dissent.

Undra Monta SINGLETON *v.* STATE of Arkansas

CR 02-057 65 S.W.3d 888

Supreme Court of Arkansas
Opinion delivered February 7, 2002

Don G. Gillaspie, for appellant.

No response.

PER CURIAM. Appellant, Undra Monta Singleton, by and through his attorney, has filed a motion for a rule on the clerk. His attorney, Don G. Gillaspie, states 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*).

Therefore, the motion is granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

ARKANSAS DEPARTMENT of HUMAN SERVICES
v. T.B., *et al.*

01-654 67 S.W.3d 539

Supreme Court of Arkansas
Opinion delivered February 14, 2002

Dana McClain, for appellant.

Stephen D. Ralph, for appellees.

W.H. "DUB" ARNOLD, Chief Justice. Appellant Arkansas Department of Human Services ("DHS") appeals the order of the Faulkner County Circuit Court ordering it to pay $48,000 to the Brown Schools, located in Tulsa, Oklahoma, for treatment of a juvenile sex offender. On appeal, DHS raises several

arguments in support of its contention that it is not responsible for paying the Brown Schools. We hold that appellant's argument is without merit and affirm the order of the trial court.

T.B., a minor, was initially brought before the juvenile court as a delinquent facing a charge of terroristic threatening stemming from an incident at Greenbrier Middle School. Upon the recommendation of DHS, the matter was changed from one of delinquency to one of family in need of services ("FINS"). Regular review hearings were held, and both T.B. and his parents underwent court-ordered counseling for an extended period of time.

On March 10, 2000, it was discovered that T.B. had sexually assaulted his three-year-old brother. At a hearing held on March 27, 2000, the juvenile court ordered that an Adolescent Sexual Adjustment Program ("ASAP") evaluation be performed on T.B. and that DHS try to find a suitable long-term placement facility for T.B. The ASAP evaluation was conducted by Jayne Barkus of Community Service, Inc. Based upon her evaluation of T.B., Barkus recommended that he be placed in a long-term residential behavioral modification program that offers specific treatment for sex offenders. She specifically noted that T.B. expressed a fear of hurting his brother in the future if he did not get help.

At the next review hearing held on May 1, 2000, Laura Strope, a DHS employee, testified that she was contacting facilities in an attempt to place T.B. but had been unsuccessful thus far. At the conclusion of the hearing, the trial court decided to take a seventy-two-hour hold of T.B. and ordered DHS to find suitable placement for him immediately.

A hearing was then held on May 4, 2000, and at that time various DHS employees again testified that there were no in-state residential treatment facilities willing to accept T.B. According to Strope and Andi McNeil, a FINS officer, either the facilities were already full, did not treat sex offenders, or did not accept patients of T.B.'s age. It was revealed during this hearing that if DHS kept T.B. in its physical custody without having a placement for him, he would have been forced to sleep on a cot in the local DHS office, with no access to a shower or food. The State then notified the court that T.B.'s parents were willing to take him home until the following Monday, so that DHS could continue to search for a placement. Strope further alerted the court that she had discussed the plans to keep T.B. separated from his younger brother with his parents and agreed that it was the best option.

The court continued the matter until May 8, 2000, when numerous officials who had denied placement to T.B. were subpoenaed to testify as to why placement was denied. Rebecca Dixon, a care manager with Arkansas Behavioral Care ("ABC"), testified that ABC had a contract with DHS to locate and facilitate placements for children referred to them by DHS. According to Dixon, ABC would pay to place a child in an out-of-state facility, but could not authorize such placement without approval from the Department of Children and Family Services ("DCFS"), a division within DHS. Specifically, Dixon stated that DCFS employee Evelyn Block had to approve any out-of-state placement. Dixon stated that she had been working with T.B.'s case manager to place him in a residential treatment facility, but had yet to find one that would accept him. Dixon then testified that she notified Strope to consider an out-of-state placement.

Sandra Carter, a DCFS employee in Faulkner County, testified that when a situation arises where a child cannot be placed in an in-state facility, the protocol is to call the Child Case Review Committee to seek approval to place the child in an out-of-state facility. It was Carter's understanding, as well as Strope's, that the Committee required written denials from all in-state facilities before considering out-of-state placement.

During a recess in this hearing, the parties met privately and discussed available options for T.B. When the hearing resumed, Teri Swicegood, the local attorney for DHS, notified the court that she believed a solution had been reached, and asked the court to allow Ms. McFarland, attorney for ABC, to address the court. Thereupon, McFarland recommended that T.B. be returned to the custody of his parents for the purpose of removing any impediments to out-of-state placement. According to McFarland, ABC would then be required to place T.B. in a facility within twenty-four hours. Swicegood then requested that the court remove T.B. from DHS's custody and return custody to his parents. The court agreed and ordered the parents to place him in a residential treatment facility within twenty-four hours. T.B. was subsequently placed in the Brown Schools.

T.B. initially made little to no progress at the Brown Schools. Reports from his therapist indicated that he refused to participate in group therapy, provoked the other children, and showed no remorse. After some time, however, T.B. began to exhibit slow signs of progress. About the time T.B. began to improve, officials at the Brown Schools were notified that Medicaid would no longer

cover the cost of T.B.'s treatment. An appeal of that decision was also summarily denied. A letter written on "Arkansas Department of Human Services, Medical Services Division" letterhead and dated November 22, 2000, stated that further coverage was being denied because T.B. did not meet certain Medicaid criteria. According to this letter, T.B. was not making any improvement and, thus, his treatment was not "medically necessary." Although this letter was on DHS letterhead, it was signed by Shirley Wilson, an employee of First Mental Health. First Mental Health, a Tennessee corporation, was the contractor hired by DHS to review their Medicaid claims after its previous contractor, ABC, went out of business.

The court was notified that Medicaid was no longer covering the cost of T.B.'s treatment during a review hearing held on September 18, 2000. Jennifer Wunstel, a supervisor with DCFS, testified that she had been in contact with the Brown Schools, and was aware that they were going to appeal the decision to First Mental Health. The DHS case plan filed with the court recommended that T.B. continue with his current treatment at the Brown Schools. After all parties, including counsel for DHS, agreed that it was in T.B.'s best interest to remain at Brown Schools and continue his treatment, the court ordered that T.B. remain at the Brown Schools.

During the next review hearing held on January 16, 2001, Wunstel indicated that DHS was attempting to work with First Mental Health to obtain recertification for T.B., but had yet been unsuccessful. The court was notified that an attempt to subpoena Wilson had failed, because she simply refused to travel from Tennessee to Arkansas to appear in court. In an effort to determine who was going to be responsible for paying the $48,000 debt owed to the Brown Schools, the attorneys and the court began discussing the nature of First Mental Health as a contractor for DHS. The issue of whether T.B.'s decertification was tied to the closing of the FINS case also arose. Discussions also centered on the possibility that decertification was somehow linked to the change in DHS's contractors. The following colloquy is illustrative:

> THE COURT: Well, and — and what is the Court's jurisdiction as to ordering the State of Arkansas to pay this bill?
>
> MS. SWICEGOOD: Well —
>
> THE COURT: Even if it has to go through the Claims Commission?

MS. SWICEGOOD: Well, Your Honor, the — of course, that would probably be something that would be — your could order it but we'd probably have to appeal it because it has to be a funding thing. And I'm not even sure — since I haven't seen the initial contract and I don't know who's responsible, I don't know that we have exhausted everything —

THE COURT: All the administrative remedies?

MS. SWICEGOOD: Yeah.

MS. SCROGGINS: Your Honor, if the Court ordered the Department of Human Services to pay the bill and that order hit the Department, I would think the Department would say, "First Mental Health, you need to do this because we're not."

. . . .

THE COURT: Well, what I'm — I'm just looking — trying to look at the big picture as to how to actually get to the goal that we all want which is for this child to continue to receive the treatment that he needs and is responding to, finally.

MS. SCROGGINS: Your Honor, if the Court could order the Department to pay the bill or, in the alternative, get the Department to get First Mental Health to approve the treatment, because, that way, it would put the Department administrative personnel — and I don't think this — I'm not directing it locally at the people here because I think they've probably done everything that they could do in that regard, but I think that would get the higher-ups at the Department of Human Services on the band wagon to get somebody looking into why this has been denied. And, if they're not going to pay it and First Mental Health is not going to pay it, have the order require the Department to get those people here.

A written order requiring DHS to pay the $48,000 was filed on January 30, 2001. A motion to reconsider was subsequently filed on February 9, 2001, wherein DHS raised several allegations of error with regard to the juvenile court's order; the court denied the motion for reconsideration.

On appeal, appellant DHS asserts that the trial court erred when it ordered DHS to pay the Brown Schools $48,000 for treatment of a child that DHS had neither custody nor control over, and where out-of-state placement was made in violation of Ark.

Code Ann. § 20-46-106 (Supp. 2001), Emotionally disturbed youth treated out of state, and Ark. Code Ann. § 9-27-332(10)(b) (Supp. 1999). Specifically, appellant contends that the trial court erred in the following ways:

1) The trial court cannot order specific placement of a child when ordering family services;

2) The DHS is not a party to the contract formed between T.B.'s parents and the Brown Schools, and, as such, cannot be held liable as an innocent third party for payment;

3) The trial court violated State sovereign immunity when it ordered DHS to pay the Brown Schools $48,000 or make the "responsible party" pay;

4) The trial court's order violated the doctrine of separation of powers.

We disagree that the trial court erred in any of these regards and affirm.

I. Specific Placement

Under Ark. Code Ann. § 9-27-332(1)(A) (Supp. 1999), the juvenile court may order family services for a family that it finds to be a "family in need of services" (FINS). Family services are defined as "relevant services, including, but not limited to: child care; homemaker services; crisis counseling; cash assistance; transportation; family therapy; physical, psychiatric, or psychological evaluation; counseling; or treatment, provided to a juvenile or his family." Ark. Code Ann. § 9-27-303(23)(A) (Supp. 1999). The trial court has the power to order family services. However, what the trial court may *not* do is order or specify a *particular provider* for placement or family services. Ark. Code Ann. § 9-27-332(10)(b).

Appellant mistakenly contends that the trial court in this case ordered appellee juvenile to a specific facility, that being the Brown Schools, when, in fact, the trial court simply ordered him to "a residential treatment facility" and ordered that ABC would locate a placement. No in-state facilities were available, and after custody was returned to T.B.'s parents in order to find an out-of-state facility, and his parents placed him in the Brown Schools upon ABC's recommendation, the trial court simply ordered that he

remain there after subsequent status hearings. As pointed out in the facts, stated above, DHS even recommended that T.B. remain at the Brown Schools in its report to the court, dated January 16, 2001, *after* Medicaid benefits had been denied.

We hold that the court did not order placement in a specifically-named facility but rather ordered T.B. to "a residential treatment facility"; as such, the court committed no error in this regard.

II. Contract between Juvenile's Parents and Brown Schools

DHS maintains that it is not a party to the contract formed between T.B.'s parents and the Brown Schools, and as such cannot be held liable as an innocent third party for payment. We find no merit in appellant's argument. First, DHS is obligated by statute to provide services to T.B.; included in those "services" is treatment in a residential facility if the court determines treatment is necessary, which the court *did* in this case. DHS attempts to argue here that it had nothing to do with the decision to place T.B. at the Tulsa facility. Not only is such an assertion misleading, but it also ignores DHS's obligation to provide services for children of this state. DHS participated actively in this case from the beginning. Even after custody was returned to the parents, DHS maintained a protective services case. Strope, the case worker, continued to file reports with the court, and the court continued to hold regularly scheduled review hearings. In fact, the case plans filed by Strope with the court continuously recommended that T.B. remain at the Brown Schools until he successfully completed the treatment program. This was true even after DHS had notice that Medicaid was no longer covering the cost of T.B.'s treatment. In sum, just because DHS did not have custody of T.B., does not mean that they were likewise not obligated to provide necessary services. T.B.'s family may have had the "contract" with the Brown Schools, but it was only because custody had to be in their name, rather than DHS's, in order for the out-of-state facility to be considered. If an Arkansas facility would have been available, T.B. would have received treatment in-state, and DHS would have paid for the services.

Clearly, because a protective services case was open on T.B., DHS was obligated to provide the services ordered by the trial court. Initially, the trial court ordered DHS to find a residential treatment facility for T.B.. When there were no in-state facilities

available, DHS agreed to placing T.B. in an out-of-state facility. DHS specifically asked the juvenile court to consider such an option and then requested that the juvenile court return custody to the parents in order to facilitate the out-of-state placement. The fact that DHS did not have custody of T.B. is irrelevant in determining whether DHS is responsible for paying the cost of the child's treatment.

III. Sovereign Immunity

DHS contends that the trial court violated State sovereign immunity when it ordered DHS to pay the Brown Schools $48,000 or make the "responsible party" pay. Article 5, § 20, of the Arkansas Constitution provides that "[t]he State of Arkansas shall never be made a defendant in any of her courts." Suits against the State are expressly forbidden by this provision. DHS is a State agency, and it maintains that when the trial court ordered it to pay the Brown Schools bill, it made DHS a defendant and, thus, violated the Sovereign Immunity clause of the Arkansas Constitution. We disagree.

This Court has addressed this issue before, and we have recognized an exception to the doctrine of sovereign immunity where an act of the legislature has created a specific waiver of immunity. *See Arkansas Dep't of Human Services v. R.P.*, 333 Ark 516, 970 S.W.2d 225 (1998); *Arkansas Office of Child Support Enforcement v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997); *State v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996). The Juvenile Code expressly empowers the court to order cash assistance in FINS cases. When a family is found to be in need of services, the court may order "family services." Ark. Code Ann. § 9-27-332 (Supp. 1999). The following are included within the definition of "family services":

> (A) "Family services" means relevant services, including, but not limited to:
>
> (i) Child care;
>
> (ii) Homemaker services;
>
> (iii) Crisis counseling;
>
> (iv) *Cash assistance*;

(v) Transportation;

(vi) Family therapy;

(vii) Physical, psychiatric, or psychological evaluation;

(viii) Counseling; or

(ix) *Treatment, provided to a juvenile or his family.*

(B) Family services are provided in order to:

(i) Prevent a juvenile from being removed from a parent, guardian, or custodian;

(ii) Reunite the juvenile with the parent, guardian, or custodian from whom the juvenile has been removed; or

(iii) Implement a permanent plan of adoption, guardianship, or rehabilitation of the juvenile.

Ark. Code Ann. § 9-27-303(23) (emphasis added). A FINS petition may be initiated by any adult. Ark. Code Ann. § 9-27-310(b)(3)(A) (Supp. 1999). Before a juvenile may be removed from a parent, the court is required to order family services appropriate to prevent removal. Ark. Code Ann. § 9-27-328(a) (Supp. 1999).

■ We concluded in *R.P., supra*, that given that the trial court is empowered to order family services in FINS cases to prevent a juvenile from being removed from a parent, which by definition includes cash assistance, the General Assembly has specifically waived sovereign immunity as to DHS in such instances. Any other interpretation would effectively eviscerate the court's power to order family services in FINS cases. This is especially true considering that a FINS case may be initiated by "any adult," where DHS will not be the initial moving party. Such a consequence could not have been intended by the General Assembly in enacting the Juvenile Code.

■ ■ DHS maintains that it is not its policy to provide financial assistance for out-of-state treatment; however, with regard to the contention that the trial court's order does not comport with its policy, this Court has previously held that the juvenile court's orders do not have to comply with DHS policy. *See Arkansas Dep't of Human Servs. v. Clark*, 304 Ark. 403, 802 S.W.2d 461 (1991). In

short, this Court has conclusively held that the legislature has "waived" immunity by empowering the court to provide family services; therefore we affirm on the issue of sovereign immunity.

IV. Separation-of-Powers Doctrine

DHS contends that by requiring it to pay a debt to the Brown Schools, the trial court has in effect adjudged DHS to be a party to a contract with the Brown Schools. Appellant maintains that this violates the separation-of-powers doctrine. DHS argues that by ordering the parents to place T.B. at the Brown Schools, without following the guidelines set forth under Ark. Code Ann. § 20-46-106 "Emotionally disturbed youth treated out of state," the juvenile court in effect chose a particular provider (the Brown Schools) and usurped the authority given to DHS by the General Assembly. This argument is without merit.

First, as addressed above in subsection I., the court did not order T.B.'s parents to place him at the Brown Schools. The court simply ordered that he be placed in a residential treatment facility. Moreover, in regard to § 20-46-106 and appellant's contention that the court failed to follow the guidelines set out therein, appellant concedes in its reply brief that it is DHS's responsibility (not the court's) to make the determinations outlined in § 20-46-106 and that said determinations, *although made*, were not *explicitly documented* due to time constraints. The trial court was eager to proceed immediately with finding a treatment facility for T.B., and it was clear that no in-state facilities were available.

It is true that subsection (a)(2) of Ark. Code Ann. § 20-46-106 (Supp. 2001) requires DHS to make "and document" certain determinations established in subsection (b) of this section and that if an out-of-state placement is made without documenting such determinations, payment for services shall not be authorized. However, as stated above, DHS admitted that the determinations were, in fact, made and that it was DHS's responsibility to document the determinations. The fact that the court was eager to proceed immediately in no way absolved DHS of its responsibility under § 20-46-106 to document the determinations that it had already admittedly made in order that T.B. might be placed in an appropriate facility, albeit out of state.

We hold that DHS cannot refuse to pay for services simply because documentation was not specifically made, although

determinations *were* made, pursuant to § 20-46-106, when it is DHS's duty, itself, to document the determinations referred to in that section. Furthermore, the purpose of § 20-46-106 is to ensure that, whenever possible, children in Arkansas receive treatment in Arkansas; this was clearly not going to happen in this case, as no facilities were available at that time in Arkansas.

For all of the forgoing reasons, we affirm the case.

Affirmed.

BROWN, IMBER, and THORNTON, JJ., dissent.

RAY THORNTON, Justice. I respectfully dissent on the issue of whether DHS is immune from this lawsuit under the protection of the doctrine of sovereign immunity. As a state agency, DHS is afforded the protection of sovereign immunity, a defense that arises from Article 5, Section 20, of the Arkansas Constitution, which provides: "The State of Arkansas shall never be made a defendant in any of her courts." Sovereign immunity may only be waived in limited circumstances, and this court has recognized only two ways that a claim of sovereign immunity may be defeated: (1) where the state is the moving party seeking specific relief; and (2) where an act of the legislature has created a specific waiver of immunity. *Short v. Westark Community College*, 347 Ark. 497, 65 S.W.3d 440 (2002); *State Office of Child Support Enforcem't v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997). Furthermore, sovereign immunity is jurisdictional immunity from suit that may be waived by consent. *State v. Goss*, 344 Ark. 523, 42 S.W.3d 440 (2001). In the present case, neither exception applies. The trial court failed to recognize that the state did not waive sovereign immunity, nor did DHS consent. When the trial court ordered DHS to pay the Brown Schools's bill, it violated the doctrine of sovereign immunity.

The Juvenile Code gives the court the power to order DHS to provide funds for family services, but the legislature specifically limited waiver of the state's sovereign immunity with respect to any payment for out of state placement. Clear statutory language contained in Ark. Code Ann. § 20-46-106 subsections (a)(2) and (b)(1)—(10). Ark. Code Ann. § 20-46-106(a) provides as follows:

> (2) Prior to making an out-of-state placement, the Department of Humans Services shall make and document the determinations

> established in subsection (b) of this section. *If an out of state placement is made without documenting such determinations, payment for services shall not be authorized.*

[Emphasis added.] In the case under consideration, the Department of Human Services did not make the required determinations. There was a complete failure to follow the mandatory directions required by Ark. Code Ann. § 20-46-106(b), which reads as follows:

> Before an emotionally disturbed youth is placed in an out-of-state treatment facility, the Department of Human Services shall make and document the following determinations:
>
> (1) Whether the emotionally disturbed youth has been appropriately and accurately diagnosed;
>
> (2) Whether an appropriate treatment facility exists within the state;
>
> (3) Whether there is an appropriate treatment facility in a border state;
>
> (4) Whether the facility being considered has the most appropriate program.
>
> (5) Whether the program requires payment of board, and if so, what is the amount;
>
> (6) Whether the total cost for treatment in the out-of-state facility exceeds the cost for treatment in state;
>
> (7) Where youth residing at the facility attend school, and whether the school is accredited;
>
> (8) What type of professional staff is available at the facility;
>
> (9) What mechanisms are in place to address problems that are not within the purview of the program;
>
> (10) What other considerations exist, in addition to the youth's emotional problems, such as other medical conditions, travel expenses, wishes of the youth, best interests of the youth, effect of out-of-state placement on the youth, and proximity to the emotional disturbed youth's family; and

> (11) What alternatives exist to out-of-state placement, and the benefits and detriments of each alternative.

The trial court entered its order without requiring DHS to make the statutorily required determinations, and the state's statutory waiver of sovereign immunity did not occur.

The matter of payment for out-of-state services obtained without complying with Ark. Code Ann. § 20-46-106 should be presented to the claims commission for determination.

Today's decision awards money damages against the state when there was a specific retention of sovereign immunity, and I respectfully dissent.

I am authorized to state that JJ. BROWN and IMBER join in this dissent.

Raphel CHERRY *v.* STATE of Arkansas

CR 01-858 66 S.W.3d 605

Supreme Court of Arkansas
Opinion delivered February 14, 2002
[Petition for rehearing denied March 21, 2002.]

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

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

W.H. "DUB" ARNOLD, Chief Justice. Appellant Raphel Jerome Cherry was previously before us in *State v. Cherry*, 341 Ark. 924, 20 S.W.3d 354 (2000), wherein the State appealed the trial court's order denying the State's motion for reconsideration and granting Cherry's motion for a new trial, after the jury returned a guilty verdict and a sentence of life imprisonment for Cherry, based on juror misconduct. On appeal, we held the trial court did not abuse its discretion in granting Cherry's motion for new trial because Cherry was deprived of a fair trial where prejudice stemmed from the fact that some of the jurors may have made up their minds about his guilt or innocence before the case was submitted to them. On remand and retrial of the first-degree murder charge, Cherry was again found guilty, but this time

he received a sentence of thirty years in the Department of Corrections. Cherry, now, brings this appeal, raising three points for reversal and dismissal: whether the trial court erred when it denied Cherry's motion to dismiss on speedy-trial grounds, whether the trial court erred in denying Cherry's motion for continuance, and whether the trial court erred in allowing the State to cross-examine Cherry during the sentencing phase of the trial. We hold the trial court's rulings were correct, and, therefore, affirm.

Speedy Trial

On remand, Cherry's retrial began on January 24, 2001. However, in a pretrial motion, Cherry moved to dismiss for violation of his right to speedy trial as provided in Arkansas Rule of Criminal Procedure 28.1. Cherry argued that the speedy-trial time began running on September 23, 1999 in accordance with Arkansas Rule of Criminal Procedure 28.2(c), the date the trial court granted a new trial.

In Arkansas, a defendant's right to a speedy trial is governed by Arkansas Rules of Criminal Procedure 28.1 through 28.3 (2001). A defendant charged in circuit court must be brought to trial within twelve months, excluding periods of necessary delay, of the earlier of the date he was arrested or the date charges were filed; otherwise, the defendant is entitled to an absolute discharge and a bar to prosecution. Ark. R. Crim. P. 28.1(c) & 28.2(a) (2001). Where a defendant is retried following the grant of a new trial, the time commences running on the date the new trial was ordered. Ark. R. Crim. P. 28.2(c) (2001). Periods of necessary delay are set forth in Rule 28.3. Once a defendant makes a *prima facie* showing that he was brought to trial beyond the twelve months, the burden shifts to the State to show reasons for such delay. *Jones v. State*, 329 Ark. 603, 951 S.W.2d 308 (1997). The speedy-trial clock is tolled during a period resulting from other proceedings concerning the defendant or during other periods of delay for good cause. Ark. R. Crim. P. 28.3(a) & 28.3(h) (2001). On appeal, this Court reviews the excludability of periods of time for the speedy-trial calculation *de novo*. *Jones*; *supra*.

In this case, Cherry argues that the time period began running on the date the new trial was granted, September 23, 1999, and, not, as the State contends, on the date the mandate was issued after the court affirmed the trial court's grant of a new trial, September 7, 2000. Cherry argues Rule 28.2(c), which provides:

> The time for trial shall commence running, without demand by the defendant, from the following dates:
>
> . . . .
>
> (c) if the defendant is to be retried following a mistrial, an order granting a new trial, or an appeal or collateral attack, the time for trial shall commence running from the date of mistrial, order granting a new trial or remand.

Ark. R. Crim. P. 28.2(c) (2001). Cherry argues he was to be retried not because of an appeal, but because of the granting of a new trial. Cherry contends that this rule lists several events at which the time for trial should commence running, namely, it contains the common principle that the time for retrial begins upon the date of the event that requires the retrial. Thus, if that event were the grant of a new trial, the time for retrial begins running upon the date the new trial was granted. If retrial was made necessary due to an appeal, the time for retrial begins running on the date the mandate is issued. Cherry also asserts that the retrial was necessary because the trial court granted a new trial, hence the time for retrial commenced running on September 23, 1999, the date the trial court granted the new trial.

Cherry further argues that there are no excludable periods of time provided for in Rule 28.3, that would lengthen the time for trial to be brought by the State. Cherry contends that the time in which the State's appeal was pending was not excludable from the calculation because it is not provided for in Rule 28.3(a), which states:

> The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trials of other charges against the defendant.

Ark. R. Crim. P. 28.3(a). Cherry asserts that this rule is intended for only those appeals in which the defendant brings, and not the State.

However, the State relies on *Thornton v. State* as controlling authority. 317 Ark. 257, 878 S.W.2d 378 (1994). In that case, the State appealed a trial court's dismissal order of the charges against

the defendant, which this court reversed. On remand, the defense moved for dismissal based on speedy trial, and the trial court denied the motion. This court reversed the trial court's denial of the motion to dismiss for the denial of speedy trial, and held that the time between the filing of the State's notice of appeal and this court's issuance of mandate in the state's appeal, which reinstated the State's charges against the defendant were excluded. This Court further held that:

> Rule 28.2(c), the rule relied on by the state, provides that, if the defendant is to be retried following a mistrial, an order granting a new trial, or an appeal or collateral attack, the time for trial shall commence running from the date of mistrial, order granting a new trial or remand. Before Rule 28.2(c) applies, the provision plainly presumes, at the least, the state had commenced trying its case against the defendant and the trial concluded in a mistrial or the defendant had been tried but his conviction had been set aside, appealed, or collaterally attacked. In the *Clements* case relied upon by the state, the defendant had been tried, convicted and sentenced, but his conviction was overturned on appeal and remanded for a new trial.

Thornton v. State, supra; *Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993). Therefore, this court held that the speedy-trial clock was tolled during the pendency of the State's appeal pursuant to Rule 28.3. *Thornton, supra.*

Cherry contends that the holding of *Thornton* and the plain wording of Rule 28.2(c) compels that the time for retrial commences upon the date of the event that precipitated the retrial. That event in the case at hand, Cherry asserts, was the trial court's grant of a new trial, which was affirmed by this court, and not this court's mandate following the affirmance of that order. Thus, the time for retrial here commenced on September 23, 1999, the date the trial court granted a new trial, and the State has until September 2000, less any excludable periods in which to try Cherry.

Cherry additionally claims there was no excludable periods of time that would lengthen the time for bringing the retrial. Rule 28.3 states:

> The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial

> motions, interlocutory appeals, and trials of other charges against the defendant.

Ark. R. Crim. P. 28.3(a) (2001). Cherry claims that since there were no competency issues, pretrial concerns, interlocutory appeals, or other charges against him, there were no periods of time which could be construed as excludable.

The State, in this case, argues that the time in which the State appealed the trial court's grant of a new trial on the motion by Cherry was another proceeding concerning the defendant under Rule 28.3, regardless of the fact that it was not an appeal by Cherry. The State relied upon *Thornton*, where the trial court first dismissed the charges against Thornton and set him free, and then the State appealed that dismissal and won. Thornton, later, moved to dismiss the charges based on speedy-trial grounds, which the trial court denied. This court held that the trial court should have granted the motion to dismiss on speedy-trial grounds and reversed and dismissed the case. This court held that the time spent on the state's appeal was excluded, and even excluding that amount of time, the State took too long. *Thornton v. State,* 317 Ark. 257, 878 S.W.2d 378 (1994).

Cherry distinguishes his case from that of *Thornton* by stating that Thornton had been dismissed and was freed from state custody. Cherry further argues that under *United States v. Loud Hawk*, 474 U.S. 302 (1986), his Sixth Amendment right to speedy trial had been violated. This court cited *Loud Hawk* in *Thornton* stating:

> It is also settled that, for Sixth Amendment purposes, the appeal time, during which Thornton's felony charge had been dismissed freeing him of all liberty restrictions, should be excluded from the length of delay considered under the Speedy Trial Clause.

Thornton v. State, supra; Loud Hawk, supra. The United States Supreme Court in *Loud Hawk* held that "an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay," however, there are three factors that are to be considered in determining whether a government interlocutory appeal would qualify as a good reason for delay, (1) the strength of the Government's position on the appealed issues; (2) the importance of the issue in the posture of the case; and (3) in some cases — the seriousness of the crime. *Loud Hawk, supra; Barker v. Wingo,* 407 U.S. 514 (1972). Cherry asserts that if this tripartite analysis is applied to this case, it

would be clear that the State's appeal would not have weighed in its favor. However, the Sixth Amendment issue was not raised below.

We cannot consider arguments raised for the first time on appeal. *Hill v. State*, 341 Ark. 211, 16 S.W.3d 539 (2000); *Wallace v. State*, 326 Ark. 376, 931 S.W.2d 113, (1996). Even a constitutional argument, raised for the first time on appeal, will not be addressed. *Claiborne v. State*, 319 Ark. 537, 892 S.W.2d 324 (1995). We are therefore precluded from addressing these arguments on appeal. *Woods v. State*, 342 Ark. 89, 27 S.W.3d 367 (2000).

Cherry asserts that the factor weighing most heavily against the State in this matter is the fact that Cherry was incarcerated while the State took its appeal, unlike the defendants in *Thornton* and *Loud Hawk*. Cherry contends that where the State takes a discretionary and unnecessary appeal while the defendant is incarcerated, the time should be held against the State for purposes of the speedy-trial calculation. Therefore, Cherry argues this case must be reversed and dismissed.

However, this court does not accept such an argument. Under Ark. R. Crim. P. 28.3(h), other periods of delay for good cause are excluded in computing the time for trial. Therefore, we hold that the speedy-trial clock was tolled during the pendency of the State's appeal to this court. We allow the State to bring appeals to this court; therefore, logical reasoning would adhere to the speedy-trial clock being tolled during such matters. Further, this court will not address the factors set forth in the United States Supreme Court case of *Loud Hawk* since Ark. R. Crim. P. 28.3(h) controls. Therefore, we affirm the trial court's order denying the speedy-trial violation.

Motion for Continuance

Before retrial on November 26, 2000, Cherry moved for the allocation of $10,000.00 to hire a pathologist, who was needed because the state's pathologist had testified in the first trial that the victim has suffered from sickle cell anemia which contributed to her death. However, just how large a factor the sickle cell anemia played in the victim's death could not be estimated by the state's pathologist. Cherry's motion for allocation was granted, but was limited to $5,000.00, on December 12, 2000.

In a pretrial hearing, held two days before trial, on January 22, 2001, Cherry moved for a continuance in order to obtain the services of a pathologist knowledgeable in sickle cell anemia. Cherry explained that he ran into great difficultly in finding such a pathologist, and could not find one in Arkansas, but Cherry did locate an expert in Georgia. This expert would talk with Cherry, and asserted his testimony would be relevant to purposefulness. Cherry argued that the testimony by such expert would be relevant to premeditation and deliberation. Cherry entered into the record an affidavit by the pathologist, Geral T. Gowitt, M.D., who was at the time the Chief Medical Examiner for DeKalb County, Georgia. He had reviewed the autopsy report, the police file with photographs, but had not reviewed the slides produced by the Arkansas Medical Examiner. Dr. Gowitt's fee was $250.00 an hour, with a minimum retainer of $2,500.00. Based on his preliminary review of this case, he believed he could be of substantial assistance to the defense. However, he was unable to testify without payment of his retainer and four to five months advance notice of any trial date. At this pretrial hearing, the trial court denied the motion for continuance.

On the day of the trial, Cherry renewed his motion of continuance and entered into the record an affidavit from the Public Defender Commission, stating that the funds for the hiring of expert witnesses had already been depleted. Again, the motion was denied by the trial court.

■ In deciding whether to grant or deny a motion for a continuance, the trial court should consider the movant's diligence, the probable effect of the testimony at trial, the likelihood of procuring the witness' appearance at trial, and the filing of an affidavit stating the facts that the witness would testify to along with a statement that the affiant believed the facts to be true. *Anthony v. State*, 339 Ark. 20, 2 S.W.3d 780 (1999). A lack of diligence alone is sufficient basis to deny a motion for a continuance, and the burden of showing prejudice rests of the appellant. *Anthony, supra.*

■ The law on continuances for the lack of a witness is contained in Ark. Code Ann. § 16-63-402(a) (1987) and Arkansas Rules of Criminal Procedure 27.3. The following factors are to be considered by a trial court faced with a motion for a continuance for the lack of a witness:

> (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the attendance of

> the witness in the event of a postponement; and (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true. To demonstrate error on appeal, an appellant must show that he or she was prejudiced by the trial court's denial of the continuance.

Dyer v. State, 343 Ark. 422, 36 S.W.3d 724 (2001); *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998); *Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997).

Cherry contends that all of these factors in this case are present and are in appellant's favor. Cherry asserts that he tried to find a forensic pathologist familiar with sickle cell anemia, however was unable to locate such an expert without assurances that he would be able to pay. Nevertheless, Cherry did locate the pathologist in Georgia who stated the probable effect of the testimony at trial, and he set forth the witness's availability.

Cherry asserts that prejudice was shown by appellant's inability to seriously attack Dr. Erickson's, the State's expert, testimony that Cherry had to have applied pressure continuously to the victim's neck for several minutes somewhat short of four minutes in order to cause her death. This permitted the State an easy inference of a purposeful mental state, which was required to convict under the charge because there was nothing to rebut the testimony. Cherry further argues that the State, in its closing argument, made certain references to the expert called by the State and how he was the "only one who testified." Therefore, the denial of Cherry's continuance also amounted to a denial of an expert witness to an indigent who needed the use of such expert.

The State asserts that the trial court did not abuse its discretion by denying Cherry's motion for a continuance because Cherry did not diligently obtain the expert's testimony. The State explains that a new trial was ordered on September 23, 1999, and the grant of a new trial was affirmed on September 7, 2000. The State argues that Cherry's motion, made two days before trial, was hardly diligent, because he had more than five months in which to procure the services of an expert witness. His lack of diligence, therefore, was itself a sufficient basis for the trial court to deny his motion for a continuance. Furthermore, the State contends that regardless of the financial status of the Commission, the record shows that Cherry did not even locate the expert until shortly before trial.

This Court's review of the denial of a motion for a continuance is under the abuse-of-discretion standard. *Anthony v. State, supra.* This court shall grant a continuance only upon a showing of good cause and only for so long as it is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case. Ark. R. Crim. P. 27.3 (2001). An appellant must not only demonstrate that the trial court abused its discretion by denying the motion for a continuance, but also show prejudice that amounts to a denial of justice. *Anthony, supra.*

We hold that the trial court did not abuse its discretion by denying Cherry's motion for a continuance. Furthermore, the trial court's denial demonstrated no prejudice to Cherry. Cherry had the opportunity to cross-examine the State's expert witness to discredit his findings, and was allowed the opportunity to hire his own expert. Cherry only brought this motion for a continuance two days before retrial was to begin, when he had five months to procure such an expert. Furthermore, in the affidavit by the expert, it was only stated that he would be of substantial assistance to the defense. He did not state specific instances in which he would testify to, not did he state what he would testify to. Here, Cherry cannot show the trial court abused its discretion by denying the motion for continuance, nor can he show prejudice that amounted to a denial of justice; therefore, we affirm the trial court's order denying the motion for a continuance.

Cross-Examination During Sentencing Phase of Retrial

Cherry did not testify during the guilt phase of his trial, but he did testify in his own behalf during the sentencing phase of his trial. During his testimony, he sympathized with the family of the victim, but did not take responsibility for the death, stating "I can't say anything but I never touched Jerri. And that's the truth." On cross-examination, the prosecutor started off with the following question: "So, Mr. Cherry, all these witnesses came in here and lied." Defense counsel objected to this line of questioning on the basis that the cross-examination concerned the state's case-in-chief. The trial court overruled the objection, and the prosecutor then went on to discuss the evidence introduced by the State in the penalty phase.

Cherry asserts that in the penalty phase of a criminal trial, the issue to be decided is the sentence the jury will assess. *State v. Robbins*, 343 Ark. 262, 27 S.W.3d 336 (2001). Cherry argues that the line of questioning by the prosecutor had nothing to do with the sentence Cherry was to be assessed by the jury or his credibility, but rather was a rehash of the state's evidence introduced in the guilt phase with Cherry's reaction to such evidence.

The State continued to cross-examine appellant, confronting him with the evidence against him, and the trial court permitted the appellant to maintain a continuing objection to the State's line of questioning. The State argues that evidence introduced in the guilt phase may be considered by the jury in the sentencing phase, regardless of whether it is introduced in the sentencing phase. Ark. Code Ann. § 16-96-101(2) (Supp. 2001). Furthermore, the rules of evidence do not apply in sentencing proceedings. Ark. R. Evid. 1101(a)(3) (2001). The State claims that Cherry denied that he had committed the murder for which he had just been convicted. Because he made that denial on direct examination, it was permissible for the State to cross-examine his claim of innocence in light of the evidence that the jury found persuasive enough to satisfy them beyond a reasonable doubt that he had purposefully killed the victim. The State argues, therefore, that the trial court did not abuse its discretion by allowing the cross-examination.

We find no error in allowing such cross-examination. Cherry decided to testify on his own behalf during the sentencing phase of his retrial, therefore was subject to cross-examination on his testimony. Furthermore, because of Cherry's testimony, the State has the right to cross-examine him on his claim of innocence. Therefore, we affirm the trial court's order allowing the State to cross-examine Cherry during the penalty phase of his trial.

In conclusion, we affirm the trial court's order denying Cherry's motion to dismiss on speedy-trial grounds, the trial court's order denying Cherry's motion for a continuance, and the trial court's ruling in allowing the State to cross-examine Cherry during the penalty phase of his trial.

Affirmed.

STATE of Arkansas *v.* DIAMOND LAKES OIL COMPANY

01-760 66 S.W.3d 613

Supreme Court of Arkansas
Opinion delivered February 14, 2002

Mark Pryor, Att'y Gen., by: *Charles L. Moulton*, Ass't Att'y Gen., for appellant.

Friday, Eldredge & Clark, by: *Diane S. Mackey* and *Kelly M. McQueen*, for appellee.

TOM GLAZE, Justice. This case involves the cleanup of an environmentally contaminated gas-station site, and it requires us to interpret our statutes regarding when a period of limitations commences. Jurisdiction is in this court pursuant to Ark. Sup. Ct. R. 1-2(b)(6).

The gas station at issue here is a Citgo facility, located at 498 East Page Street, in Malvern. As early as 1991, neighbors had complained of gasoline odors coming from the vicinity of the East Page Citgo. The Arkansas Department of Environmental Quality ("ADEQ") conducted soil and water tests that showed some contamination; for unknown reasons, however, ADEQ took no further action with respect to this contamination and required no remediation at that time. In May of 1992, Ronnie Waggoner, the president of Diamond Lakes Oil Co., purchased the Citgo station; at the time, he was aware of the 1991 ADEQ investigation. In 1994,

ADEQ received another complaint about gasoline smells around the area, and it ordered another assessment of the property. The East Page Citgo again passed the tank and line tightness tests, and ADEQ informed Waggoner that the station was in compliance; according to Waggoner, that was the last he heard from ADEQ until 1997.

In 1997, Sabrina Fleming, a homeowner whose property adjoined the Citgo property, filed a complaint with ADEQ, alleging that there was gasoline leaking onto her land. ADEQ undertook another investigation of the Citgo property, and at that time, discovered significant groundwater and soil contamination under the station. At that time, ADEQ ordered Waggoner to undertake interim corrective action under Ark. Code Ann. § 8-7-809 (Repl. 2000), which is part of the Regulated Substance Storage Tank Act. ADEQ directed Waggoner to address the contamination by taking actions such as removing the tanks, soils, lines, pumps, pump islands, and canopies. Waggoner and his company were eligible for reimbursement of costs, minus a deductible, from the Arkansas Petroleum Storage Tank Trust Fund ("the Fund"), *see* Ark. Code Ann. § 8-7-901 *et seq.* (Repl. 2000) (reimbursement costs at the time of trial were $116,000). Subsequent sampling revealed that the source of the contamination was from another gas station, the Malvern Chief, located across the street. Upon further investigation, it was discovered that underground "slugs" of contamination were migrating from the Malvern Chief's property.

On July 15, 1998, Fleming sued Diamond Lakes, alleging that gasoline contamination from the Citgo property migrated onto her property, causing her damages. On August 18, 1998, Diamond Lakes filed an answer to Fleming's complaint and a third-party complaint against the Malvern Chief, alleging that the Chief station's leak resulted in gas leaking onto the Citgo property. ADEQ filed a motion to intervene in this lawsuit pursuant to Ark. Code Ann. § 8-7-908(d)(2) (Repl. 2000), in order to protect its interests payable from the Fund.

During discovery, ADEQ learned that Diamond Lakes was seeking $472,184.95 in temporary damages, which represented the costs to clean the Citgo property, despite Diamond Lakes' eligibility for reimbursement under the Fund. On August 10, 1998, ADEQ filed a motion for summary judgment, alleging that Diamond Lakes had brought its suit outside of the three-year statute of limitations, *see* Ark. Code Ann. § 16-56-105(4), and that a damage award predicated on cleanup costs was impermissible because the Fund was already reimbursing Diamond Lakes for those costs. On August

31, 2000, Diamond Lakes responded, alleging ADEQ's motion was flawed for the following reasons: 1) Diamond Lakes' action was not a complete cause of action before 1997; 2) the gasoline contamination was a recurring event, and therefore tolled the statute of limitations; and 3) the collateral-source rule prohibited the admissibility of evidence of the Fund's reimbursement of the cleanup costs to Diamond Lakes.

On September 18, 2000, ADEQ filed a motion *in limine* to exclude Diamond Lakes' request for remediation because ADEQ was in the process of assessing the Citgo property, and Diamond Lakes could not obtain these damages because Diamond Lakes had failed to exhaust its administrative remedies. Diamond Lakes rejoined that the exhaustion-of-remedies doctrine was not applicable, and filed its own motion *in limine*, seeking to exclude any evidence of the value of the property; Diamond Lakes argued that because it was only seeking temporary damages and only intended to introduce evidence of cleanup costs, the value of its Citgo property was irrelevant. ADEQ responded that the Citgo property had been appraised at $52,400 and that the cleanup costs were not a proper measure of property damages because the costs grossly exceeded the market value of the property.

On October 11, 2000, the trial court held a hearing on the parties' motions, and, by letter order dated October 26, 2000, made the following rulings: 1) the three-year statute of limitations was applicable, but there was a fact question concerning the timing of the occurrence or reoccurrence of the event giving rise to the cause of action; 2) ADEQ's exhaustion of remedies argument was denied; and 3) Diamond Lakes' request to exclude the value of the Citgo property was granted.

After a trial, commencing on October 31 and ending on November 2, 2000, the jury found in Diamond Lakes' favor, awarding it temporary (remedial) damages of $200,000 and consequential property damages in the sum of $100,000. ADEQ filed a motion for judgment notwithstanding the verdict,[1] reasserting its arguments that the statute of limitations had barred the complaint, and that the award of temporary damages was improper because they were grossly disproportionate to the value of the property. The

[1] The State also moved for a directed verdict at the close of Diamond Lakes' case, and the trial court denied that motion as well.

trial court denied the motion, and from the jury award and the final order denying the motion for JNOV, ADEQ brings this appeal.

In its first argument for reversal, ADEQ restates its contention that Diamond Lakes' action was barred by the three-year statute of limitations found in Ark. Code Ann. § 16-56-105(4) (1987). That statute provides that "[a]ll actions for trespass on lands" shall be brought within three years after the cause of action accrues. Particularly, ADEQ argues that Waggoner knew about the existence of the contamination at least as early as 1994, but did not file his third-party complaint until 1998; in other words, ADEQ urges, the statute of limitations commenced in 1994 and barred Diamond Lakes' cause of action sometime in 1997.

The limitation period found in § 16-56-105 begins to run when there is a complete and present cause of action, and, in the absence of concealment of the wrong, when the injury occurs, not when it is discovered. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 285 (1996); *Shelter Ins. Co. v. Arnold*, 57 Ark. App. 8, 940 S.W.2d 505 (1997) (statute of limitations for tort actions begins to run when the underlying tort is complete). Further, if there is any reasonable doubt as to the application of the statute of limitations, this court will resolve the question in favor of the complaint standing and against the challenge. *Dunlap v. McCarty*, 284 Ark. 5, 678 S.W.2d 361 (1984).

When the running of the statute of limitations is raised as a defense, the defendant has the burden of affirmatively pleading this defense. *Chalmers*, 326 Ark. at 902. However, once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations was in fact tolled. *Id.* This court has held that fraud or deliberate concealment suspend the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of reasonable diligence. *Id.* In discussing when a negligent act occurs to begin the three-year statute of limitations, this court has previously noted that "[a]t times, the beginning of the occurrence is a law question to be determined by the court. At other times, it is a fact question for the jury to determine." *Id.* (quoting *Orsini v. Larry Moyer Trucking, Inc.*, 310 Ark. 179, 833 S.W.2d 366 (1992)).

ADEQ argues that Arkansas follows the "occurrence rule" to determine when the statute of limitations begins to run, and cites *Ragar v. Brown*, 332 Ark. 214, 964 S.W.2d 372 (1998), in support of its contentions.[2] Further, ADEQ posits that, in trespass cases, absent fraud or deliberate concealment, the cause of action arises at the time of occurrence. Because Diamond Lakes never alleged fraud or deliberate concealment on the part of the Malvern Chief in its pleadings, ADEQ contends, the statute of limitations should have expired sometime in 1997 because Waggoner "knew, or should have known, about the trespass to his property" in 1994.

Diamond Lakes rejoins this argument by noting that the trespass in this case was "inherently concealed," and because of the nature of the trespass, the cause of action should not have accrued until Waggoner could ascertain the full nature and extent of the injury.[3] This so-called "discovery rule" has been previously recognized by this court on many occasions. For example, in *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999), the court stated that when an injury is suffered, no cause of action in tort begins to accrue *until the plaintiff knows, or by the exercise of reasonable diligence should have discovered, the cause of the injury* (emphasis added); *see also McEntire v. Malloy*, 288 Ark. 582, 707 S.W.2d 773 (1986) ("[a] cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered *not only that he has been injured but also that his injury may have been caused by the defendant's conduct*") (quoting *Raymond v. Eli Lilly & Co.*, 371 A.2d 170 (N.H. 1977) (emphasis added).

We find application of the discovery rule to be appropriate in light of the facts presented in this case, as even ADEQ frames its argument in terms of when Diamond Lakes "knew or should have known" of the contamination. Here, the evidence demonstrated that Diamond Lakes could not have known about the cause of the contamination until 1997. Although, as ADEQ points out, Diamond Lakes' expert, Dr. Jerry Overton, stated that the contamination had been present since at least 1994, he also testified that there

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[2] The "occurrence rule" provides that an action accrues when the last element essential to the cause of action occurs, unless the wrongdoing is actively concealed. *See Ragar*, 332 Ark. at 219, where this court acknowledged it had held fast to this minority rule in cases involving attorneys and other professionals, including accountants and insurance agents.

[3] Diamond Lakes also argues that this court should apply the limitations period found in 42 U.S.C. § 9601 *et seq.*, the Comprehensive Environmental Response, Compensation, and Liability Act, or "CERCLA." However, Diamond Lakes did not raise this argument below until its response to ADEQ's second motion for judgment notwithstanding the verdict; therefore, it is untimely, and we do not discuss it further.

was not enough information to identify the source of the pollution in 1994. He further related that information about the source was not available until 1997, when additional monitoring wells were installed at both the Citgo and the Malvern Chief properties. While the presence of contamination was known to Waggoner as early as 1994 (if not 1992, when he purchased the station), at that time, he did not know that there was anything that needed to be done to clean the site up, since ADEQ did not direct any kind of remediation until 1997. Further, in addition to not knowing the scope of the injury, Waggoner and Diamond Lakes did not know — and, according to Overton, could not have known — the *cause of the injury* until 1997. Specifically, until Waggoner learned that Diamond Lakes' injury was caused by the migration of gasoline from the Malvern Chief, his cause of action had not accrued, and did not accrue until 1997.

For its second point on appeal, ADEQ argues that the trial court erred in granting Diamond Lakes' motion *in limine* to exclude evidence of the market value of its Citgo property. At trial, ADEQ had sought to introduce evidence that the fair market value of the gas-station property was $52,400. In its motion *in limine*, Diamond Lakes had contended that, because ADEQ had ordered remediation, the property would eventually be cleaned up, and therefore the only damages it was seeking were temporary damages. The court reasoned that, because Diamond Lakes was not seeking permanent damages, the market value was irrelevant.

The trial court's decision was correct. Arkansas Model Instruction 2224 provides that temporary or repairable damages to real property are measured by "[t]he reasonable expense of necessary repairs to any property which was damaged." Where the damages are capable of repair, restoration costs are a recoverable element of damages for temporary damage done to property, *Kutait v. O'Roark*, 305 Ark. 538, 809 S.W.2d 371 (1991), and when injury to real property is temporary, the measure of damages is the cost of restoring the property to the same condition that it was in prior to the injury. *Fox v. Nally*, 34 Ark. App. 94, 805 S.W.2d 661 (1991) (citing *C.R.T., Inc. v. Brown*, 269 Ark. 114, 602 S.W.2d 409 (1980); *Arkansas Western Gas Co. v. Foster*, 254 Ark. 14, 491 S.W.2d 380 (1973)). In *Fox*, the court of appeals correctly held that the trial court did not err in excluding evidence of the before-and-after value of the land, because the damage was temporary in nature, and such evidence was not the proper measure of damages. *See also Shamlin v. Shuffield*, 302 Ark. 164, 767 S.W.2d 687 (1990). Here, because ADEQ mandated that the Citgo site be cleaned up, the

damages were by their very nature temporary, as they would cease to exist once the environmental remediation was completed. ADEQ's evidence about the fair market value of the property was irrelevant to what it would cost to restore the property to its former condition.

ADEQ's third argument on appeal also pertains to the trial court's rulings with respect to the damages awarded to Diamond Lakes. It asserts that the temporary damage award of $200,000 was grossly disproportionate to the actual value of the Citgo station ($52,400), and that where damages to real property are capable of repair, then the injured party may recover only the reasonable expense of necessary repairs. If the damages are permanent or incapable of repair, the proper measure of damages is the difference in market value before and after the injury, or diminution in value. However, quoting from *Benton Gravel Co. v. Wright*, 206 Ark. 930, 175 S.W.2d 208 (1943), ADEQ argues that where there is more than one method of estimating damages and either of two measures will fully compensate the injured party for his loss, that measure which is less expensive to the wrongdoer must be adopted.

This argument again ignores the fact that it was ADEQ that ordered the remediation; Diamond Lakes had no discretion in the process.[4] Dr. Overton, Diamond Lakes' expert, testified that the reasonable cost of remediation, as directed by the State, was in excess of $260,000; other unreimbursed expenses exceeded $60,500. Of the former amount, ADEQ had only reimbursed $116,000 from the Petroleum Storage Tank Trust Fund. *See* Ark. Code Ann. § 8-7-905(d) (Repl. 2000). The jury awarded $200,000 in temporary damages. This amount was not unreasonable,[5] because Diamond Lakes had no choice but to conduct the repairs.

In its final point, ADEQ argues that the damages sought and ultimately awarded by the jury were speculative and contingent, because those damages depended on what the State would require in the future. ADEQ points to testimony by Dr. Overton to the effect that ADEQ had not yet decided whether or not the building

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[4] Oversight of the assessment process was required to be provided by a registered professional geologist or professional engineer, and all work plans had to be approved by ADEQ in order for the Petroleum Fund to provide reimbursement. The owner of the Malvern Chief testified that, with respect to the state-ordered remediation, he had "to do what the State says or we're shut down or we're fined I think $10,000 a day. . . . We have no discretion one way or the other of what to do and how to do it."

[5] $260,000 + $60,500 = $320,500 - $116,000 = $204,500.

would have to be torn down, and that Mike Shinn, the ADEQ project manager, would have to approve any efforts made toward the cleanup. Because such requests by ADEQ for further assessment and corrective action had not been made by the time of trial, ADEQ asserts, any award of damages was based on speculation as to what ADEQ would require in the future.

However, the costs to repair or replace the property were definite and based on bids and estimates Diamond Lakes' owner, Waggoner, had obtained. Ron Burns, one of Diamond Lakes' expert witnesses, testified that it would take $88,000 to put the fuel system back in operation; that system had been removed at ADEQ's direction. Dr. Overton testified, as noted above, that the environmental remediation costs alone would exceed $260,000. Other witnesses testified as to the costs necessary to get the gas station back up and running. The damage award, then, was not based on speculation, but was instead based on testimony presenting amounts either already spent on repairs, or estimates, gathered from appropriate persons, showing what future costs would be required.

Moreover, this court has held that recovery will not be denied merely because the damages are difficult to ascertain. *See, e.g.*, *Morton v. Park View Apartments*, 315 Ark. 400, 868 S.W.2d 448 (1993); *Dr. Pepper Bottling Co. v. Frantz*, 311 Ark. 136, 842 S.W.2d 37 (1992) (holding that this court has not insisted on exactness of proof in determining damages, and if it is reasonably certain that some loss has occurred, it is enough that damages can be stated only approximately). Here, the damages were based on actual expert-calculated figures and on expenditures already made. Therefore, the trial court did not err in denying ADEQ's motion for judgment notwithstanding the verdict on the question of damages.

For the foregoing reasons, we affirm.

JONES RIGGING and HEAVY HAULING, INC.,
and Paul Kemp *v.* Shannon PARKER
and Michael Rodney Parker

01-770 66 S.W.3d 599

Supreme Court of Arkansas
Opinion delivered February 14, 2002
[Petition for rehearing denied March 21, 2002.]

[redacted]

Friday, Eldredge & Clark, by: *William M. Griffen, III* and *Jason B. Hendren*, for appellant.

Wright, Chaney, Berry, Daniel, Hughes & Moore, P.A., by: *Don P. Chaney*, for appellees.

DONALD L. CORBIN, Justice. Appellants Jones Rigging and Heavy Hauling, Inc. ("Jones Rigging"), and Paul Kemp appeal the order of the Clark County Circuit Court granting Appellees Shannon Parker and Michael Rodney Parker a new trial. For reversal, Appellants argue that the trial court abused its discretion in granting a new trial on the basis of surprise, because it erroneously interpreted Ark. R. Civ. P. 59(a)(3). Appellees have filed a cross-appeal, arguing that the trial court erred during the trial in denying their motion *in limine*, thereby allowing Appellants to introduce extrinsic evidence to impeach a witness. This case was certified to us from the Arkansas Court of Appeals; as such, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(d). We agree with Appellants and reverse.

This case stems from an automobile accident that occurred on June 25, 1996, in Caddo Valley, while Kemp was employed as a

driver for Jones Rigging. At the time of the accident, Appellees were traveling north on Highway 7 when they collided with a tractor trailer driven by Kemp. Kemp, who had been sitting at a stop sign at an exit ramp off Interstate 30, was in the process of making a left-hand turn when Appellees' vehicle collided with the truck's right rear dual tires. Appellees admitted that just prior to the accident they had gone through the drive-through of a Taco Bell restaurant and were going to eat their food while driving to Hot Springs. Appellees initially denied being injured as a result of the accident and did not seek medical attention until later that evening.

Appellees filed a personal injury complaint against Appellants on October 1, 1997, alleging that Kemp was negligent in pulling out in front of them, thereby causing the accident and their subsequent injuries. Appellees also alleged in their complaint that under the doctrine of *respondeat superior*, Kemp's negligence was imputed to his employer Jones Rigging. Discovery ensued between the parties, and Appellants provided Appellees with information regarding Jones Rigging's status as an ICC motor carrier. In June 2000, however, Jones Rigging was dissolved, and its assets were sold. Appellants never supplemented any of their prior discovery responses to reflect Jones Rigging's changed status.

The case went to trial on January 29, 2001. During their case-in-chief, Appellees called Peter Waddell, who at the time of the accident was Director of Safety at Jones Rigging, to testify. During direct examination, Waddell testified that Jones had been dissolved and its assets sold. Waddell also testified about the creation of Sampson Heavy Hauling, d/b/a Jones Heavy Hauling. At the time this testimony was elicited, Appellees failed to object to Waddell's testimony, nor did they seek any type of curative relief. Likewise, at no time prior to the jury reaching a verdict, did Appellees notify the court that they had been surprised by the information of Jones Rigging's corporate status because of Appellants' failure to supplement their discovery responses. During closing statements, counsel for Appellees told the jurors that any negligence found on the part of Kemp would be imputed to Jones Rigging as his employer; thus, the issue of the trucking company's status was irrelevant. Moreover, the trial court instructed the jury that at the time of the accident Kemp was employed by Jones and any negligence on his part was chargeable to Jones.

The case was submitted to the jury on January 31, 2001, and they reached a unanimous verdict in favor of Appellants. Appellees subsequently filed a motion for a new trial, alleging that they were

surprised by the evidence of Jones Rigging's dissolution and ordinary prudence on their part could not have prevented such surprise. Appellees further stated that they were prejudiced by this new information, because the jury was left with the belief that Kemp would be individually liable for any judgment the jury might have awarded. Appellees also argued that they were entitled to a new trial, because the trial court erred in denying their motion *in limine* to prevent Appellants from presenting extrinsic evidence in an attempt to discredit one of their witnesses. Appellants responded to the motion by arguing that Appellees' failure to remedy any alleged prejudice prior to the jury reaching a verdict precluded them from seeking a new trial. Appellants also argued that they were under no duty to supplement their discovery responses, because Appellees never inquired about issues related to dissolution of the corporation.

The trial court initially denied the motion for a new trial, but Appellees then filed an amended motion, supplementing their previous motion with documentation from the Arkansas Secretary of State's office regarding Jones Rigging's dissolution. The trial court then granted the motion, finding that Appellees had been prejudiced by Appellants' failure to notify them of the dissolution of Jones Rigging. Although the trial court's order does not specifically recite the basis for granting the new trial, the language of the court's order indicates that the new trial was granted pursuant to Rule 59(a)(3), which allows for a new trial when a party's rights have been substantially affected due to surprise. The trial court did not address Appellees' argument regarding the motion *in limine.* From this order, comes the instant appeal.

The sole issue on appeal is whether the trial court manifestly abused its discretion in granting Appellees' motion for a new trial under Rule 59(a)(3). Appellants argue that the trial court did abuse such discretion, as it erroneously applied the provisions of Rule 59(a)(3) to the facts of this case. Appellants contend that Appellees' failure to seek curative relief prior to the jury reaching a verdict precluded them from seeking the remedy of a new trial. We agree.

■■ Upon review of a trial court's grant of a new trial, this court must determine whether the trial court abused its discretion. *Sunrise Enters., Inc. v. Mid-South Rd. Builders, Inc.*, 337 Ark. 6, 987 S.W.2d 674 (1999); *Razorback Cab of Ft. Smith, Inc. v. Martin*, 313 Ark. 445, 856 S.W.2d 2 (1993). Where a new trial has been granted, it is more difficult to prove that the trial court abused its discretion, as the party opposing the motion will have another opportunity to prevail. *Id.*; *Worthington v. Roberts*, 304 Ark. 551, 803

S.W.2d 906 (1991). This court has held that a manifest abuse of discretion is one exercised improvidently or thoughtlessly and without due consideration. *Martin*, 313 Ark. 445, 856 S.W.2d 2; *Security Ins. Co. v. Owen*, 255 Ark. 526, 501 S.W.2d 229 (1973). Even in light of this rigorous standard, the trial court in the present case clearly abused its discretion in granting Appellees a new trial.

Rule 59(a)(3) provides that a new trial may be granted where a party's substantial rights are materially affected by "accident or surprise which ordinary prudence could not have prevented." In *Swindle v. Lumbermens Mut. Cas. Co.*, 315 Ark. 415, 869 S.W.2d 681 (1993), this court reaffirmed the long-standing principle that both an objection and a request for a continuance are prerequisites to appellate review of a claim of surprise in civil cases. *See, e.g., Massengale v. Johnson*, 269 Ark. 269, 599 S.W.2d 743 (1980); *Arkansas Power & Light Co. v. Jennings*, 258 Ark. 908, 529 S.W.2d 866 (1975); *National Cash Register Co. v. Holt*, 193 Ark. 617, 101 S.W.2d 441 (1937). This principle was also recognized by the court of appeals in *Thorne v. Magness*, 34 Ark. App. 39, 805 S.W.2d 95 (1991). There, the court of appeals affirmed a trial court's denial of a new trial where the appellant failed to request a continuance and also failed to object to the testimony he claimed was a surprise. In so holding, the court of appeals stated that a person who is surprised by his adversary's testimony is not entitled to a new trial on that ground if, rather than asking for a postponement to secure necessary evidence, he reserves his plea of surprise as a "masked battery in the effort for a new trial." *Id.* at 44, 805 S.W.2d at 98 (quoting *Sellers v. Harvey*, 220 Ark. 541,545, 249 S.W.2d 120, 122 (1952)).

In the present case, Appellees chose to call Waddell as a witness after noticing that he was present in the courtroom. Thereupon, the following colloquy took place between counsel and Waddell:

Q: Okay, in 1999, how long had you worked for Jones?

A: A little over six years.

Q: And at that time, did you and the owner of the company, Mr. Dale Vinzant, jointly manage the company?

A: That's correct.

Q: And you would supervise the truck drivers for Jones Trucking?

A: Yes, sir.

Q: And at that time, you told me you thought you were going to be the corporate representative for Jones Trucking at this trial?

A: Yes, sir.

Q: But apparently your jobs have changed?

A: Yes, sir, Jones has sold.

Q: Okay. Is there still a Jones Trucking?

A: Kind of. It's Samson Heavy Hauling d/b/a Jones Heavy Hauling. So there is no more Jones Rigging Heavy Hauling.

Q: But there's a corporation that has bought that —

A: It's dissolved.

Q: The corporate entity?

A: Yes.

Q: Okay. The assets of the corporation were sold to another company?

A: Yes.

At no point during this exchange did Appellees object to Waddell's testimony. They also did not request a continuance or seek any type of curative relief, such as a cautionary instruction from the court.

Moreover, Appellees were also responsible for introducing the offending testimony. It is well settled that a party who invites error may not complain of that error for which he or she is responsible. *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997); *Peters v. Pierce*, 308 Ark. 60, 823 S.W.2d 820 (1992). Cognizant of this rule of law, this court similarly held that it is not an abuse of discretion for a trial court to refuse to grant a new trial on the basis of surprise where the complaining party placed the surprising information into evidence. *Black v. Johnson*, 252 Ark. 889, 481 S.W.2d 701 (1972). Appellees' argument regarding Appellants' failure to supplement discovery does not negate the fact that Appellees were

the ones responsible for placing the offending testimony into evidence.

In addition to these procedural shortcomings, Appellees also failed to establish the basic elements required for the grant of a new trial. In order to obtain a new trial, Appellees must establish that their right to a fair trial was materially affected. In *Suen v. Greene*, 329 Ark. 455, 947 S.W.2d 791 (1997), this court reversed a trial court's grant of a new trial after holding that the trial irregularities complained of by appellee did not "materially affect the substantial rights of [the] party" *Id.* at 458, 947 S.W.2d at 793 (citing Ark. R. Civ. P. 59(a); *Diemer v. Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993)). In reversing the grant of a new trial in *Suen*, this court concluded that there was no possibility that the appellee was deprived of a fair trial, and thus, it was a manifest abuse of discretion to grant the motion.

When claiming that a new trial is warranted because of surprise, the moving party must also show that such surprise could not have been prevented through ordinary prudence. *See* Rule 59(a)(3); *Black*, 252 Ark. 889, 481 S.W.2d 701. The court in *Black* held that a new trial was not warranted where the complained of information was obtainable through the exercise of due diligence. *See also Swindle*, 315 Ark. 41 Ark. 5, 869 S.W.2d 681. Here, Appellees state that even if they had acted with ordinary prudence, the information related to the dissolution would not have come to their attention. This argument is without merit. Appellees could have certainly propounded further discovery prior to trial in order to inquire about the status and solvency of Jones Rigging. Moreover, Appellees could have checked with the Secretary of State's office regarding Jones Rigging's corporate status, as they did after the jury reached a verdict in favor of Appellants. Such actions are not outside the realm of ordinary prudence.

We are likewise unpersuaded by Appellees' reliance on *Peters*, 308 Ark. 60, 823 S.W.2d 820. Appellees rely on this case for the proposition that testimony drawing attention to a party's inability to satisfy a judgment prejudices a plaintiff's right to a fair trial, because it appeals to the sympathy of the jury. There, this court reversed the trial court and ordered a new trial after the trial court refused to allow the appellant to introduce rebuttal evidence in response to the appellee's misleading testimony regarding his lack of insurance coverage. In reversing, this court noted that the trial court recognized that the misleading testimony had an impact on the jury,

but then refused to allow the appellant to correct the misinformation. *Peters* is distinguishable, because the jury was left with the misperception that a verdict could financially devastate the appellee. No such misleading testimony occurred in this case; nor was there any indication that the jury was affected by Waddell's testimony.

The trial court ruled that Appellants' failure to timely supplement its discovery responses regarding the dissolution of Jones Rigging prejudiced Appellees. The trial court's order, however, does not state how Appellees were prejudiced, nor is this court able to discern how such information, or lack thereof, prejudiced Appellees. A review of the record reveals that at the close of all the evidence, the trial court instructed the jury as follows:

> At the time of the occurrence, Jones Rigging and Heavy Hauling, Incorporated and Paul Kemp were employer and employee. Therefore, any negligence on the part of Paul Kemp is charged to Jones Rigging and Heavy Hauling Incorporated, with respect to the claims of the Plaintiffs, Shannon Parker and Michael Rodney Parker.

During closing argument, counsel for Appellees stated:

> MR. CHANEY: One of the things that you do not have to decide, and this may make this case a little easier, the Court is telling you that any negligence on the part of the truck driver, Mr. Kemp, any negligence is charged to Jones Rigging and Heavy Hauling. So you don't have to decide anything about [the] trucking company. It's responsible for its drivers. That's what that means.

And again during rebuttal, counsel stated that the trucking company had to be held accountable for the actions of Kemp. Here, the jury was clearly told that any negligence they found on the part of Kemp would be imputed to Jones Rigging. Appellees' assertion that the jury based its verdict on sympathy for Kemp, is nothing more than mere speculation.

In sum, Appellees failed to take the necessary steps to preserve their right to claim entitlement to a new trial and also failed to prove that they did not receive a fair trial because of surprise. In *Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297 (1997), this court held that a trial court's erroneous application of the law or a rule in granting a new trial constitutes a manifest abuse of discretion. Because the trial court erroneously interpreted Rule 59(a)(3), we reverse its order granting a new trial and remand for

reinstatement of the jury's verdict. The cross-appeal is, therefore, moot and we need not address it.

Reversed and remanded; cross-appeal moot.

Don WILLIAMS *v.*
LITTLE ROCK SCHOOL DISTRICT

01-499 66 S.W.3d 590

Supreme Court of Arkansas
Opinion delivered February 14, 2002
[Petition for rehearing denied March 21, 2002.]

[redacted]

[redacted]

Roachell Law Firm, by: *Richard W. Roachell*, for appellant.

Friday, Eldredge & Clark, by: *John C. Fendley, Jr.*, for appellee.

DONALD L. CORBIN, Justice. Appellant Don Williams appeals the order of the Pulaski County Chancery Court dismissing his suit against Appellee Little Rock School District ("LRSD"). For reversal, Williams argues that the chancery court erred in ruling that it lacked subject-matter jurisdiction and thereby dismissing his suit. As this appeal involves an issue of first impression and statutory interpretation, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1) and (6). We agree with Williams and, therefore, reverse and remand this matter to the chancery court.

During the 1997-98 school year, Williams was employed with the LRSD as a nonprobationary school teacher at Gibbs Elementary School. On May 4, 1998, Williams verbally informed the school's principal, Felicia Hobbs, that he wished to resign. Hobbs, in turn, informed Williams that she needed him to submit a written resignation. The following morning, Williams contacted Hobbs and stated that he had acted hastily and wished to withdraw his resignation. Hobbs informed Williams that she had already reported his resignation to administration officials who had decided to accept his resignation. On May 28, 1998, the LRSD's Board of Directors met and formally approved Williams's oral resignation.

Williams subsequently filed suit against the LRSD on January 19, 2000, claiming that the Board's acceptance of his oral resignation was in violation of the provisions of the Arkansas Teacher Fair Dismissal Act ("TFDA"), codified at Ark. Code Ann. § 6-17-1501 to 1510 (Repl. 1999). Specifically, Williams argued that because his resignation did not comply with the TFDA's resignation requirements, the school district's act of accepting his resignation was void and resulted in a breach of his teaching contract. Williams sought declaratory and injunctive relief, including reinstatement to his former position and back pay. The LRSD responded with a motion to dismiss, alleging that the chancery court lacked subject-matter jurisdiction over Williams's claim. According to the LRSD, Williams's exclusive remedy under section 6-17-1510(d) of the TFDA was to file an appeal of the Board's decision in circuit court within seventy-five days of the Board's decision.

A hearing was held on the motion to dismiss, and after hearing arguments from both parties, the chancellor granted the motion. The chancellor found that the exclusive remedy provision of section 6-17-1510(d) was applicable to the present case, and thus, Williams was required to file an appeal of the Board's decision in circuit court. In a written order filed February 5, 2001, the chancellor

dismissed Williams's claim with prejudice. From that order, comes the instant appeal.

We review a trial court's decision on a motion to dismiss by treating the facts alleged in the complaint as true and viewing them in the light most favorable to the plaintiff. *Goff v. Harold Ives Trucking Co., Inc.*, 342 Ark. 143, 27 S.W.3d 387 (2000); *Arkansas Tech Univ. v. Link*, 341 Ark. 495, 17 S.W.3d 809 (2000). In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and all pleadings are to be liberally construed. *Id.*

With this standard in mind, we turn to the merits of Williams's argument on appeal. Williams argues that the trial court erred in dismissing his complaint on the basis of a lack of subject-matter jurisdiction because the exclusive-remedy provision of section 6-17-1510(d) is not applicable to cases involving resignations. Williams also argues that the exclusive-remedy provision presupposes notice and a hearing before the Board. The LRSD counters that the Board's action in voting to accept Williams's resignation amounted to a nonrenewal of his contract, and, as such, it falls within the ambit of section 6-17-1510(d). The LRSD further avers that any issues regarding its compliance with the TFDA should have been raised in circuit court within the seventy-five day time period. The issue before this court, then, is whether the exclusive-remedy provision of section 6-17-1510(d) governs in the present situation.

As this issue requires us to engage in statutory interpretation, we initially point out that the basic rule of statutory construction is to give effect to the intent of the General Assembly. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001); *NationsBank, N.A. v. Murray Guard, Inc.*, 343 Ark. 437, 36 S.W.3d 291 (2001). In considering 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 in such a way so that no word is left void or superfluous, with meaning and effect given to every word therein, if possible. *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). If the language of a statute is clear and unambiguous and conveys a clear and definite meaning, it is unnecessary to resort to the rules of statutory interpretation. *Id.* Where a statute is ambiguous, however, we must interpret it according to the legislative intent. *Barclay*, 344 Ark. 711, 42 S.W.3d 496. In reviewing the act in its entirety, this court will reconcile provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part. *Id.* We also

look to the legislative history, the language, and the subject matter involved. *Id.*

Having set forth the rules of statutory construction, we now turn to the statute itself in order to determine its applicability in the present case. Section 6-17-1510(d) provides:

> The *exclusive remedy* for any nonprobationary teacher aggrieved by the decision made by the board shall be an appeal therefrom to the circuit court of the county in which the school district is located, within seventy-five (75) days of the date of written notice of the action of the board. Additional testimony and evidence may be introduced on appeal to show facts and circumstances showing that the *termination* or *nonrenewal* was lawful or unlawful. [Emphasis added.]

In arguing that this section applies to Williams, the LRSD focuses on the language "any . . . teacher aggrieved by the decision made by the board." According to the LRSD, Williams was aggrieved by the Board's decision to accept his resignation, thus he was required to file an appeal in circuit court within the prescribed time limits. This particular language must be read, however, in the context of the entire section. First, looking to the title of section 6-17-1510 it reads, "Board action on *termination or nonrenewal* — Appeal." (Emphasis added.) This court has held that even though the title of an act is not part of the law, it may be referred to in order to help ascertain the intent of the General Assembly. *Routh Wrecker Serv., Inc. v. Wins*, 312 Ark. 123, 847 S.W.2d 707 (1993). Moreover, each of the subsections preceding subsection (d) deals specifically with instances of termination or nonrenewal. Finally, the second sentence of subsection (d) provides for the taking of additional proof on appeal, but specifically limits itself to proof on issues of termination or nonrenewal.

This court has previously acknowledged its reluctance to interpret a statute in a manner contrary to its express language unless it is clear that a drafting error or omission has circumvented legislative intent. *Yamaha Motor Corp. v. Richard's Honda Yamaha*, 344 Ark. 44, 38 S.W.3d 356 (2001); *State v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994). There is nothing in the language of section 6-17-1510 that either explicitly or impliedly states that the exclusive remedy of an appeal to circuit court is applicable to cases involving a disputed resignation. The fact that the General Assembly specifically stated the types of grievances that must be appealed to circuit court is a prime indicator of legislative intent; thus, we

will not interpret this section in a manner that will circumvent that intent.

We are likewise unpersuaded by the LRSD's argument that section 6-17-1510(d) is applicable because the Board's action of voting to accept Williams's resignation amounted to a decision to terminate his contract. In its brief to this court, the LRSD states that the Board's action amounted to a termination of Williams's teaching contract. In oral arguments to this court, however, counsel for the LRSD wavered when questioned about the nature of the school board's action. Initially, counsel stated that it was the Board's position that this was simply a situation involving a resignation, but later began asserting that the Board's action constituted a termination of Williams's contract. We do not agree with this assertion.

The LRSD mistakenly asserts that this court in *Teague v. Walnut Ridge Schs.*, 315 Ark. 424, 868 S.W.2d 56 (1993), clearly implied that a board action on a disputed resignation constituted a nonrenewal of a contract. There, a teacher submitted his resignation to his principal but later attempted to revoke it. After the school district voted to accept his resignation, the appellant filed suit in chancery court requesting reinstatement to his prior position. The chancery court dismissed his complaint. On appeal, he argued that his letter was an offer to resign, capable of being revoked until the school board acted on the offer. In affirming the chancellor, this court held that section 6-17-1506 did not require the board to take any official action in response to the appellant's resignation. Section 6-17-1506(a) (Repl. 1997) states in relevant part:

> Every contract of employment made between a teacher and the board of directors of a school district shall be renewed in writing on the same terms and for the same salary, unless . . . during the period of the contract or within ten (10) days after the end of the school year, the teacher shall deliver or mail by registered mail to the board of directors his or her resignation as a teacher, or unless such contract is superseded[.]

In interpreting this section, this court stated, "[h]ad the legislature intended to require a school board to officially accept a teacher's resignation, it could have so provided. It did not." *Id.* at 428, 868 S.W.2d at 58. Thus, the appellant's action of delivering his resignation to the principal constituted substantial compliance with the TFDA's resignation requirements.

In *Higginbotham v. Junction City Sch. Dist.*, 332 Ark. 556, 966 S.W.2d 877 (1998), this court rejected an argument that a school board's acceptance of a resignation that the appellant had attempted to revoke constituted a constructive termination. In that case, the school district's superintendent sent the appellant a letter requesting his immediate resignation or face termination procedures. The appellant wrote on the superintendent's letter that he resigned, cleaned out his office, and turned in his keys. The next day the appellant attempted to revoke his resignation, but was informed by the school district that his resignation had already been accepted. After the school board met and formally accepted his resignation, the appellant appealed to the circuit court, which held that his resignation was valid. In affirming the circuit court, this court held that the appellant's resignation satisfied the delivery requirements of 6-17-1506. This court stated that the rule in *Teague*, that delivery is effective upon receipt by the superintendent, was still controlling.

If we were to now accept the LRSD's argument that Williams's resignation amounted to either a termination or nonrenewal, this court's holdings in *Teague* and *Higginbotham*, that a resignation is effective without action by a school board, would be rendered meaningless. In light of the statutory language and this court's case law, it is clear that Williams resigned his position and was not subjected to nonrenewal or termination proceedings that would have triggered the exclusive remedy provision of section 6-17-1510(d). Accordingly, Williams was not limited to pursuing an action against the LRSD in circuit court within the seventy-five day time period. Accordingly, we reverse the chancery court's finding that it lacked jurisdiction over Williams's claim.

Finally, we take this opportunity to clarify an aspect of our law with respect to the TFDA, specifically the compliance standard set forth in section 6-17-1503.[1] At the time that Williams's cause of action arose, section 6-17-1503 provided:

> This subchapter is not a teacher tenure law in that it does not confer lifetime appointment nor prevent discharge of teachers for any cause which is not arbitrary, capricious, or discriminatory. A *nonrenewal, termination, suspension, or other disciplinary action* by a

[1] The General Assembly amended section 6-17-1503 in Act 1739 of 2001 to require that the school district substantially comply with the provisions of the TFDA.

> school district shall be void unless the school district strictly complies with all provisions of this subchapter and the school district's applicable personnel policies. [Emphasis added.]

Relying on this section, Williams alleges that the school district's action in accepting his resignation was void because it failed to strictly comply with the requirements for a resignation set forth in section 6-17-1506. Such reliance is misplaced, however. Turning again to the principles of statutory construction and giving the words of this section their ordinary and usually accepted meaning, it is apparent that the General Assembly's intent was to require strict compliance by the school district with the TFDA in the enumerated instances: nonrenewal, termination, suspension, or other disciplinary actions. This interpretation is reinforced when considered in light of the TFDA's underlying purpose, namely to protect teachers in their jobs from arbitrary and capricious actions committed by the school district. The purpose of the TFDA is not to protect teachers from their own actions.

In *Teague*, 315 Ark. 424, 868 S.W.2d 56, this court recognized that where there is a disputed resignation, the issue on review is whether the teacher *substantially complied* with the resignation procedures of section 6-17-1506. As previously pointed out, the *Teague* court held that a school board need not take any official action in order for a resignation to be deemed effective. If no school board action is required for a resignation to become effective, then it cannot be said that a school district's failure to strictly comply with the resignation procedures automatically results in a resignation being voided.

Part of the current confusion over this issue may well stem from this court's opinion in *Higginbotham*, 332 Ark. 556, 966 S.W.2d 877. There, this court initially stated that the appellant's reliance on the strict-compliance provision was misplaced. "This standard of strict compliance does not, however, aid Appellant in his argument on appeal, as he was not involuntarily terminated from his position, but instead, resigned." *Id.* at 565, 966 S.W.2d at 881. The court in *Higginbotham* recognized that *Teague* was decided under a substantial-compliance standard, but then attempted to distinguish the two cases, ultimately holding that receipt of a resignation by a superintendent constituted strict compliance under the TFDA. This holding was inaccurate for two reasons. First, *Teague* and *Higginbotham* are not distinguishable. Both cases involved disputed resignations and their subsequent effectiveness. Moreover, both cases were decided after Act 625 of 1989 instituted a strict

compliance standard in nonrenewal, termination, suspension, or disciplinary cases. The only distinction in these two cases is that the court in *Teague* clearly recognized that strict compliance was not the applicable standard in resignation cases, while there was some confusion on the issue in *Higginbotham*. Therefore, that portion of *Higginbotham* that mistakenly applies a strict-compliance standard for resignation cases is hereby overruled.

We thus reverse and remand this case to the chancery court for proceedings consistent with the foregoing opinion.

GLAZE and IMBER, JJ., concur.

BROWN and THORNTON, JJ., dissent.

TOM GLAZE, Justice, concurring. I join the majority opinion in this case, but add the following reasons. Arkansas Code Annotated section 6-17-1506 (Repl. 1997) sets forth the procedures by which a teacher is to tender his or her resignation. That statute provides that teacher contracts are to be renewed every year, in writing, on the same terms and for the same salary for the next school year, unless

> [d]uring the period of the contract or within ten (10) calendar days after the end of the school year, the teacher shall *send by certified or registered mail to the president, vice president, or secretary of the board of directors of the school district, with a copy to the superintendent . . . his or her resignation* as a teacher."

§ 6-17-1506(a)(2) (emphasis added).

As noted by the majority, the strict compliance standard found in Ark. Code Ann. § 6-17-1503 does not apply in resignation situations. *See Teague v. Walnut Ridge School District*, 315 Ark. 424, 868 S.W.2d 56 (1993) (where the issue is a disputed resignation, the issue on review is whether the teacher substantially complied with the resignation procedures of § 6-17-1506). Here, however, in my view, Williams failed to *substantially* comply with those procedures. Williams tendered an oral resignation to the principal of the school where he taught, instead of mailing a written notice to the president of the school board with a copy to the superintendent. By way of contrast, in *Teague*, *supra*, the teacher sent a letter to the principal, and that letter was given to the school superintendent, who communicated the resignation to the school board members. In *Higginbotham v. Junction City School District*, 332 Ark. 556, 966 S.W.2d 877

(1998), the teacher signed his name to a resignation letter, and the superintendent then notified the board members of Higginbotham's resignation that night by telephone. Here, Williams attempted to tender to the school principal an *oral* resignation, and the principal conveyed that oral resignation to "administration officials." There was no written resignation, and there was nothing conveyed to the superintendent. This attempted resignation was void because it failed to substantially comply with the statute. I believe the trial court was wrong in dismissing his complaint for this reason as well.

IMBER, J., joins this concurrence.

ROBERT L. BROWN, Justice, dissenting. Two things concern me about the majority opinion. The first is that the majority analyzes this case as if it were merely a resignation case and, thus, not covered by the Teacher Fair Dismissal Act. This case is not a resignation case. It is a *disputed* resignation case where the teacher reneged on his resignation, and the School Board took action and accepted it anyway. This equates to a termination. Williams, in his response to the motion to dismiss, referred to it as a termination where strict compliance with the Act was required. And the chancery court likewise found that the School Board had *terminated* Williams's employment.

This leads to my second concern which is that Williams filed his complaint as a violation of the Teacher Fair Dismissal Act. He now seeks to distance himself from the Act for purposes of the statute of limitations. In his complaint, Williams initially stated that the Act governs resignations and then alleged:

> 12. The acceptance of Willams's oral resignation is in violation of the Teacher Fair Dismissal Act and, therefore, a breach of the 1997-98 employment contract.

Williams then prayed for a declaration that the School Board's action in accepting his resignation was unlawful and asked for reinstatement and back pay. The School District moved to dismiss the complaint under Ark. R. Civ. P. 12(b), as untimely. As the majority correctly points out, in our analysis under Rule 12(b), we accept the allegations made in the complaint as true. Williams's complaint manifestly asserted that the School Board's action, in accepting a resignation that he had rescinded, wronged him.

So what is his remedy? When a teacher is "aggrieved" by School Board action, the recourse is spelled out in the Teacher Fair Dismissal Act:

> (d) The *exclusive remedy* for any nonprobationary *teacher aggrieved* by the decision made by the board shall be an appeal therefrom to the circuit court of the county in which the school district is located, within seventy-five (75) days of the date of written notice of the action of the board. Additional testimony and evidence may be introduced on appeal to show facts and circumstances showing that the termination or nonrenewal was lawful or unlawful.

Ark. Code Ann. § 6-17-1502(d) (Repl. 1999). Clearly, Don Williams alleged in his complaint that he was aggrieved by the School Board's acceptance of his resignation, which he tried to retract. Clearly, he invoked the Teacher Fair Dismissal Act for relief. Clearly, under the Act, he had to bring his appeal within 75 days of the School Board's action. And clearly, Williams at least, believed that this was a termination case under the Act because he referred to it as such in his response to motion to dismiss.

This court decided an almost identical case four years ago. *See Higginbotham v. Junction City Sch. Dist.*, 332 Ark. 556, 966 S.W.2d 877 (1998). In that case, as in the present case, a superintendent resigned and then the next day attempted to withdraw the resignation. The School Board, however, accepted the disputed resignation. The superintendent appealed the circuit court's affirmance of the School Board action to this court, and we affirmed as well. In doing so, we concluded that this fact situation fell within the purview of the Teacher Fair Dismissal Act. We said:

> We recognize that strict compliance is now the standard for determining if Appellant's resignation was proper according to the language found in section 6-17-1506. Under the facts as stated in this case, the District strictly complied with the Teacher Fair Dismissal Act when it voted to accept Appellant's resignation, which was effective upon delivery to Kelly.

Higginbotham, 332 Ark. at 568, 966 S.W.2d at 883. In effect, we treated a disputed resignation as a termination.

Now, a majority of this court has changed its mind and concludes that this disputed resignation in the Williams case does not fall under the aegis of the Teacher Fair Dismissal Act at all for purposes of the 75-day time limit for appeal, and we overrule

Higginbotham in part. I would adhere to precedent, which was well reasoned, and not depart from the *Higginbotham* rationale that a disputed resignation is governed by the Act.

Williams did not file his complaint until more than a year and a half after the School Board's action, when the Act calls for filing within 75 days. Now, according to the majority, disputed resignations, which a School Board has accepted, can be left hanging for five years, which is the statute of limitation for breach of contract. That kind of uncertainty is not what the Act contemplates. I would resolve this case by deciding that the disputed resignation is comparable to a termination under the Act and enforce the 75-day limit.

One final point. This decision today could well come back to haunt this court in a later case when it is to a teacher's advantage in a disputed-resignation case to be covered by the Teacher Fair Dismissal Act. As I read today's decision, that can no longer be the case.

I respectfully dissent.

THORTON, J., joins.

RAY THORNTON, Justice, dissenting. On the issue of whether the ATFDA applies to Mr. Williams's resignation, I respectfully dissent. Williams appeals the chancery court decision by claiming that his oral resignation is both within and outside the provisions of the ATFDA, and the majority agrees. Specifically, the majority holds that the ATFDA applies to acceptance of a proffered oral resignation but that the exclusive remedy clause within the ATFDA does not apply to resignations. It is the unequal application of the statute with which I disagree.

In my view the ATFDA must either (1) apply to both the submission of a resignation and the appeal from a ruling on such resignation, or (2) not be applicable to a submission of a resignation and therefore not applicable to an appeal from a ruling on such resignation. The statute is either applicable, or it is not. I am mystified that today's majority decision determines that ATFDA is both applicable and inapplicable to exactly the same circumstances.

If the ATFDA is not applicable to resignations, then an oral resignation is fully effective when it is tendered without any requirement of School Board action. *Teague v. Walnut Ridge Schs.*, 315 Ark. 424, 868 S.W.2d 56 (1993). If however, an oral resignation

triggers the application of the ATFDA, thereby giving Williams rights not otherwise available, Williams's appeal from School Board action must be controlled by the provisions of the ATFDA providing an exclusive statutory means for effecting such an appeal.

In my view, Williams cannot have it both ways. Either the ATFDA applies or it does not. I know of no legal principle that allows an individual to reap the benefits conferred by a statute without being bound by that statute's carefully expressed requirements.

I respectfully dissent.

I am authorized to state that Justice BROWN joins this dissent.

WAL-MART STORES, INC., A Delaware Corporation d/b/a Sam's Club *v.* The P.O. MARKET, INC., A Texas Corporation; Joseph O'Banion, Leonard Hoffman, and Michael McNew

00-1223 66 S.W.3d 620

Supreme Court of Arkansas
Opinion delivered February 14, 2002
[Petition for rehearing denied March 21, 2002.]

Williams & Anderson LLP, by: *Peter G. Kumpe* and *Stephen B. Niswanger*, for appellant.

Hardin, Jesson & Terry, by: *Bradley D. Jesson* and *Rex Terry*; *Dover & Dixon, P.A.*, by: *Thomas S. Stone* and *Michael Johns*; *McKool Smith, P.C.*, by: *Lewis T. LeClair, Robert Goodfriend*, and *Garret W. Chambers*; and *Patton, Haltom, Roberts, McWilliams & Greer*, by: *James C. Wyly*, for appellees.

ROBERT L. BROWN, Justice. This is a trade-secrets case. The appellant is Wal-Mart Stores, Inc., doing business as Sam's Club. The appellee is P.O. Market, Inc., a Texas corporation, as well as three individuals: Joseph O'Banion, Leonard Hoffman, and Michael McNew, all of whom are principals in P.O. Market. Following a ten-day jury trial, P.O. Market was awarded $31.7 million in compensatory damages for misappropriation of a trade secret. The trial court also awarded attorneys' fees of $5 million. Wal-Mart now appeals the jury's verdict and raises four points: (1) a trade secret was not involved; (2) there was no competent evidence of misappropriation; (3) the trial court erred in various evidentiary rulings and in instructing the jury; and (4) the judgment improperly permits double recovery of damages. We reverse the judgment on the first point and dismiss the case.

P.O. Market was a Texas corporation which was incorporated by Joe O'Banion on December 4, 1992. O'Banion's brother-in-law, Dallas attorney Leonard Hoffman, prepared the incorporation documents. P.O. Market was capitalized at $1,500 and never received any additional capital. It never filed income tax returns. P.O. Market's three shareholders (O'Banion, Hoffman, and McNew), however, did conduct regular business meetings. In 1992 and 1993, the corporation was in good standing in Texas and qualified to do business in Arkansas.[1]

Before the creation of P.O. Market, O'Banion and McNew were owners of Southwest Factors, a Little Rock factoring business. Southwest Factors offered credit to subcontractors by purchasing their accounts receivable and then collecting those accounts.

Sam's Club is a division of Wal-Mart Stores and is headquartered in Bentonville. It is a wholesale warehouse club. Members of Sam's Club are able to buy goods in bulk at wholesale prices. The Export Division of Sam's Club handles bulk transactions for large-scale purchasers. These bulk purchasers typically buy in large quantities by the truckload or in shipping containers. Most of these export purchasers are domestic companies, despite the name of the department. These large-scale bulk sales are effected via direct shipment from a manufacturer, vendor, or a Sam's distribution center to the customer and do not involve any individual Sam's Club store.

Prior to November 1993, there was not a system in place at Sam's Club for purchasers of large quantities of goods to finance their purchases.[2] Specifically, Sam's Club customers could not submit a purchase order from their company that was payable at a later time because Sam's Club operated on a "cash and carry" basis, with the sole exception of Discover credit card purchases.

In August of 1992, O'Banion first learned of this cash-and-carry feature of Sam's Club. At that time, he was approached by Dan DeLaughter, who was a representative of a corporation called The Service Department in Little Rock. The Service Department

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[1] Although the corporation was not formed until December 4, 1992, after the occurrence of some of the events that gave rise to this litigation, it will be referred to as being in existence before that time for convenience.

[2] P.O. Market alleged in its complaint, and Sam's Club admitted in its answer, that Wal-Mart founder Sam Walton had a "philosophical aversion" to consumer credit. Hence, Wal-Mart and its divisions were slow to adopt credit programs such as the one at issue in this case.

bought goods wholesale from Sam's Club and then resold them to its customers at a markup. DeLaughter approached O'Banion at Southwest Factors about financing a bulk purchase of computers for The Service Department, to be resold to the University of Arkansas at Little Rock. Southwest Factors declined to do the financing due to the credit risk. Through these negotiations, O'Banion met the manager of the Sam's Club store in Little Rock, Mike Hampson. According to O'Banion's trial testimony, Hampson told him that bulk credit purchases were a huge untapped market for Sam's Club.

Following that conversation, O'Banion contacted Hampson with a proposal that Sam's Club buy his idea for a way to execute bulk credit transactions. Subsequently, Hampson put O'Banion in touch with a Sam's Club executive named Sharon Austin. Austin was a member of the Export Division of Sam's Club, and her title was Export Business Developer. For part of the time relevant to this litigation, she reported directly to Colin Washburn, who was then Sam's Club General Merchandise Manager. Washburn, in turn, reported to the CEO of Sam's Club. At other times, Austin reported to another member of the Export Division, manager Scott Burford. In September 1992, O'Banion and Austin arranged to meet in Bentonville to discuss the P.O. Market proposal. O'Banion testified at trial that Austin agreed during this telephone conversation to keep O'Banion's proposal confidential.

On October 7, 1992, O'Banion sent Austin a letter confirming the meeting and requesting that all information disclosed thus far be kept confidential. O'Banion's proposal to Sharon Austin was outlined in his letter. The salient points were these: After a purchaser submitted a purchase order to Sam's Club, P.O. Market would buy the named goods from Sam's Club. P.O. Market would receive the most favorable pricing from Sam's Club, which the letter described as "favored nation" pricing. It would be a same-day settlement. P.O. Market would take title to the goods, would mark up the price of the goods, and sell them on a credit basis to the purchaser. Between the "favored" pricing of the goods and the mark-up to the end customer, O'Banion estimated that P.O. Market would realize a profit of between 8% and 12% of gross sales. O'Banion further proposed that P.O. Market be granted a nonexclusive license to use Sam's Club logos and trademarks in order to boost bulk purchaser confidence in its operation.[3] He proposed that P.O. Market have a

[3] This license was considered by O'Banion to be critical in obtaining financing for P.O. Market to be able to make the kinds of bulk purchases contemplated.

regional sales force, in addition to advertising, to market the bulk credit purchase service to Fortune 500 companies and other large purchasers. These purchasers would be preapproved by P.O. Market's financing institution, which O'Banion contemplated would manage the credit risk as well as the same-day settlement of Sam's sales transactions. The lender would also track the purchasers' orders and accounts.

Under O'Banion's proposal, Sam's Club would guarantee the quality of their products just as in any regular sales transaction made directly between a customer and Sam's Club. He also proposed setting up direct computer communications to allow a purchaser to place an order with P.O. Market, and that same day for the order to be transmitted to Sam's Club for the goods to be pulled and "dock ready" for delivery the next business day. The letter proposed a five-year exclusive arrangement between P.O. Market and Sam's Club. Though O'Banion's proposal later changed in certain respects, for ease of convenience we will refer to it as the O'Banion concept.

O'Banion testified that his concept allowed the bulk purchaser to get the benefit of a credit transaction for a wide variety of products. A business's entire procurement needs could be satisfied with one purchase order. This could be accomplished under his plan without exposing Sam's Club to any credit risk, because P.O. Market took title to the goods and thereby assumed the risk of non-payment. Further, Sam's Club would receive same-day settlement of sales transactions, which O'Banion understood to be critical to Sam's Club. According to O'Banion, Sam's Club also got the benefit, if P.O. Market expanded Sam's Club's market share, of gaining deeper discounts from vendors as its own purchases got bigger. P.O. Market got the benefit of the price mark up, although it bore the credit risk. O'Banion testified at trial that he was not very concerned about credit risk because he contemplated doing business only with large corporate and government purchasers. Moreover, potential purchasers would have to qualify with P.O. Market's financial institution as a low credit risk to participate in the program. The October 7, 1992 letter contained a paragraph requesting Austin to keep the proposal confidential.

In early October 1992, O'Banion, Leonard Hoffman, and Michael Hill, who was also interested in the O'Banion concept, met with Sharon Austin and another Export Division employee named Ralph Bane at the Sam's Club headquarters in Bentonville. According to O'Banion's trial testimony, Austin and Bane told him that Sam's Club was not discussing a similar credit arrangement

with any other potential partner. O'Banion further testified that Austin told him that she would communicate his proposal to her Sam's Club superiors and to the Wal-Mart legal department. If they were not interested, she said she would contact him within 24 hours. In her trial testimony, Austin stated that she only remembered giving the proposal to her boss, Export Division manager Scott Burford.

At the October meeting, Hoffman stressed to all parties the need to maintain confidentiality. He produced a confidentiality agreement that he had prepared for the meeting. According to O'Banion's trial testimony, Austin told him to put his agreement away because it would not be needed. She preferred to give her word that the matters discussed at the meeting would be kept confidential.

After Austin and O'Banion's initial meeting, a second meeting was held on November 9. At this meeting, O'Banion, Hoffman, and Hill met with Sharon Austin in her office in Bentonville. O'Banion took a draft license and sales agreement with him, but he did not show her the document because there were some changes that Hoffman wanted to make to the draft. After the second meeting, O'Banion and Hoffman mailed Austin the revised license and sales agreement. O'Banion testified at trial that based on the mood at the second meeting, he expected to close the deal and get the revised license and sales agreement signed in the near future. Austin, however, requested that O'Banion send another letter to her describing the P.O. Market proposal in simpler language than was used in the license and sales agreement. In a letter dated November 18, 1992, O'Banion did so.

There were several changes in the O'Banion concept in the November 18 letter. First, a distinction was made between orders of 5,000 items or more in that these bulk purchases of 5,000 items or more would be shipped directly from the vendor to the purchaser without any Sam's Club store involvement. Also, the term of the prospective agreement was shortened to three years. The November 18 letter further proposed a five-state region in which to begin the bulk credit purchase program rather than nationwide. P.O. Market would thus begin by servicing only a portion of the 268 Sam's Club stores.

After the November 18, 1992 letter, Austin and O'Banion met for a third time in early December 1992. P.O. Market was represented by O'Banion, Hoffman, and Hill. Austin and Bane were

accompanied by Scott Burford and a buyer's assistant named Debra Connell. At this meeting, Austin told O'Banion that the license and sales agreement was currently being reviewed by the legal department. She stated that the legal department had problems with two aspects of the agreement, namely, the licensure and the exclusivity. The legal department did not want to grant P.O. Market a license to use Sam's Club logos and trademarks. In addition, she said that the legal department believed that the exclusivity clause might represent an antitrust problem. It also believed that it was impossible for Wal-Mart to agree to the exclusivity clause because Sam's Club already had credit arrangements utilizing the Discover card.

Regardless of these problems, O'Banion testified that he still believed that the agreement would be signed "any day." He emphasized to Austin that he needed a signed agreement to obtain the necessary financing to enable P.O. Market to purchase the bulk goods from Sam's Club and begin operations. In a follow-up letter of December 15, 1992, he enclosed a new version of the agreement, which had now become only a sales agreement with the licensing feature eliminated. This third version of the agreement, like the two before it, contained a confidentiality agreement.

Austin informed O'Banion that she would give the proposed sales agreement to her superiors and to the legal department. When O'Banion called her to find out about its status, he testified that she told him, "We've passed it up to the people who approve these. They don't have a problem. It should be signed at some point. Any day." The agreement was not signed, and Austin denied at trial ever having passed the documents along to the legal department.

On January 7, 1993, there was a fourth meeting between O'Banion and Hoffman and Austin, Burford, and Connell. At this meeting, according to O'Banion, the same assurances were given that the sales agreement would be signed any day.

Also raised as a topic at the January 7 meeting was the prospect of P.O. Market's arranging bulk credit transactions for customers in Mexico. Sam's Club customers had been buying goods in bulk in the United States and then marking the goods up for retail sale across the border in Mexico. Sam's Club stores along the border had been accepting letters of credit from these bulk purchasers. This letter-of-credit arrangement, however, was not a Sam's Club corporate program but rather was handled by each individual store manager. Sam's Club's border stores were losing money on the letter-of-credit arrangement, according to Austin. She proposed

that P.O. Market set up a system of financing for these customers, which were higher-risk than those originally contemplated by O'Banion's proposal.

O'Banion testified that he was willing to do a credit arrangement for purchases in Mexico if that would result in his getting the sales agreement signed. Hoffman drafted a proposal for the Sam's Club border stores and the letters of credit in January 1993. Meanwhile, O'Banion was calling Austin regularly to check on the status of the sales agreement.

Sometime in January 1993, Austin stopped returning O'Banion's telephone calls. To get Sam's Club back to the table, Hoffman drafted a letter to Austin in which he enclosed four additional drafts of the sales agreement and repeated that financing for P.O. Market's bulk purchases from Sam's Club would not be forthcoming until a signed sales agreement was in place.

During November and December 1992 and January 1993, O'Banion discussed potential financing for P.O. Market's purchase of bulk goods from Sam's Club with approximately eight lenders. He was rejected by several of the lenders, each of whom he presented with a copy of his concept, accompanied by a confidentiality agreement. With the help of a businessman in Atlanta, Georgia, Bill McBrine, he finally settled on NationsBank, now Bank of America, to finance P.O. Market's operation. NationsBank Executive Vice President Steve Sims was, according to O'Banion and McBrine, interested in meeting with O'Banion, Austin, and Sam's Club executives with the authority to sign the sales agreement. In a letter dated March 11, 1993, Hoffman emphasized to Austin that Sam's Club's financial officers would need to attend this meeting, which was scheduled for March 22, 1993.

The meeting, however, never took place, as Austin did not respond and was still not returning O'Banion's telephone calls at this time. Because Austin never confirmed whether Sam's Club financial officers would attend the March 22 meeting, O'Banion canceled it. Austin, however, testified at trial that she wanted the meeting to take place because she was still hopeful that P.O. Market would take over the credit arrangements for the Sam's Club stores along the Mexican border.

In March of 1993, O'Banion gave up hope of Sam's Club agreeing to his proposal. He returned to his work at Southwest Factors, where he continued to engage in factoring accounts

receivable for various clients in the construction industry. He had no contact with any representative of Sam's Club between January 1993 and November 1993.

In November 1993, McBrine called O'Banion and alerted him to an article he had read in the *Wall Street Journal* dated November 2, 1993, entitled "Wal-Mart Sets Sights on Big Customers in Bid to Improve Warehouse-Club Unit." The article described a new program established by Sam's Club which allowed bulk purchasers to buy goods on credit. O'Banion later saw a similar article in the *Dallas Morning News*, also dated November 2, 1993, and entitled "Sam's Club Program to Compete Against Corporate Suppliers."

O'Banion testified that he then tried to contact Sharon Austin at her office in Bentonville but could not reach her there. He learned that she no longer worked for Sam's Club but was instead doing consulting work. He did finally manage to contact her by telephone, and he talked to her in November 1993 and April 1994. Unbeknownst to Austin, he taped these telephone conversations. During these telephone conversations, Austin told him that there was no doubt that the idea of bulk credit purchasing was O'Banion's idea, that he had "made it easy for them" to implement the new program, that O'Banion had educated Wal-Mart, and that Wal-Mart had "stepped on" O'Banion. Austin, in these telephone conversations, also told O'Banion that she could not be sure whether or not his proposals had ever made it into the hands of top-level Sam's Club executives. She did say, however, that she briefly "ran it by" Al Johnson, who was then CEO of Sam's Club. At trial, however, she testified that she was not sure whether or not this encounter had taken place because Johnson had vacated the position of CEO prior to her first contact with O'Banion. She also told him that she had given the proposal to the legal department. O'Banion admitted that the reason why he secretly taped some of these telephone conversations was because he had decided to file suit against Wal-Mart.

During the period in November and December 1992, when O'Banion had been meeting with Sam's Club executives about his concept, Wal-Mart executives had been meeting with representatives of General Electric Capital Corporation (GECC) about developing a credit system for bulk purchases. GECC had been interested in establishing such an arrangement with Wal-Mart for a number of years. In late 1992 and early 1993, GECC finally succeeded in getting Wal-Mart to agree to such a program for a five-year exclusive term.

Under the GECC program, which was named Sam's Club Direct program, Sam's Club sold bulk goods to large purchasers in credit transactions and then sold the accounts receivable to GECC for full price.[4] GECC never took title to the goods; rather, title to the goods passed directly from Sam's Club to the purchaser. The transaction was facilitated by either the new Sam's Club credit card created by GECC or by a credit account number for larger purchases. GECC, having bought the accounts receivable, would handle the purchase-order tracking and the billing of the credit card accounts. GECC made a profit by charging a $100 fee to open a credit account for Sam's purchases. The GECC program was directed toward purchases from $300 or $400 and higher. Delivery would only be available for very large purchases. Sam's Club would use its own sales force to market its new service.

In February 1993, Wal-Mart and GECC exchanged letters of confidentiality and exclusivity. In March 1993, they signed a Master Agreement in which they agreed to implement GECC's proposal regarding bulk credit transactions. The program became operational in November of 1993.

P.O. Market filed its first complaint against Wal-Mart for misappropriation of a trade secret in 1994 or 1995 in Pulaski County Circuit Court. It later nonsuited that action. On April 9, 1999, P.O. Market filed the complaint giving rise to this appeal in Miller County Circuit Court. At the time, O'Banion resided in Texarkana. The complaint included six causes of action: breach of implied contract, breach of a confidentiality agreement, breach of confidential relations, misappropriation of a trade secret, unjust enrichment, and negligence. What lay at the core of P.O. Market's complaint was that Wal-Mart had stolen the O'Banion concept and implemented it with GECC as the Sam's Club Direct program. Sam's Club answered and filed a motion for summary judgment on grounds that no trade secret was involved. The motion was denied by the trial judge.

At the jury trial in March 2000, P.O. Market presented the testimony of Joe O'Banion, Leonard Hoffman, and Sharon Austin, among others. As part of his testimony, O'Banion testified that P.O. Market had lost profits of between $8,651,897 and $30,057,771, due to Sam's Club's improper conduct. These figures were based on

[4] GECC later began charging a 1.37% charge to Sam's Club for each transaction that it financed.

Sam's Club manager Mike Hampson's initial estimates of an additional $12 million in sales per year for each Sam's Club store that implemented the bulk credit purchase program. O'Banion figured his damages based on two scenarios: first, a scenario in which P.O. Market serviced only a five-state start-up market (the $8 million figure), and second, a scenario in which P.O. Market serviced all 268 Sam's Club stores then in existence (the $30 million figure).

Bill McBrine, who in 1992 was dealing in brokering short-term loans using accounts receivable as collateral for Crown USA, also testified for P.O. Market. He testified that he thought O'Banion's idea was exciting, novel, a unique product, and worth a lot of money. He put O'Banion in touch with NationsBank as a potential financing partner. He also testified that the services proposed by O'Banion were known in the financing industry, but had not been applied to Sam's Club before. Finally, he stated that he proposed that Crown USA get involved in some of the financing of P.O. Market's operation, but that Crown was not interested, because it was in the process of winding down its business at that time.

P.O. Market offered the testimony of Allyn Needham, an economist, as an expert witness. Needham prepared a chart of similarities and differences between the O'Banion concept and the Sam's Club Direct Program. He stated that the two programs had a similar target market (schools, hospitals, governments, Fortune 1000 companies), similar benefits for customers, and similar benefits to Sam's Club. The two programs also had differences, including credit risk exposure to Sam's Club, the sales force to be utilized, and the actual method by which title to the goods was transferred. He testified that despite these differences, which he characterized as "semantic," the moving force behind the two programs was the same. He stated that in his opinion, the two programs were substantially similar.

P.O. Market's final witness was a second expert, Robert Sherwin, an expert in financial economic management. Sherwin testified to the damages suffered by P.O. Market. One calculation of damages was a royalty calculation — how much P.O. Market would have been entitled to for the bulk credit purchase idea alone. It was based on 1.5% of the Sam's Club Direct Program sales for the five years it had been in existence at the time of trial. This royalty calculation resulted in a figure of $6,736,761. Sherwin also testified that P.O. Market, in addition to this royalty figure, stood to make between $21 million and $72 million in profit due to its profit margin for actually carrying out the transactions.

At the end of P.O. Market's case-in-chief, Wal-Mart moved for a directed verdict based on two arguments. Wal-Mart first argued that P.O. Market had offered no evidence that the O'Banion concept was a trade secret. Secondly, Wal-Mart contended that even if it was a trade secret, there was no evidence to show that the secret had been misappropriated. The trial court denied this motion.

Wal-Mart offered the testimony of fourteen witnesses in its case, as well as several portions of depositions that were read into the record. Its defense was that Wal-Mart had been talking to GECC since 1989 about bulk credit purchases and that GECC had implemented comparable programs with other companies. According to Wal-Mart, what O'Banion proposed to Sharon Austin was simply a larger version of what Dan DeLaughter had proposed to O'Banion in August 1992. Moreover, O'Banion's concept was constantly evolving and changing during October, November, and December 1992, and the financing for P.O. Market's purchase of the goods was never effected. Finally, Wal-Mart presented witnesses to the effect that the O'Banion concept and the GECC plan, which resulted in the Sam's Club Direct Program, were markedly different. Hence, it argued that no trade secret was involved, and there was no misappropriation.

Wal-Mart renewed its motion for directed verdict at the close of all the evidence, and the jury was instructed. The jury returned a special verdict and answered two interrogatories. It first found that Wal-Mart had misappropriated a trade secret and then awarded damages of $6,736,761 for P.O. Market's lost profits and $25 million, which represented Wal-Mart's unjust enrichment. Several weeks after the verdict was rendered, the trial court also awarded attorneys' fees of $5 million and costs of $1,125 to P.O. Market. Wal-Mart now appeals this judgment.

I. Standard of Review

Our analysis must begin with our standard of review. There are two standards involved in our analysis of this case. With respect to a question of a statutory interpretation, we review the matter *de novo* on appeal, as it is for this court to decide what a statute means. *Fewell v. Pickens*, 346 Ark. 246, 57 S.W.3d 144 (2001); *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). Our review of a denial of a directed-verdict motion is different. A directed-verdict motion is a challenge to the sufficiency of the evidence, and when reviewing a denial of a motion for a directed

verdict, this court determines whether the jury's verdict is supported by substantial evidence. *See, e.g., Pettus v. McDonald II,* 343 Ark. 507, 36 S.W.3d 745 (2001); *Farm Bureau Mut. Ins. Co. v. Foote,* 341 Ark. 105, 14 S.W.3d 512 (2000); *State Auto Property Cas. Ins. Co. v. Swaim,* 338 Ark. 49, 991 S.W.2d 555 (1999). Substantial evidence is defined as evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond mere suspicion or conjecture. *See State Auto Property Cas. Ins. Co. v. Swaim, supra*; *City of Little Rock v. Cameron,* 320 Ark. 444, 897 S.W.2d 562 (1995); *St. Paul Fire & Marine Ins. Co. v. Brady,* 319 Ark. 301, 891 S.W.2d 351 (1995).

When determining the sufficiency of the evidence, we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered, and we give that evidence the highest probative value. *See State Auto Property Cas. Ins. Co. v. Swaim, supra*; *Arthur v. Zearley,* 337 Ark. 125, 992 S.W.2d 67 (1999); *Union Pac. R.R. Co. v. Sharp,* 330 Ark. 174, 952 S.W.2d 658 (1997). A motion for a directed verdict should be granted only when the evidence viewed is so insubstantial as to require the jury's verdict for the party to be set aside. *ConAgra, Inc. v. Strother,* 340 Ark. 672, 13 S.W.3d 150 (2000); *Wal-Mart Stores, Inc. v. Kelton,* 305 Ark. 173, 806 S.W.2d 373 (1991). A motion for a directed verdict should be denied when there is a conflict in the evidence or when the evidence is such that fair-minded people might reach different conclusions. *Wal-Mart Stores, Inc., v. Kelton, supra*; *Stalter v. Coca-Cola Bottling Co.,* 282 Ark. 443, 669 S.W.2d 460 (1984). Under those circumstances, a jury question is presented, and a directed verdict is inappropriate. *Wal-Mart Stores, Inc., v. Kelton, supra*; *Stalter v. Coca-Cola Bottling Co., supra.* It is not this Court's province to try issues of fact; we simply examine the record to determine if there is substantial evidence to support the jury verdict. *Wal-Mart Stores, Inc., v. Kelton, supra; City of Caddo Valley v. George,* 340 Ark. 203, 9 S.W.3d 481 (2000).

II. Trade Secret

Wal-Mart first urges that the O'Banion concept is not a trade secret and that the trial court erred in declining to direct a verdict in its favor on this point. Initially, Wal-Mart claims that the information included in the O'Banion concept meets neither the statutory definition of a trade secret (Ark. Code Ann. § 4-75-601(4) (Repl. 2001)), nor the six criteria set out in *Saforo & Assocs., Inc. v. Porocel*

Corp., 337 Ark. 553, 991 S.W.2d 117 (1999). Wal-Mart disputes in its challenges whether the O'Banion concept was ever concretely defined and further claims that the concept was generally known and readily ascertainable.

At oral argument, Wal-Mart also claimed that placing competing economic ideas under trade-secret protection would have a chilling effect on innovations in the market place. Wal-Mart's point appeared to be that, if P.O. Market is correct, anyone proposing a plan to a company to solve a business problem could then claim a trade secret and prevent that company from using other problem-solving ideas submitted by other persons or entities which embraced some of the same components.

The Arkansas Trade Secrets Act, Ark. Code Ann. § 4-75-601 to -607 (Repl. 2001) (ATSA), defines "trade secret" as follows:

> (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> > A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
> >
> > (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ark. Code Ann. § 4-75-601(4) (Repl. 2001). In addition to this definition, the issue of whether information constitutes a trade secret under the ATSA is governed by six factors:

> (1) the extent to which the information is known outside the business;
>
> (2) the extent to which the information is known by employees and others involved in the business;
>
> (3) the extent of measures taken by appellee to guard the secrecy of the information;
>
> (4) the value of the information to appellee and to its competitors;

(5) the amount of effort or money expended by appellee in developing the information; and,

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Saforo & Assocs., Inc. v. Porocel Corp., supra (adopting the six factors from the *Restatement of Torts* § 757, cmt. b); *see also ConAgra, Inc. v. Tyson Foods, Inc.*, 342 Ark. 672, 30 S.W.3d 725 (2000) (applying the *Saforo* factors). Information must meet both the ATSA definition and all of the six *Saforo* factors in order to qualify as a trade secret. *ConAgra, Inc. v. Tyson Foods, Inc., supra.*

a. Information

We first consider whether the O'Banion concept is "information, including a formula, pattern, compilation, program, device, method, technique, or process," and, thus, a trade secret under the ATSA. Ark. Code Ann. § 4-75-601(4) (Repl. 2001). As already stated, to the extent that this issue involves a matter of statutory construction, we will review the issue *de novo*, as it is for this court to decide what a statute means. *Fewell v. Pickens, supra*; *Hodges v. Huckabee, supra.* Other jurisdictions agree that this "information" facet of the trade secret definition is a legal question. *See, e.g., Weins v. Sporleder*, 569 N.W. 2d 16 (S.D. 1997); *Uncle B's Bakery, Inc. v. O'Rourke*, 920 F. Supp. 1405 (N.D. Iowa 1996).

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. *Raley v. Wagner*, 346 Ark. 234, 57 S.W.3d 683 (2001); *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. *Stephens v. Arkansas Sch. for the Blind,* 341 Ark. 939, 20 S.W.3d 397 (2000); *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997).

We have, either directly or by inference, passed on whether certain information qualified as "information, including a formula, pattern, compilation, program, device, method, technique, or process," under § 4-75-601(4), in three cases during the past decade. *See Saforo & Assocs., Inc. v. Porocel Corp., supra*; *Cardinal Freight Carriers v. J.B. Hunt Transp. Service*, 336 Ark. 143, 987 S.W.2d 642 (1999); *Allen v. Johar, Inc.*, 308 Ark. 45, 823 S.W.2d 824 (1992). The case of *Allen v. Johar, supra*, dealt with whether a customer list was a

trade secret. We held that it was, because it took almost twenty years to compile the list, and the list included personal details about the customers such as hobbies and individual preferences. We concluded that the customer list at issue was clearly a "compilation" under the ATSA's definition. In *Cardinal Freight Carriers v. J.B. Hunt Transp. Serv., supra,* there were five pieces of economic data at issue: (1) profits made from particular customers; (2) general profit margins and pricing models; (3) customers' long-term buying habits; (4) general business operating tools such as software; and (5) future plans including marketing strategies. This was "information" as defined by the ATSA and specifically fell into the category of methods, processes, or compilations. Finally, in *Saforo & Assocs. Inc. v. Porocel Corp., supra,* the equipment at issue was a way of partially processing a raw material which was an alumina residue called Bayer Scale through a wash water system. Though the wash water system was a combination of known components, it was unique and qualified as a "process."

Those three cases stand in stark contrast to a case from South Dakota in which the South Dakota Supreme Court held that the plaintiffs could not precisely identify exactly what information they were trying to protect as a trade secret. *See Weins v. Sporleder, supra.* In *Weins*, the issue was whether a livestock feed supplement had been misappropriated. The various competing feed supplements involved the mixing of similar ingredients such as flour, cane molasses, proteins, vitamins, iodine, and the like. The South Dakota Supreme Court, in wrestling with the issue of whether "information" under the trade secret statute was involved, observed:

> Throughout the proceedings, however, there was never a clear assertion as to what exactly was claimed to be the trade secret. Weins' complaint initially refers to the "feed product, and its use and application" as the trade secret. Later in the complaint, Weins states that the "selling and developing of the feed product" is the trade secret. In Weins' amended complaint, there is reference to an "idea," an "invention," a "tub feed product containing a combination of ingredients to be fed free choice," and "selling and developing the feed product" as the trade secret. The second amended complaint refers to the trade secret as a "feeding system." During the trial, Meyer testified the trade secret was the formula alone, while Weins testified the trade secret was not the formula, but the idea of combining ingredients into a tub. In addition, Weins' briefs submitted to this Court fail to assert what exactly constitutes the trade secret.

Weins, 569 N.W.2d at 18.

Other jurisdictions have wrestled with the issue of whether the information sought to be protected was sufficiently specific so as to qualify as trade-secret information. In *Coenco, Inc. v. Coenco Sales, Inc.*, 940 F.2d 1176 (8th Cir. 1991), the Eighth Circuit Court of Appeals affirmed a judgment notwithstanding the verdict where the issue was whether a new version of a machine to control the environment in chicken houses violated Coenco, Inc.'s trade secret. Some of the same producers and suppliers were used to operate the competing machines. The Eighth Circuit noted that it was confused as to what specific trade secret was at issue. Similarly, in *Electro-Craft Corp. v. Controlled Motion, Inc.*, *supra*, the Minnesota Supreme Court held that the dimensions of a design of a brushless electric motor were unclear and lacked specificity and, thus, were unsuitable for trade-secret protection.

We must confess to some of the same concerns in the case at hand. What precisely comprised the O'Banion concept appears to have been subject to change and in flux throughout discussions with Sam's Club representatives. For example, the licensure feature to use Sam's Club logos and trademarks was discarded after the initial meeting in October 1992, as was the exclusivity provision, and the term of the agreement changed. Over time, the geographic market to be served was also reduced down to five states and at one point appeared to focus on the Sam's Club stores bordering Mexico. Even though we have concerns about the definiteness of the O'Banion concept and whether it is a protectable "method" for bulk credit sales under § 4-75-601(4), we do not decide this case on that basis.

b. Generally known and readily ascertainable

We next focus on whether there was substantial evidence that the O'Banion concept derived economic benefit from not being generally known to, and readily ascertainable by, other persons by proper means under § 4-75-601(4)(A). Our standard of review on this factual issue is whether substantial evidence exists to support the verdict. We conclude that the evidence supporting the jury's verdict on this point was insufficient.

There appears to be a dearth of authority on whether an economic plan or idea for structuring a business qualifies as a trade secret. P.O. Market, using our case of *Saforo & Assocs., Inc. v. Porocel Corp., supra*, contends that the O'Banion concept took known

economic principles and molded them into a unique combination that is entitled to trade-secret protection. As already mentioned in part, in *Saforo*, this court upheld a finding of misappropriation of a trade secret where one company used another company's specialized process for constructing a piece of equipment to wash alumina residue. Although each step of the washing process was known in the industry, we held that the unique combination of the known elements into a particularized piece of equipment created a trade secret. In so holding, we were in agreement with other jurisdictions that have considered whether a unique combination of known components constitutes a trade secret. *See, e.g., Integrated Cash Mgmt. Serv., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171 (2d Cir. 1990); *Weston v. Buckley*, 677 N.E.2d 1089 (Ind. App. 1997); *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890 (Minn. 1983); *Lee v. Cercoa, Inc.*, 433 So. 2d 1, 2 (Fla. App. 1983).

The testimony of Joseph O'Banion on cross examination illustrates the fact that he essentially assembled known economic principles in fashioning his concept, which, he contended, was unique:

> COUNSEL: Now, Mr. O'Banion, each of these items listed as part of your proposal, each of these are arrangements or activities that were customarily done in business prior to November 18, 1992, weren't they, sir?
>
> O'BANION: Yes, sir. I would agree with that.
>
> COUNSEL: You'd agree with that. And these activities were well known. I mean, there was nothing secret about these activities, were they?
>
> O'BANION: Uh, individually, there was nothing secret about them. But we, we, you and I have talked about that a lot. So.
>
> COUNSEL: And so, it's your contention that when you combined these activities, that that turned it into something secret?
>
> O'BANION: It turned it into, it was a problem solving situation, Mr. Kumpe, that I had to resolve problems for each and every level of this chart back here or it was not gonna work.
>
> COUNSEL: And each of these various points are part of the solution?
>
> O'BANION: That is correct.

COUNSEL: And each of these activities were known in the businesses world prior to 1992?

O'BANION: Outside of this program, I would agree with that.

COUNSEL: Well, when you combined them together that did not all of a sudden shroud them in secrecy did they, sir?

O'BANION: I don't know of anybody so far that did a, a, to my knowledge, of doing a transfer of risk with minimum cost. I wasn't aware of that situation. Apparently, Wal-Mart wasn't either, because they would have already been doing it, frankly.

The question then that confronts this court is whether the O'Banion concept is indeed unique information or whether it is, at its core, a variation of other economic models already in the public domain and readily ascertainable. *See Jostens, Inc. v. National Computer Systems, Inc.*, 318 N.W.2d 691 (Minn. 1982). Again, we turn to other jurisdictions.

In *Computer Care v. Service Systems Enterprises, Inc.*, 982 F.2d 1063 (7th Cir. 1992), a methodology for triggering notice to customers to bring cars in for repairs was at issue. The Seventh Circuit Court of Appeals reversed a preliminary injunction by the federal district court and noted that that court had granted trade-secret protection to the "mere idea of using more than one trigger" for car repairs. 982 F.2d at 1073. The Seventh Circuit underscored that this information of "multiple triggers" was generally available in the industry and the fact that Computer Care was first to use it did not, in and of itself, transform otherwise general knowledge into a trade secret. The Seventh Circuit further concluded that the methodology could readily be duplicated.

In *TGC Corp. v. HTM Sports, B.V.*, 896 F. Supp. 751 (E.D. Tenn. 1995), the federal district court entered a judgment notwithstanding a jury verdict and found that the idea of a seamless palm in a sports glove could not qualify as a trade secret, because this idea was public knowledge. As was the case in *Computer Care v. Service Systems Enterprises, Inc., supra,* the district court focused on the point that simply being first to employ an idea did not, by itself, transform general knowledge into a trade secret. As P.O. Market contends in the instant case, TGC Corp. argued that the combination of known factors that went into making the sports glove entitled it to protection "like the recipe for baking a cake." 896 F. Supp. at 760. The district court disagreed that the combination

qualified as a trade secret because its components were already generally known.

And, again, in *Weins v. Sporleder, supra,* the South Dakota Supreme Court concluded that the combination of ingredients that resulted in the feed supplement could not be considered a trade secret because all of the ingredients were public knowledge and being the first to combine them was not enough to warrant protection. In short, the feed supplement in question was easily duplicable. Other courts have reached similar conclusions. *See, e.g., Jostens, Inc. v. National Computer Systems, Inc., supra* (computer software for designing class rings not a trade secret when the system was no different in concept from other systems in public domain and the combination of known data was not so particularized to achieve trade-secret status); *Microbiological Research Corp. v. Muna,* 625 P.2d 690, 699 (Utah 1981) (medical diagnostic kits were not unique combination where defendant had "utilized basic chemistry for a basic process consisting of a series of well known, published steps").

It is apparent to this court that any person reasonably well versed in the economics of wholesaling and credit purchasing could have put together the O'Banion concept. Indeed, the O'Banion concept was essentially wholesaling in the sense that it contemplated buying goods in bulk at a favorable price and selling them at a markup to preordained customers. Even though we look to the combination of the components and not to their individual qualities, the O'Banion concept was hardly unique. We are hard pressed to conclude that P.O. Market can claim what is essentially a wholesaling model to resolve a problem as its own proprietary information. In short, there was nothing about this business plan that was not generally known in the industry or readily ascertainable. For this reason, we distinguish our decision in *Saforo & Assocs., Inc. v. Porocel Corp., supra,* where what was involved was a highly specialized process for washing alumina residue and where this court concluded that the equipment built to do that was unique.

Joseph O'Banion himself testified that the genesis for his concept was a plan proposed to him by Dan DeLaughter of The Service Department in August 1992 to provide computers to the University of Arkansas at Little Rock. O'Banion was approached to provide financing to The Service Department, which would take title to the bulk sale of computers from Sam's Club and then sell the computers to the university at a markup. This was the essence of the O'Banion concept which was submitted to Sharon Austin on a much greater scale. It, too, is evidence of the fact that a first cousin

of the O'Banion concept was already known and being used in business circles.

We give little credence to the testimony of O'Banion and Leonard Hoffman regarding the uniqueness of their proposal. Both men were interested parties, who alleged in their complaint that the O'Banion concept was "a novel business concept not previously tried or considered by Sam's Club or Wal-Mart," and, therefore, was a trade secret. The fact that they testified similarly at trial was simply self-serving and a restatement of their theory of the case. This court has reversed jury verdicts for lack of substantial evidence even when the plaintiffs testified at trial on their own behalf. *See, e.g.*, *State Auto Property & Cas. Ins. Co. v. Swaim*, *supra*; *St. Joseph's Regional Health Center v. Munos*, 326 Ark. 605, 934 S.W.2d 192 (1996); *Thompson Newspaper Publishing, Inc. v. Coody*, 320 Ark. 455, 896 S.W.2d 897 (1995). Even Bill McBrine, who testified that the concept was "novel" was directly involved in promoting the plan by attempting to arrange financing at NationsBank. McBrine also admitted that the basics of the O'Banion concept were known in the industry but had not been applied to Sam's Club. Hence, we conclude that the testimony of these three men does not rise to the level of evidence of such sufficient force and character to compel a conclusion on this point with reasonable certainty. *See State Auto Property Cas. Co. v. Swaim*, *supra*. Nor do we agree that the mere statements by them that a unique or novel idea was involved transforms the matter into a trade secret and raises a reasonable inference for protection purposes.

We, again, voice our concern over whether the O'Banion concept ever reached that point of definiteness so as to qualify as protected "information" for trade secret purposes. Nevertheless, we hold that the basic economic components of the O'Banion concept were generally known in the business world and that the combination of the components into the O'Banion concept was not unique but rather was readily ascertainable. Thus, the O'Banion concept does not meet the test for a trade secret. Because we hold that the O'Banion concept did not qualify as a trade secret under either the ATSA, and specifically § 4-75-601(4)(A), or the corresponding Saforo factors due to the fact that it was generally known or readily ascertainable, we need not address the remaining points raised on appeal concerning misappropriation, the trial proceedings, or damages.

Reversed and dismissed.

GLAZE and CORBIN, JJ., not participating.

Special Justice NOYL HOUSTON joins.

Joe Louis DANSBY *v.* STATE of Arkansas

CR 00-1363 66 S.W.3d 585

Supreme Court of Arkansas
Opinion delivered February 14, 2002

William A. McLean, for appellant.

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

ANNABELLE CLINTON IMBER, Justice. A jury found Joe Louis Dansby guilty of two counts of capital murder and sentenced him to death on April 24, 1997. On direct appeal, we affirmed the capital-murder convictions and death sentence in *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999) (*Dansby I*). Pursuant to Ark. R. Crim. P. 37.5 (2001), Mr. Dansby filed a petition for postconviction relief in which he raised only one claim for relief: that his trial counsel were ineffective in permitting him to testify because doing so led to the State's use of rebuttal testimony from his wife that he confessed his crimes to her. The circuit court found that the decision to testify was a strategical and tactical decision made jointly by Mr. Dansby and his attorneys and denied his petition for postconviction relief. Mr. Dansby filed a notice of appeal from the denial of postconviction relief. He also filed a petition for writ of error *coram nobis* that this court denied. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (*per curiam*). Mr.

Dansby's appeal from the denial of postconviction relief is now before this court, and we affirm the circuit court's decision.

The facts of this case were explained in detail in *Dansby I*, and need not be repeated here except as they relate to the Rule 37.5 hearing. Eugene D. Bramblett, one of Mr. Dansby's trial attorneys, was the only witness at the Rule 37.5 hearing. Mr. Bramblett testified on direct examination that, of all the evidence offered during the three-week trial, the testimony of Joe Dansby's wife was the most damaging to their case. Mrs. Dansby first testified during the State's case-in-chief. However, because Mr. Dansby's attorneys had prevailed on a motion to invoke the marital privilege, Mrs. Dansby was prohibited from testifying concerning a confession by her husband. After Mrs. Dansby's initial testimony, Jackie Cooper testified that, while he and Mr. Dansby were being held at the Nevada County jail, Mr. Dansby told him that he committed the murders. Mr. Cooper also admitted to a history of criminal activities, including "seven different stretches" in the penitentiary over the past twenty years. Other evidence introduced by the State included expert testimony matching (1) .22 shell casings found at the crime scenes with a shell casing found at Mr. Dansby's house; (2) the metal in the bullets used to kill the couple with the metal in the bullets found in Mr. Dansby's .22 rifle; and (3) the DNA from Mr. Dansby's blood sample with the DNA in semen recovered from the body of the murdered woman.

After the State rested its case-in-chief, Mr. Dansby testified in his own behalf. His attorneys examined him "with great care to make sure that none of the questions that we asked Mr. Dansby would . . . open the door to a waiver of the marital privilege." Before the State cross-examined him, the trial court ruled that the confession to Mr. Cooper constituted a waiver of the marital privilege and allowed the State to question Mr. Dansby concerning the alleged confession to his wife, which he denied. The State then recalled Mrs. Dansby as a rebuttal witness, and she testified that her husband had confessed to her that he "killed the kids," referring to the murdered young couple. Mr. Dansby's attorneys then called other defense witnesses in an unsuccessful attempt to show that another man was a suspect and could have murdered the couple.

I. Standard of Review.

The standard for review of a denial of a petition for postconviction relief has been often recited and was recently summarized in *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 485 (2001):

> The criteria for assessing the effectiveness of counsel were enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* provides that when a convicted defendant complains of ineffective assistance of counsel, he must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced his defense. Judicial review of counsel's performance must be highly deferential, and a fair assessment of counsel's performance under *Strickland* requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993). A reviewing court must indulge a strong presumption that the conduct falls within the wide range of reasonable professional assistance. *Id.*
>
> To prevail on any claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. *Thomas v. State*, 322 Ark. 670, 911 S.W.2d 259 (1995). This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. *Id.* Secondly, the petitioner must show that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.* Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.* The petitioner must show that there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt in that the decision reached would have been different absent the errors. *Id.*; *Huls v. State*, 301 Ark. 572, 785 S.W.2d 467 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Thomas*, 322 Ark. 670, 911 S.W.2d 259.

Andrews v. State, 344 Ark. at 611-12, 42 S.W.3d at 487-88. On appeal, a trial court's denial of postconviction relief will not be

reversed unless the ruling was clearly erroneous. *Peebles v. State*, 331 Ark. 188, 958 S.W.2d 533 (1998).

II. Deficient Performance of Counsel.

Mr. Dansby claims that if he had not testified, the State could not have asked him whether he confessed to his wife and then called his wife as a rebuttal witness to his denial of the confession. He argues that because his counsel failed to adequately research and comprehend the law of waiver of marital privilege, they failed to grasp the risks of allowing him to testify. Thus, he asserts that his counsel were ineffective in allowing him to testify.

The first prong of the *Strickland* test is whether counsel's performance was deficient because Mr. Dansby testified in his own behalf. We have consistently held that whether or not a defendant testifies is not a basis for postconviction relief. "The accused has the right to choose whether to testify in his own behalf. Counsel may only advise the accused in making the decision. The decision to testify is purely one of strategy." *Chenowith v. State*, 341 Ark. 722, 734, 19 S.W.3d 612, 618 (2000) (citations omitted); *Pogue v. State*, 316 Ark. 428, 433, 872 S.W.2d 387, 389 (1994) ("This dispute over Pogue's taking the stand appears to be more a debate over trial strategy than evidence of ineffectiveness of counsel. Such matters do not form the basis of post-conviction relief."); *Wainwright v. State*, 307 Ark. 569, 580, 823 S.W.2d 449, 454-55 (1992) ("[T]he decision to advise a defendant not to take the stand, even if it proves improvident, is a tactical decision within the realm of counsel's professional judgment, and matters of trial tactics and strategy are not grounds for post-conviction relief."); *Scott v. State*, 303 Ark. 197, 201, 795 S.W.2d 353, 355 (1990) ("We might agree with Scott's argument that he had a right to testify in his own defense, but he has shown nothing to indicate the decision was other than a tactical one."); *Isom v. State*, 284 Ark. 426, 430, 682 S.W.2d 755, 758 (1985) ("[T]he decision to advise a client not to take the stand is a tactical one within the realm of counsel's professional judgment, and matters of trial tactics and strategy are not grounds for postconviction relief. Neither mere error on the part of counsel nor bad advice is tantamount to a denial of a fair trial."); *McDaniel v. State*, 282 Ark. 170, 174, 666 S.W.2d 400, 403 (1984) ("Even if petitioner would have been better off not taking the stand, mere mistakes on counsel's part do not establish the denial of a fair trial."); *Watson v. State*, 282 Ark. 246, 248, 667 S.W.2d 953, 955 (1984) ("Even if counsel's advice caused petitioner to take the stand, there is nothing

to indicate that she compelled him to testify. The decision to advise a client to testify is a tactical decision within the realm of counsel's professional judgment. Even if a decision proves unwise, matters of trial tactics and strategy are not grounds for postconviction relief.").

From the line of cases cited above, it is clear that an attorney's advice to a defendant on whether or not to testify and the defendant's decision to take or not take the stand are not grounds for postconviction relief predicated on ineffective assistance of counsel. Mr. Dansby, nonetheless, contends it was counsels' failure "to adequately research and comprehend the law of waiver of the marital privilege" that kept them from appreciating the risk of allowing him to take the stand and testify in his own behalf.

During the Rule 37.5 hearing, Mr. Bramblett testified that he and his partner, Jamie Pratt, had obtained a favorable ruling granting Mr. Dansby's motion to invoke marital privilege, thereby preventing Mrs. Dansby from testifying concerning the confession during the State's case-in-chief. The attorneys were familiar with *Perry v. State*, 280 Ark. 36, 635 S.W.2d 380 (1983), where the defendant waived his priest-penitent privilege by disclosing his confession to third parties. However, the disclosures in *Perry* were made to several people and were undisputed; whereas, in this case, the disclosure involved only one other person, and Mr. Dansby denied making the confession to Mr. Cooper. Mr. Dansby's attorneys had researched the issue, and Mr. Bramblett testified as follows at the postconviction hearing: "We were convinced that merely by taking the witness stand Mr. Dansby would not by that fact alone open the door to a waiver of the marital privilege." Mr. Bramblett further testified that Mr. Dansby wanted to testify in his own behalf and had always maintained his innocence.[1]

During Mr. Dansby's testimony on direct examination, his attorneys made sure that none of their questions would open the door to a waiver of the marital privilege. It was only after direct examination and before cross-examination that the trial judge ruled that the marital privilege had been waived by Mr. Dansby's alleged confession to Mr. Cooper. In fact, the question of whether a single alleged and disputed disclosure to a third party constituted waiver of privilege was not settled until this court's ruling in *Dansby I*. We held that the waiver of privilege by disclosure to a third party does not depend upon the disclosure being heard by a number of people

[1] Mr. Dansby did not testify at the Rule 37.5 hearing.

or upon the third party's testimony being disputed. *Dansby I*, 338 Ark. at 720, 1 S.W.3d at 416. Contrary to Mr. Dansby's allegations, his attorneys simply were not deficient just because they lost at trial and on appeal on an unsettled question of law. *See Gunn v. State*, 291 Ark. 548, 726 S.W.2d 278 (1987); *Brents v. State*, 285 Ark. 199, 686 S.W.2d 395 (1985).

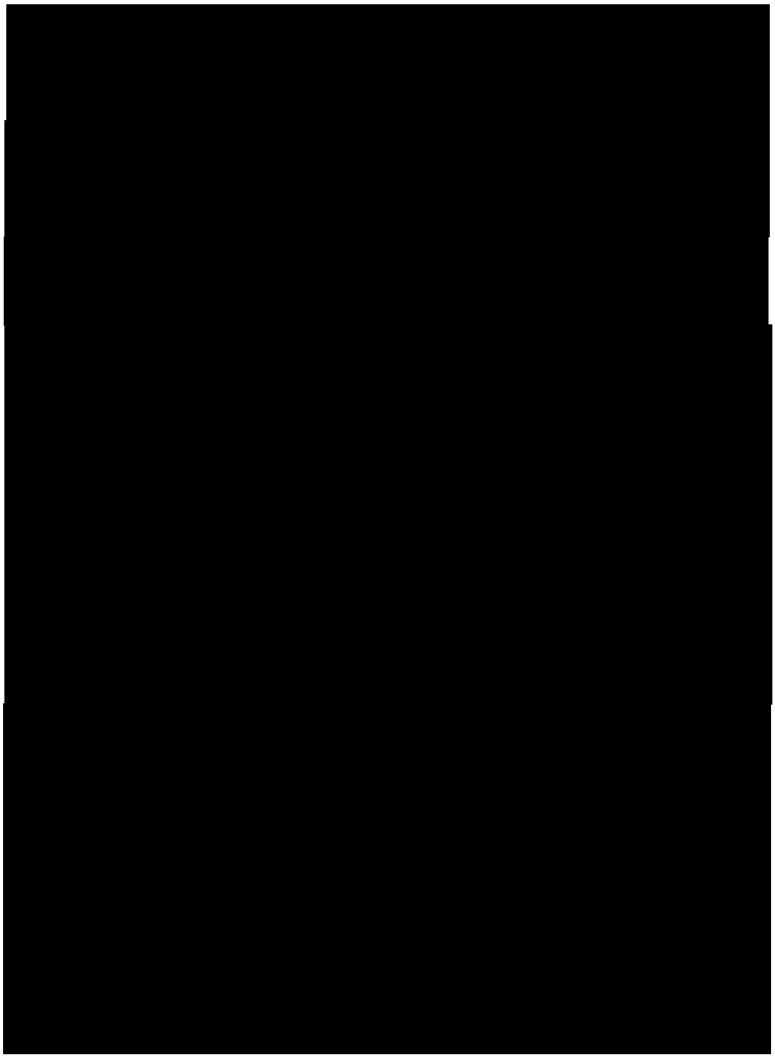
Viewed from counsel's perspective at the time, we hold that the performance of Mr. Dansby's counsel was not deficient. His counsel prevailed in asserting his marital privilege in a pretrial motion, and prevented Mrs. Dansby from testifying about the confession during the State's case-in-chief. At the time Mr. Dansby took the stand, the State had rested without the confession being admitted into evidence. It was not until Mr. Dansby's attorneys had concluded their direct examination that the trial court ruled, over defense counsels' objection, that the confession to Mr. Cooper constituted a waiver of the marital privilege. As a result, the State was permitted to raise the issue of Mr. Dansby's confession to his wife on cross-examination and to call Mrs. Dansby as a rebuttal witness. Even if in hindsight it appears that Mr. Dansby's decision to testify in his own behalf was improvident, that decision was a matter of trial strategy and tactics. As we explained in *Noel v. State*: "Matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for a finding of ineffective assistance of counsel." 342 Ark. 35, 41-42, 26 S.W.3d 123, 127 (2000). Accordingly, the trial court's ruling on this point was not clearly erroneous. In view of our holding that the performance of Mr. Dansby's counsel was not deficient, we need not address the prejudice requirement under *Strickland v. Washington, supra.*

Affirmed.

Robert A. NORMAN *v.* Josephine L. NORMAN

01-734 66 S.W.3d 635

Supreme Court of Arkansas
Opinion delivered February 14, 2002
[Petition for rehearing denied March 21, 2002.]



T.B. Patterson, Jr., P.A., for appellant.

James A. McLarty, III, for appellee.

RAY THORNTON, Justice. This action stems from an earlier appeal. *Norman v. Norman*, 334 Ark. 225, 970 S.W.2d 270 (1998) (*Norman I*). In that case, we were asked to determine whether C. Burt Newell, an attorney with Bachelor, Newell & Oliver, had a conflict of interest that would require him to disqualify from representing appellee, Josephine Norman, in an action seeking to enforce an alimony provision contained in a 1978 divorce decree dissolving the marriage between herself and appellant, Robert Norman. The alleged conflict of interest resulted from the fact that Latt Bachelor, a partner along with Mr. Newell in the Bachelor, Newell & Oliver law firm, was a former associate of George Callahan and Mr. Callahan had represented appellant in the 1978 divorce action. We held that Mr. Newell should have disqualified from representing appellee and remanded the case.

Our mandate was entered on July 17, 1998, and on September 1, 1998, appellant filed a motion seeking a judgment from appellee, Mrs. Norman, and from Mr. Newell, and Bachelor, Newell & Oliver for attorney's fees, costs, and other personal expenses incurred in defending the case brought by Mrs. Norman, using Mr. Newell as her attorney. Appellant alleged that he had incurred expenses in excess of $20,000. On September 11, 1998, Mr. Newell filed a response to appellant's motion stating that he was not liable to appellant for costs or attorney's fees. Bachelor, Newell & Oliver did not respond to the motion. Neither Mr. Newell nor Bachelor, Newell & Oliver were joined as parties to the on-going litigation between appellant and appellee.

On September 17, 1998, appellee filed a motion requesting a voluntary dismissal of her suit against appellant. On September 10, 1999, the chancellor entered an order finding that there was no cause of action between appellant and Bachelor, Newell & Oliver. The trial court also noted that there was no showing that the firm had ever been named as a party or properly served. Additionally, the chancellor found that this court had previously ruled on the issue of whether appellant was entitled to costs and attorney's fees, and therefore found that our ruling was the law of the case. The trial court further found that the motion sought damages, not fees, and that appellant did not have standing to seek to have the fees charged by Mr. Newell to his client, Mrs. Norman, "disgorged." Finally, with respect to the claim against Mr. Newell, the chancellor

found that there was constitutionally deficient notice to Mr. Newell and that Mr. Newell had a right to know the nature of the claim asserted against him by appellant. Appellant appealed this order.

In an opinion handed down by this court on October 26, 2000, we determined that appellant was appealing from an order that was not final. *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000). Specifically, we determined that because the chancellor had not granted appellee's motion to voluntarily dismiss her action, there was still an action pending in the chancery court and that pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure we were precluded from considering an appeal from an order that was not final.

On March 6, 2001, the chancellor granted Mrs. Norman's motion for voluntary dismissal. On April 4, 2001, appellant filed a notice of appeal seeking to appeal the chancellor's orders entered September 10, 1999, and March 6, 2001. We affirm the chancellor.

We review chancery cases *de novo* on the record, but we do not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Crawford & Lewis v. Boatmen's Trust Co. of Arkansas, Inc.*, 338 Ark. 679, 1 S.W.3d 417 (1999). We will affirm the trial court when it has reached the right result, even though it may have announced the wrong reason. *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001).

We first address the issue of whether either Mr. Newell or Bachelor, Newell & Oliver were parties to the on-going litigation between appellant and appellee. There is no showing in the record to support a contention that either Mr. Newell or his law firm were joined as parties to the litigation between Mr. and Mrs. Norman. We have held that the rules of civil procedure govern the conduct of parties to a legal action. *See Reynolds v. Guardianship of Sears*, 327 Ark. 770, 940 S.W. 2d 483 (1997) (holding that the rules of civil procedure inherently apply to parties to an action). According to *Black's Law Dictionary*, a "party" is:

> [A] person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A "party" to an action is a person whose name is designed on record as plaintiff or defendant. [The] term, in general, means one having right to control proceedings, to make defense, to adduce, and cross-examine witnesses, and to appeal from a judgment.

> "Party" is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently are persons interested but not parties.

Black's Law Dictionary 1122 (6th ed. 1990); *see also Reynolds, supra.*

We hold that neither Mr. Newell nor his law firm was a party to the Norman's divorce action. We further conclude that because Mr. Newell and his law firm were not parties to the divorce action, they should not have been served with appellant's motions; they were not required to respond to appellant's motions; and they were not required to offer a defense to appellant's motion. Accordingly, we affirm the chancellor.

We are not persuaded by appellant's argument that he had a valid action against Mr. Newell and his law firm based on our holding in *Liles v. Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). In *Liles*, we affirmed the decision of the trial court in assessing damages including attorney's fees and costs against an attorney for his tortious actions. While gathering information to use against Barbara Liles in a pending divorce action, the attorney, Dave Harrod, entered into a conspiracy with Tommy Liles to defraud Barbara of her marital assets. Barbara understood Harrod to be representing her and spent all day in his office preparing for a divorce action. Harrod told her that he was her attorney. He prepared an addendum to a trust, a property settlement agreement, and an entry of appearance on Barbara's behalf. The trust addendum named Harrod as trustee. At the end of the day, Harrod advised Barbara that he would no longer be representing her but that he would be representing Tommy. Harrod then filed Tommy's divorce petition. *Id.* It is clear that Harrod not only established privity with Barbara by representing himself to be her attorney, but he also became a party to a conspiracy to defraud her of her property.

The facts in this case are inapposite to those in *Liles*, and the holding in *Liles* is not controlling on the outcome of this case. Here, our decision that Mr. Newell should be disqualified from representing Mrs. Norman was not based upon a showing of tortious actions or fraudulent behavior. Mr. Newell was not a party to the divorce action and his failure to disqualify from representation of appellee in accordance with our code of ethics did not create a cause of action against him in favor of appellant. Accordingly, we

have no hesitancy in holding that a tort action against a non-party attorney cannot be sustained under the facts in this case.

Having reached the conclusion that neither Mr. Newell nor his law firm were ever made parties to the underlying divorce action, we need not specifically address the other arguments in appellant's brief asserting claims against Mr. Newell or Bachelor, Newell & Oliver.[1]

We next turn to the question whether appellant's September 1, 1998, motion seeking attorney's fees and costs from appellee, Mrs. Norman, was properly denied by the chancellor. Appellant contends that the chancellor erred when he determined that the issue of recovering attorney's fees from appellee was barred by the doctrine of law of the case. Appellant further argues that appellee should be required to pay his "attorney's fees, costs, through this appeal and subsequent proceedings, together with any other expenses he incurred as a result of the wrongful pursuit of the claim of defendant by Mr. Newell."[2]

On this issue, the chancellor found "the award of fees and costs is a matter within the jurisdiction of the Arkansas Supreme Court which has ruled making that issue the rule of the case." In our mandate issued July 17, 1998, we awarded appellant $100.00 for filing fee, $500.00 for preparation of his brief, and $1,460.65 for preparation of the record. We did not award attorney's fees to appellant.

We cannot agree with the chancellor's finding that the law of the case doctrine controls this issue. As appellant points out in his brief, this issue was not ripe for consideration until we determined in *Norman I* that Mr. Newell's conflict of interest precluded his representation of appellee.

Notwithstanding our conclusion that the chancellor erroneously applied the doctrine of the law of the case as the basis for his denial of appellant's request for attorney's fees from appellee, we hold that the chancellor reached the right result. Specifically, we hold that appellant was not entitled to attorney's fees from appellee

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[1] *See also* Ark. Code Ann. § 16-22-310 (Repl. 1999).

[2] We note that appellant also argues that Mr. Newell and Bachelor, Newell & Oliver should be jointly and severally liable with appellee for these costs. Because we have already determined that neither Mr. Newell nor his firm was a party to the Norman's litigation, we decline to address this argument.

because he failed to properly request that he be reimbursed for such fees. Rule 54 of the Arkansas Rules of Civil Procedure governs requests for attorney's fees. The rule provides:

> (e)(1) Attorneys' Fees. Claims for attorneys' fees and related non-taxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.
>
> (2) Unless otherwise provided by statute or order of the court, the motion must be filed and served *no later than 14 days after entry of judgment; must specify the judgment and the statute or rule entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought.* If directed by the court, the motion, shall also disclose the terms of any agreement with respect to fees to be paid for the services for which the claim is made.

Id. (emphasis added).

The entry of judgment triggering the application of Rule 54 was our mandate issued on July 17, 1998. Under Rule 54 a motion for attorney's fees must be filed no later than fourteen days from the entry of the order of the court. Here, the motion was filed on September 1, 1998, approximately forty-six days after the entry of our mandate. We also note that appellant's untimely motion did not provide the chancellor or this court the specific statute or rule that would entitle him to such fees. Because appellant failed to comply with Rule 54(e) of the rules of civil procedure, we hold that appellant is not entitled to receive attorney's fees or other expenses from appellee, Mrs. Norman.

In appellant's last point on appeal, he argues that the chancellor erred on several rulings. First, appellant argues that the chancellor erred in failing to strike the pleadings filed by Mr. Newell on behalf of appellee. Appellant did not receive a ruling from the chancellor on this issue. We have held that the failure to obtain a ruling from the trial court is a procedural bar to our consideration of the issue on appeal. *Madden, supra.* Because appellant failed to obtain a ruling from the chancellor on this issue, we are precluded from considering this issue on appeal.

Next, appellant argues that the chancellor erred in granting appellee's motion for nonsuit. Appellant does not support this contention with a convincing argument or citation to authority. Where no citation to authority or convincing argument is offered,

we decline to address the issue on appeal. *See City of Van Buren v. Smith*, 345 Ark. 313, 46 S.W.3d 527 (2001) (holding that this court does not consider arguments that are unsupported by convincing argument or sufficient citation to legal authority).

Affirmed.

STATE of Arkansas *v.* Eric G. HOLMES

CR 01-729 66 S.W.3d 640

Supreme Court of Arkansas
Opinion delivered February 14, 2002

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellant.

No response.

RAY THORNTON, Justice. Appellant, State of Arkansas, brings this appeal, pursuant to Ark. R. App. P.—Crim. 3 (2001), from an order entered by Pulaski County Circuit Court granting a posttrial motion to set aside the verdict in favor of appellee, Eric G. Holmes. On appeal, the State first argues that the trial court erred in granting the posttrial motion because appellant had waived any question pertaining to the sufficiency of the evidence by failing to comply with Ark. R. Crim. P. 33.1(b) (2001), and as a result, was barred from challenging the sufficiency of the evidence supporting his conviction in a posttrial motion. For its second point, the State contends the trial court erred by not having a hearing on a posttrial motion when requested by the State. We agree with the State's argument on the first point, and reverse and remand.

Holmes was charged by felony information with two counts of theft by deception and one count of violating the real estate licensing law. In the information, the State alleged that Holmes obtained $1,300.00 from Priscilla Jones and $7,000.00 from Rose Taylor, in violation of Ark. Code Ann. § 5-36-103 (Repl. 1997), by falsely representing to each of these women that he was going to sell them a house when he knowingly intended to take their money without conveying title to the property.

At the bench trial, Priscilla Jones testified that she attempted to purchase a home from Holmes in March 1999. She testified that she entered into an agreement with Holmes in February 1999, and that Holmes was making repairs to the house before she moved in. She stated that she gave him a thirteen-hundred dollar cashier's check as a down payment, with a promise to pay more money down after the completion of the repairs.

Jones further testified that "[s]omething unusual happened in April 1999." She said Holmes told her, "Well, I don't know if it's a good idea that you should move in." According to Jones, she and Holmes were to meet to discuss the alleged problem with the house, but "[n]othing ever transpired." Holmes then told her that she could move into the house in a couple of months. Someone else moved into the house in mid-April 1999. She attempted to contact Holmes, but he would not return her calls.

Rose Taylor also testified at trial. She had been a victim of the tornado in 1998, and had lost her home on Battery Street. Shortly thereafter, she met Holmes, who called her at work one day and said that he had a home that she could buy. She said, "[W]e'll see," and stated that she felt pressure from Holmes to buy a home from him. Holmes showed her a home, and Taylor acquired a down payment from FEMA and a tax refund check.

Prior to moving into the home, she told Holmes that she did not want to give him any money down because she wanted to check her credit. According to Taylor, Holmes gave her the keys and told her to move in. She signed a contract and moved into the house on March 21, 1999. She testified that he wrote the contract as a purchase agreement to buy. She later gave Holmes approximately $1200 to $1300, and $3500 when Holmes worked on the loan for the house. She further testified that "I gave Eric more money at other times on this house." She later obtained a backdated receipt in the amount of $7000 with a date of February 5, 1999. In early June 1999, Holmes told Taylor that her loan did not go through and that she had to move out of the house because he had sold it to someone else. He assured her that he would return her down-payment, but he did not.

Detective Jacqueline Brandford, a detective at Little Rock Police Department, testified that she received a complaint and a report filed by Rose Taylor. She contacted Holmes several times by phone. On September 1, 1999, after *Miranda* warnings were given to him, he signed a waiver form, and Brandford obtained a taped statement from him. That tape was played in its entirety at trial. In his taped interview, Holmes denied that he received the $7000 from Rose Taylor.

After the State rested, defense counsel moved for a directed verdict as to all counts, and the trial court denied the motions.

The defense then presented its case-in-chief during which Holmes testified that Taylor never gave him $7000 but that he wrote out a receipt for $7000. On cross-examination, he testified that he created a false receipt for $7000. Holmes also admitted on cross-examination that he lost his license because he was found guilty of violations by the real estate commission.

After the close of all the evidence, the State made its closing argument. The defense counsel then responded by presenting his

closing arguments. At the end of his closing argument, defense counsel made the following statement:

> MR. KEARNEY [*counsel for Holmes*]: And, your Honor, for that reason and because the state has the burden and they've not met it, we'd ask you to dismiss each charge.

The trial court convicted Holmes of the two counts of theft of property, but granted an earlier motion to dismiss on the licensing charge. The trial court sentenced Holmes as a habitual offender to ten years' incarceration with five years suspended conditioned upon his payment of restitution to the victims.

After he was convicted, Holmes filed a motion to set aside the verdict, or in the alternative, a motion for a new trial. In his motion, he argued that the State's witnesses were not credible, that the State failed to prove motive, and included a stipulation in which he proposed to pay full restitution to the victims, conditioned in part on the granting of his motion. The State filed a responsive pleading and requested a hearing. The trial court, without holding a hearing, granted Holmes's motion and set aside the convictions, accepting Holmes's stipulation to provide his cash bond as restitution to the victims. The State filed a timely notice of appeal from the order setting aside Holmes's conviction. From the trial court's order granting Holmes's motion to set aside the verdict, the State brings this appeal.

For its first allegation of error, the State argues that the trial court erred in granting Holmes's motion because he had waived any question pertaining to the sufficiency of the evidence by failing to comply with Ark. R. Crim. P. 33.1(b) (2001). Specifically, the State argues that, because Holmes did not make a motion for directed verdict at the close of all the evidence, the trial court lacked authority to grant his motion.

■ Arkansas Rule of Criminal Procedure 33.1 provides in pertinent part:

> (b) In a nonjury trial, if a motion for dismissal is to be made, *it shall be made at the close of all of the evidence.* The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.

> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

Id. (emphasis added). Rule 33.1 is strictly construed. *Etoch v. State*, 343 Ark. 361, 37 S.W.3d 186 (2001) (citing *Thomas v. State*, 315 Ark. 504, 868 S.W.2d 483 (1994)).

In the present case, Holmes's motion for directed verdict was not made at the close of all the evidence. Rather, it was included during Mr. Kearney's closing argument, as quoted above. Under *Etoch, supra*, we adhere to a strict interpretation of our rules, and we hold that Holmes did not comply with Ark. R. Crim. P. 33.1(b) and (c). In order to preserve the question of the sufficiency of the evidence, Holmes should have made his motion for directed verdict at the close of all the evidence before closing arguments. Because of his failure to do so, we hold that the trial court erred in considering his motion to set aside the verdict for insufficient evidence, and we reverse and remand with instructions to reinstate Holmes's convictions and sentence.

Because the State prevails on its first point on appeal, we decline to reach the merits of the remaining arguments.

Reversed and remanded.

Lee Charles LEWIS *v.* STATE of Arkansas

CR 01-1327 66 S.W.3d 644

Supreme Court of Arkansas
Opinion delivered February 14, 2002

John F. Gibson, Jr., for appellant.

No response.

PER CURIAM. Appellant Lee Charles Lewis, by and through his attorney, John F. Gibson, Jr., has filed a motion for rule on clerk. Attorney, John F. Gibson, Jr., states in the motion that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by an attorney for a criminal defendant, is good cause to grant the motion. *See In Re Belated Appeals in Criminal Cases,* 265 Ark. 964 (1979) (*per curiam*).

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Buckie MILLS *v.* STATE of Arkansas

CR 02-67 66 S.W.3d 643

Supreme Court of Arkansas
Opinion delivered February 14, 2002

Ben Beland, Public Defender, for appellant.

No response.

PER CURIAM. Ben Beland, a state-salaried, full-time public defender for the Twelfth Judicial District, was appointed by the trial court to represent Appellant Buckie Mills, an indigent defendant, in his rape and kidnaping case. Following a trial, Mills was sentenced to life in prison without parole. A timely notice of appeal and request for the transcribed record have been filed.

Mr. Beland now asks to be relieved as counsel for Mr. Mills in this criminal appeal as a result of this court's decision in *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000). In *Rushing*, this court determined that state-salaried, full-time public defenders were ineligible for compensation by the court for work performed in the appeal of a matter in which the public defender represented the defendant. 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).

[redacted] Since the time of these decisions, however, the law has changed. In the most recent legislative session, the Arkansas General Assembly amended Ark. Code Ann. § 19-4-1604 through Act 1370 of 2001, which now provides that "[p]ersons employed as full-time public defenders who are not provided a state funded secretary may also seek compensation for appellate work from the Arkansas Supreme Court or the Arkansas Court of Appeals." Mr. Beland's motion to be relieved as counsel on appeal is denied because the motion does not contain information regarding whether he is provided a state-funded secretary. Mr. Beland may resubmit his motion, providing information about whether he is provided a state-funded secretary, in order for us to determine whether he qualifies for dismissal in light of the amendment to Ark. Code Ann. § 19-4-1604.

[redacted]

Robert Gene HUGHES *v.* STATE of Arkansas

CR 01-699 66 S.W.3d 645

Supreme Court of Arkansas
Opinion delivered February 21, 2002

[redacted]

Phillip A. McGough, P.A., for appellant.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. The issue in this case is whether the Double Jeopardy Clause bars conviction of a lesser-included offense following a directed verdict on the greater offense, during the same proceeding. The Arkansas Court of Appeals concluded that such a conviction was barred, and it reversed Appellant Robert Hughes's conviction of attempted manufacture of methamphetamine. *See Hughes v. State*, 74 Ark. App. 126, 46 S.W.3d 538 (2001). The State filed a petition for review of the court of appeals's decision, and we granted it, pursuant to Ark. Sup. Ct. R. 1-2(e). When we grant review following a decision by the court of appeals, we review the case as though it had been originally filed with this court. *See Kennedy v. State*, 344 Ark. 433, 42 S.W.3d 407 (2001); *Miller v. State*, 342 Ark. 213, 27 S.W.3d 427 (2000). We affirm the trial court and reverse the court of appeals.

The record demonstrates that on September 2, 1999, an anonymous telephone call was made to the Greene County Sheriff's Office concerning two suspicious men walking along County Road 912, near a wooded area. In response to the call, Sheriff Dan Langston drove to the area, where he witnessed the two men getting into a green Geo Metro and leaving a residence. When the two men saw the officer, they pulled into another driveway. Langston subsequently identified the two men as Appellant and Steven Corder. Appellant, who was driving the car, had multiple warrants for his arrest, as well as a warrant for a parole revocation. Upon placing Appellant under arrest, Langston called Sergeant Toby Carpenter to the scene to assist in completing an inventory of the car's contents.

Carpenter found the following items of contraband in the car: a police scanner and a bottle of pseudoephedrine tablets, found under the passenger's seat; a piece of burned tinfoil with residue, found beside the passenger's seat; a black rubber hose with blue residue, found in the back floorboard; and two moist coffee filters and a second bottle of pseudoephedrine tablets, found under the driver's seat. Carpenter described the filters as smelling strongly of ether and containing a large amount of white powder, later identified as methamphetamine. Additionally, while transporting Corder to the jail, Carpenter noted a strong odor of ether coming from Corder.

In addition to the items found in the car, the officers recovered remnants of a methamphetamine lab in the woods, near the area where the two men were originally seen. Shoe prints were left near the items found in the woods, and both Appellant and Corder were

wearing muddy shoes and clothing. Upon arriving at the scene, Carpenter again smelled a strong odor of ether. Among the items discovered in the woods were two propane tanks containing anhydrous ammonia; four punched cans of starting fluid; several Zip Loc brand plastic bags; a HCL generator; and a white bag covered by leaves and tree roots. Inside the white bag were coffee filters, drain opener, an altered flashlight, salt, tubing, several baggies, a soda bottle lid with a whole cut out, and a glass measuring cup. When questioned by the officers, Appellant admitted that he and Corder had been in the woods; however, he denied that they had been cooking methamphetamine.

Appellant and Corder were subsequently charged with manufacturing methamphetamine, Class Y felony; possession of methamphetamine, Class C felony; and possession of drug paraphernalia, Class C felony. They were tried together in the Greene County Circuit Court. Both men were convicted of possession of methamphetamine, possession of drug paraphernalia, and attempted manufacture of methamphetamine. Appellant was sentenced to a concurrent term of thirty years' imprisonment. The court of appeals affirmed the two possession charges, but reversed the attempted-manufacture charge on the ground that Appellant's double-jeopardy rights had been violated. *See Hughes*, 74 Ark. App. 126, 46 S.W.3d 538. The State sought review of that decision on the grounds that it was erroneous and that it was based on overruled law. We granted review for the purpose of clarifying the law on double jeopardy.[1]

Appellant argues that the trial court violated his double-jeopardy rights when it allowed the jury to consider the lesser charge of attempted manufacture of methamphetamine after the court had directed a verdict on the greater charge of manufacture of methamphetamine. The record reflects that during the trial, at the close of the prosecution's case-in-chief, Appellant moved for a directed verdict on the manufacturing charge. He argued that the prosecution had failed to prove that he and Corder had possessed all the ingredients necessary to manufacture methamphetamine. After considerable argument between the prosecution and counsel for both

[1] Appellant does not seek review of the court of appeals's ruling on the two possession charges. Hence, we need not review that portion of the decision.

defendants, the trial court granted a directed verdict on the manufacturing charge. The trial court based its ruling on Sergeant Carpenter's testimony that two ingredients used to make methamphetamine, lithium strips and denatured alcohol, were not found in the car or in the woods.

Immediately thereafter, the deputy prosecutor asked the trial court to allow him to amend the information to charge the defendants with the lesser-included offense of attempted manufacture of methamphetamine. Another lengthy discussion between the parties ensued. Appellant's counsel argued that submitting the lesser-included offense after the court had directed a verdict on the greater offense would violate double jeopardy. The prosecution, on the other hand, contended that Arkansas law allows the state the right to amend the information to conform to the proof, so long as it is done prior to the case going to the jury and without prejudice to the defendants. The prosecution also argued that submitting a lesser-included offense to the jury after dismissal of the greater was not barred by double jeopardy. Otherwise, the prosecution argued, a jury could never consider lesser-included offenses, because to do so, it must first acquit the defendant of the greater offense. The trial court granted the prosecution's motion to amend. The defense then rested, without presenting any evidence. Appellant argues that the trial court's ruling was an acquittal and that submission of the lesser-included offense violated his double-jeopardy rights. We disagree.

The Fifth Amendment to the United States Constitution provides that no person shall be twice put in jeopardy of life or limb for the same offense. Similarly, Article 2, § 8, of the Arkansas Constitution provides that no person shall be twice put in jeopardy of life or liberty for the same offense. The Double Jeopardy Clauses of these constitutions protect criminal defendants from (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Wilcox v. State*, 342 Ark. 388, 39 S.W.3d 434 (2000) (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)). It is the first protection that is at issue here.

Our General Assembly has reiterated this protection in two statutory provisions: Ark. Code Ann. § 5-1-112 (Repl. 1997), and Ark. Code Ann. § 16-85-712 (1987). Section 5-1-112(1) provides that a former prosecution is an affirmative defense to a subsequent prosecution for the same offense where the former prosecution resulted in an acquittal. Similarly, section 16-85-712(a) provides in part that an "acquittal by a judgment on a verdict" shall

bar another prosecution for the same offense. For purposes of double jeopardy, whether two offenses are the "same offense" depends on whether each statutory provision requires proof of a fact that the other does not. *See Craig v. State*, 314 Ark. 585, 863 S.W.2d 825 (1993) (citing *Blockburger v. United States*, 284 U.S. 299 (1932)). Under this test, a greater offense and its lesser-included offenses are the same offense. Similarly, an offense and its attempt are considered the same offense for purposes of double jeopardy. *See* Ark. Code Ann. § 5-1-110(a)(2) (Repl. 1997).

Appellant argues that when the trial court granted his motion for directed verdict on the charge of manufacture of methamphetamine, he was acquitted of that charge and any lesser-included offenses. Thus, the first question we must answer is whether the directed verdict in this case was an acquittal. "[A] decision that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause." *Brooks v. State*, 308 Ark. 660, 666, 827 S.W.2d 119, 122 (1992) (citing *Smalis v. Pennsylvania*, 476 U.S. 140 (1986); *Sanabria v. United States*, 437 U.S. 54 (1978); *Burks v. United States*, 437 U.S. 1 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)). The same is true even if the trial court's decision is based on a mistaken belief or an erroneous evidentiary conclusion. *Id.* The Supreme Court has described a judgment of acquittal as "a jury verdict of not guilty" or "a ruling by the court that the evidence is insufficient to convict[.]" *United States v. Scott*, 437 U.S. 82, 91 (1978). Similarly, section 5-1-112(1) provides in part: "There is an acquittal if the prosecution resulted in a determination of not guilty." Thus, to be an acquittal, "the trial court's judgment must be one that indicates that the government's factual case has failed" as to the statutory elements of the offense charged. *State v. Zawodniak*, 329 Ark. 179, 185, 946 S.W.2d 936, 939 (1997), *cert. denied*, 522 U.S. 1125 (1998) (citing *Scott*, 437 U.S. 82).

Under these definitions, the directed verdict in Appellant's case was an acquittal of the charge of manufacture of methamphetamine, as it was based on the trial court's conclusion that the prosecution had failed to make a *prima facie* case on that charge.[2] As such, the Double Jeopardy Clause would bar a subsequent prosecution of Appellant for the offense charged and any lesser-included

[2] The prosecution argued below that the trial court was wrong in its conclusion that the evidence was insufficient because it failed to demonstrate that all the ingredients necessary to the manufacturing process were present. We do not reach this issue, however, as the State has not challenged the trial court's ruling on appeal.

offenses. The question, then, is whether the submission of the lesser-included offense to the same jury constitutes a subsequent prosecution that would be barred by the Double Jeopardy Clause. We believe that it does not.

This court addressed this issue in *Lampkin v. State*, 271 Ark. 147, 607 S.W.2d 397 (1980). There, the defendant was charged with first-degree murder. While it is not clear from the opinion whether Lampkin was charged with any other offenses, we interpret that case as having only one offense charged in the information. At the close of the state's case, the trial court directed a verdict of acquittal on the charge of first-degree murder, but allowed the trial to continue on the lesser-included offenses of second-degree murder, manslaughter, and negligent homicide. The jury found Lampkin guilty of second-degree murder and sentenced him to ten years' imprisonment. On appeal, Lampkin argued that he had been placed in double jeopardy. This court disagreed. Relying on the Supreme Court's holding in *Pearce*, 395 U.S. 711, this court held that Lampkin's conviction did not offend any of the guarantees of the Double Jeopardy Clause. This court reasoned: "There was only one trial and one conviction. Therefore, the appellant has not been placed in jeopardy twice for the same offense nor sentenced to more than one punishment." *Id.* at 149, 607 S.W.2d at 398.

The Illinois Supreme Court faced a similar issue in *People v. Knaff*, 196 Ill.2d 460, 752 N.E.2d 1123 (2001). There, the defendant was charged with delivery of a controlled substance within 1,000 feet of public housing and the lesser-included charge of delivery of a controlled substance. Prior to jury selection, the state moved to dismiss, as a separate offense, the simple delivery. However, the state informed the court that in the event the evidence failed to prove the enhanced-location element, it would seek an instruction on the lesser-included charge. The trial court granted the state's motion. At some point during the trial, the state became aware that its key witness was wavering as to where the delivery took place. The state then moved to amend the indictment to reinstate the lesser charge. The trial court denied the motion, but indicated that it would later decide whether the jury could be instructed on the lesser-included offense. At the close of the state's case, the defendant moved for a directed verdict on the greater offense. The trial court took the matter under advisement. Following a recess, the state moved again to amend the indictment. The defendant objected on the ground that the state had already chosen to dismiss the lesser charge. The trial court found that while the evidence was insufficient to prove that the delivery occurred within

1,000 feet of public housing, the state had made a *prima facie* case of simple delivery. The defendant was convicted of the lesser charge.

The Illinois Court of Appeals affirmed Knaff's convictions. The Illinois Supreme Court granted review of the decision and also affirmed. After considering the purposes behind the Double Jeopardy Clause, the court held that the rules that had been effectuated to achieve those purposes "should not be applied mechanically when the interests they protect are not endangered and when their mechanical application would frustrate society's interest in enforcing its criminal laws." *Id.* at 468-69, 752 N.E.2d at 1128 (citing *People v. Deems*, 81 Ill.2d 384, 410 N.E.2d 8 (1980), *cert. denied*, 450 U.S. 925 (1981)). Relying on the Supreme Court's holding in *Lee v. United States*, 432 U.S. 23, 30 (1977), the Illinois court held that the "critical question" in this case was whether the trial court's ruling, dismissing the greater offense, "contemplated an end to all prosecution of the defendant for the offense charged." *Knaff*, 196 Ill.2d at 469, 752 N.E.2d at 1129. Answering that question in the negative, the court held:

> Assuming for the sake of argument that the defendant is correct in his assertion that the trial court's finding with respect to the insufficiency of the evidence amounted to an acquittal in this case of the greater charge, *it does not follow that the defendant was thereby acquitted of the lesser charges*. In fact, the exact opposite was intended by the trial court's ruling. Here, the trial court found that the State had made out a *prima facie* case with respect to the lesser charges.

Id. at 470, 752 N.E.2d at 1129 (emphasis added).

The Illinois Supreme Court recognized that the situation in Knaff's trial was no different from that where the trial court must instruct on lesser-included offenses, even when no request is made by the defendant. The court reasoned that "it would be illogical not to allow a trial judge presiding over a jury trial to ultimately submit a lesser-included offense to the jury under the present circumstances." *Id.* at 473, 752 N.E.2d at 1131. The court also compared Knaff's situation to one where an appellate court, on review, concludes that the proof is insufficient to sustain conviction on the greater offense, but reduces the conviction to a lesser-included offense. The court further held that it was unnecessary for the state to amend the indictment, because the lesser-included offense is implicitly charged with the greater offense. Finally, the court emphasized that the Double Jeopardy Clause was not violated

because both charges were prosecuted in a single prosecution. We agree with this conclusion.

The Double Jeopardy Clause is primarily directed at the threat of multiple prosecutions. *See Martin Linen Supply Co.*, 430 U.S. 564 (citing *United States v. Wilson*, 420 U.S. 332 (1975)). Thus, the controlling constitutional principle focuses on the prohibition against multiple trials. *Id.* The reasoning behind this controlling principle has been consistently stated by the Court:

> At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression. The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." "[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws."

Id. at 569 (footnote omitted) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957); *United States v. Jorn*, 400 U.S. 470, 479 (1971) (Harlan, J.)). Stated another way, "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks*, 437 U.S. at 11 (footnote omitted).

Based on the foregoing holdings, we conclude that the Double Jeopardy Clause is not offended in situations where the trial court concludes that there is insufficient proof of the greater offense charged, but finds that the prosecution has made a *prima facie* case on a lesser-included offense. Such a ruling, though technically an "acquittal" of the greater offense, does not implicate the Double Jeopardy Clause and its protections. Continuing a defendant's trial on a lesser-included offense under these circumstances is not the sort of governmental oppression that was meant to be curtailed by our constitutions. This situation is no different from the analysis that the jury must undertake any time lesser-included offenses are submitted. Before it may consider any lesser-included offense, the jury must first determine that the proof is insufficient to convict on the

greater offense. Thus, the jury must, in essence, acquit the defendant of the greater offense before considering his or her guilt on the lesser-included offense. The fact that the trial court made the initial determination in this case does not offend the Double Jeopardy Clause any more than if the jury had made it.

Moreover, we agree with the Illinois Supreme Court that charging the greater offense in the indictment or information necessarily charges any lesser-included offenses. The state is not required to charge in an information all possible lesser-included offenses before those offenses may be submitted to the jury. Once the greater charge has been filed, the lesser-included charges are implicitly filed. Indeed, the Official Commentary to section 5-1-110(b) provides: "Its primary purpose is to authorize conviction of offenses not expressly named in the indictment or information[.]" (Citation omitted.) Thus, it was not necessary for the prosecution to amend the information in this case. The trial court is required to instruct on lesser-included offenses, whether charged or not, where there is a rational basis for acquitting on the greater offense and convicting on the lesser. *See* section 5-1-110(c); *Ellis v. State*, 345 Ark. 415, 47 S.W.3d 259 (2001); *Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001).

Here, Appellant was charged with the offense of manufacture of methamphetamine, Class Y felony. That offense includes the lesser charge of attempted manufacture of methamphetamine, Class A felony. *See* section 5-1-110(b)(2). When the trial court granted a directed verdict on the manufacture charge, it was only an acquittal of that charge, based on the trial court's belief that the prosecution had not sufficiently demonstrated that the offense had been completed. From the trial court's view, the prosecution's case had failed only to the extent that it had not demonstrated a completed crime. Thus, the trial court's ruling did not contemplate an end to all prosecution for the offense charged. Accordingly, under the facts of this case, Appellant was not twice put in jeopardy for the same offense. We thus affirm the judgment of conviction.

As a final point, we must address the State's assertion that the case relied on by the court of appeals, *Hanner v. State*, 41 Ark. App. 8, 847 S.W.2d 43 (1993), is no longer valid precedent. In *Hanner*, the defendant was charged with two counts of rape. The trial court granted a directed verdict on one of the rape counts, but allowed the state to amend its information to charge the defendant

with first-degree sexual abuse. The trial court allowed the amendment despite its ruling that first-degree sexual abuse is not a lesser-included offense of rape.[3] The court of appeals reversed on the ground that, in order to prove the amended offense of first-degree sexual abuse, the state would be relying on the same conduct for which the defendant had already been prosecuted on the counts of rape. In so holding, the court of appeals relied on the case of *Grady v. Corbin*, 495 U.S. 508 (1990), and this court's interpretation of *Grady* in *State v. Thornton*, 306 Ark. 402, 815 S.W.2d 386 (1991). *Grady* was subsequently overruled by the Supreme Court in *United States v. Dixon*, 509 U.S. 688 (1993). *Dixon* abandoned the "same conduct" test established in *Grady* and retreated to the "same elements" test established in *Blockburger*, 284 U.S. 299. Thus, to the extent that Hanner relied on the "same conduct" test for determining whether double jeopardy had been violated, it has been overruled.

Circuit court affirmed; court of appeals reversed.

Leslie PRICE *v.* STATE of Arkansas

CR 01-703 66 S.W.3d 653

Supreme Court of Arkansas
Opinion delivered February 21, 2002
[Petition for rehearing denied March 21, 2002.]

[3] Depending on the particular subsection alleged for first-degree sexual abuse, as provided in Ark. Code Ann. § 5-14-108 (Repl. 1997), it may or may not be a lesser-included offense of rape. *See Weber v. State*, 326 Ark. 564, 933 S.W.2d 370 (1996).

Etoch & Halbert Law Firm, by: *Louis A. Etoch*, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Leslie Price appeals his judgment of conviction for second-degree murder and felon in possession of a firearm (felon-firearm). He was sentenced to thirty years on the former offense and twenty-five years on the latter, with the two sentences to run concurrently. He raises two points on appeal: (1) the circuit court erred in not directing a verdict in his favor on the second-degree murder charge due to insufficient evidence; and (2) the circuit court erred in not granting his motion for a new trial, because of his trial counsel's conflict of interest and ineffective assistance of counsel. We affirm the judgment of conviction.

On the evening of October 22, 1999, Price, age 43, was working at the Onyx Club in Hot Springs. The club was owned and operated by Price's wife and his mother-in-law. Price was regarded as the manager of the club. His job was to control the crowd both at the door and inside the club. Patrons of the club were required to be twenty-five years of age, and part of Price's job was to ensure that people entering the club were old enough.

On the evening in question, a large crowd of about eighty people was present in the club. Price was working at the door, checking the patrons for identification, and making sure that all guests signed the guest book as they entered. Fred Sykes, the victim in this case, arrived at the club at about midnight with his mother, Margie Walker, and his girlfriend of six months, Julia Sellers. Sellers' mother, Janice Clark, was also present at the club. Sellers was pregnant with Sykes's child, and the group was celebrating this news. Before coming to the club, Sykes had been drinking gin and cranberry juice.

What happened next was disputed at trial. According to Sellers, when Sykes, Walker, and she arrived at the club, she remained outside for some time talking to friends. She testified that Sykes and one of his friends entered the club despite the fact that Sykes was too young. She also testified that eventually she entered the club as well. Several minutes later, she saw Price forcing Sykes to leave the club. She testified that this was when the altercation began that led to Sykes's being shot.

According to Sellers, after Price asked Sykes to leave, Sykes and she left the club. While they were standing on the sidewalk in front of the club, Margie Walker came out of the club. She tripped on a curb and was lying down with one leg in the street when Sellers walked over to help her up. At this point, according to Sellers, Price came out of the club with a gun in his hand and walked rapidly toward Sykes. Seeing this, Sellers and her mother approached the two men, and Sellers stepped between them. The next thing that happened, according to Sellers, was Price grabbed Sykes by his jacket collar and pointed the gun at his face as the two men stared at each other. According to Sellers, "[H]e stared at [Sykes] and then he looked him straight in the face and then he just shot him."

Price testified to a different chain of events, beginning at the time when Sykes arrived at the club. According to Price, when Sykes arrived, he remained outside and asked Price to go inside and find his mother. Price testified that this encounter was relatively friendly and that he was about to do as Sykes asked, but before he got a chance to find Walker, she appeared in the doorway. Price testified that at some point later, Sykes got into the club unbeknownst to Price, who was not supposed to have let him enter because he was not old enough. According to Price, Sykes then left the club.

Price testified that a short while later, Sykes approached him at the front door and asked if he could go inside and get Sellers. Earlier, Price had told him that he did not think Sellers was inside, but at that moment, she appeared at the door. Sykes and Sellers then had an argument, and Price testified that Sykes slapped her "clean out the door." According to Price's testimony, Sykes approached him just inside the club and confronted him angrily about Price's earlier statement that Sellers was not inside. Price ignored him and lit a cigarette, which Sykes slapped out of his mouth. At this point, Margie Walker came and took him outside onto the sidewalk.

Once Sykes was outside, according to Price, there was a disturbance in the area immediately in front of the club. Price could hear the commotion, and someone told him that Margie Walker was lying on her back on the sidewalk. He went outside to investigate. Before he got out of the club's front door, one of Price's friends handed him a gun. Price testified that he took the gun because he did not know what he would be facing once outside.

When he got outside, Price testified that he saw Walker lying on the ground, and Sellers and her mother were trying to help her to her feet. Sykes was acting erratically and approached Price, apparently still angry that Price had told him that Sellers was not inside the club. Price asked Sykes what had happened to Walker, and Sykes began cursing and screaming at Price. According to Price, Sykes took off his jacket and was grabbing for Price's shirt. Price then grabbed Sykes's left arm. Price felt something hit his finger, and he raised the gun. The gun fired accidentally, and the recoil knocked the gun out of his hand. The bullet hit Sykes. Price testified that he never intended to kill Sykes, and that the shooting was a result of his bad judgment.

The facts surrounding the immediate aftermath of the shooting are not as sharply contested as those leading up to the shooting. After Sykes was shot, Sellers, her mother, and Margie Walker assisted him down the street, as Sykes apparently could walk a short distance. The four of them spotted a Hot Springs police patrol cruiser that had pulled a car over. They approached the policeman, who called an ambulance. Sykes was taken by ambulance to National Park Hospital, where he died from the gunshot wound.

Dr. Frank Peretti was the medical examiner in this case and testified that the bullet entered Sykes's left cheek, exited on the left side of the neck, and then reentered Sykes's body through his left shoulder. The bullet passed through Sykes's left lung and eventually lodged in the soft tissues near his spine. The cause of death was the gunshot wound to the head and chest. It was later determined that Price had broken two bones in his hand, and his hand was placed in a cast. Price was taken to the Hot Springs police station, where he gave a statement. The gun with which Sykes was shot was never found.

On December 6, 1999, Price was charged with second-degree murder and felon-firearm. He was also charged as a habitual offender. Price hired Steve Oliver as his defense attorney. In the year 2000, Oliver ran for prosecuting attorney for the judicial circuit that is composed solely of Garland County, which includes Hot Springs. Oliver ran a contested race in both the primary election in May 2000 and the general election in November 2000. The general election was held on November 7, 2000. He won both races and was sworn in as prosecuting attorney on January 1, 2001.

Oliver filed several pretrial motions on Price's behalf and obtained several continuances of the trial. On September 11, 2000,

he filed a motion for a severance of Price's two charged offenses. On September 18, 2000, he filed a motion for continuance. The trial was set to begin the next day, September 19, 2000, and the circuit court held a hearing on the motion. At the motion hearing, Oliver and the deputy prosecuting attorney, Dan Turner, explained to the judge that the state had agreed not to oppose the motion for continuance in return for Oliver's withdrawing the motion to sever. The court agreed and granted the continuance, and the motion to sever was withdrawn.

From November 20 through the 22, 2000, the two charges against Price were tried before a jury. At the trial, the prosecutor presented the testimony of multiple witnesses, including Julia Sellers. The defense presented the testimony of several witnesses including Price's mother and Price himself. The jury was instructed on the two charges and returned a guilty verdict.

During the sentencing phase of the trial, the prosecutor introduced proof of three of Price's four prior convictions: a 1979 conviction for battery and two convictions for felon-firearm, one in 1983 and one in 1989. The fourth offense was admitted during the guilt phase of the trial. Price was sentenced to thirty years on second-degree murder and twenty-five years on felon-firearm, with the sentences to run concurrently.

After Price was convicted and sentenced, Oliver immediately withdrew as counsel in the case. Price hired a new attorney, Louis Etoch. Etoch timely filed a motion for a new trial based on Oliver's alleged conflict of interest and ineffective assistance of counsel at trial. At the ensuing motion hearing, Oliver testified that he spent a great deal of time and money campaigning for the position of prosecutor and that he ran on a platform of aggressive prosecution. He testified that when he made the decision to file as a candidate for the office, he informed Price of his decision. Oliver also testified that he continued to represent Price, but that Price did not seek independent counsel to advise him on any possible conflict of interest. Oliver further testified that if he had persisted in the motion to sever the charges of second-degree murder and the felon-firearm charge, the motion would have been granted. The circuit court denied the motion for a new trial.

I. Sufficiency of the Evidence

Price's first argument on appeal is that the evidence of his mental state was insufficient to support a conviction for second-degree murder. We disagree.

We address the issue of sufficiency of the evidence first because of the double-jeopardy implications. *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001); *Cox v. State*, 345 Ark. 391, 47 S.W.3d 244 (2001). 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); *Johnson v. State*, 326 Ark. 3, 929 S.W.2d 707 (1996); *Penn v. State*, 319 Ark. 739, 894 S.W.2d 597 (1995). This court has repeatedly held that in reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Williams v. State*, 346 Ark. 304, 57 S.W.3d 706 (2001); *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); *Willett v. State*, 335 Ark. 427, 983 S.W.2d 409 (1998). Substantial evidence is that evidence 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. *Haynes v. State, supra*; *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). In determining the sufficiency of the evidence, this court will not second-guess credibility determinations made by the factfinder. *Hale v. State*, 343 Ark. 62, 31 S.W.3d 850 (2000); *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000); *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996).

A criminal defendant's intent or state of mind is rarely capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Green v. State*, 330 Ark. 458, 956 S.W.2d 849 (1997). 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. *Whitfield v. State*, 346 Ark. 43, 56 S.W.3d 357 (2001); *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000); *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999). Because of the obvious difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his acts. *Leaks v. State*, 345 Ark. 182, 45 S.W.3d 363 (2001); *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000).

The offense of second-degree murder is defined as follows:

> (a) A person commits murder in the second degree if:
>
> (1) he knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life[.]

Ark. Code Ann. § 5-10-103(a)(1) (Repl. 1997). The culpable mental state of acting "knowingly" is defined in the Criminal Code:

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

Ark. Code Ann. § 5-2-202(2) (Repl. 1997).

With regard to whether Price acted knowingly, the State bottoms its argument that he did so on the jury's credibility determination regarding the different versions of events presented at trial. At trial, Julia Sellers testified that the altercation leading to Sykes's death began when Price came out of the club, gun in hand, and walked very rapidly and angrily toward Sykes. She stated that Price then grabbed Sykes's shirt, pointed the gun to his head, stared at him for a few seconds, and then fired the gun. This testimony is sufficient circumstantial evidence of Price's mental state to uphold his conviction. The jury was free to believe or disbelieve Sellers's testimony, and it chose to believe it. *See Chapman v. State*, 343 Ark. 643, 38 S.W.3d 305 (2001); *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998) (noting that this court does not weigh the credibility of witnesses). Sellers and Price, of course, gave different versions of what happened. Under our standard of review, however, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Williams v. State*, *supra*.

With regard to whether Price acted under circumstances manifesting an extreme indifference to human life, this court has held that the mere act of pointing a loaded gun at another person in the course of a robbery is a manifestation of extreme indifference to the value of human life. *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996). In *Isbell*, we stated that this act of pointing the weapon was sufficient to constitute the requisite circumstances regardless of

whether there was an actual intent to shoot. *Isbell*, 326 Ark. at 26, 931 S.W.2d at 80. In the instant case, Price pointed a loaded gun at the victim's head during an argument. That act alone decides the issue of whether Price acted with extreme indifference to the value of human life. We affirm the circuit court on this point.

II. New Trial Motion

Price's second point is that the circuit court erred in refusing to grant him a new trial. Price raises five grounds in support of his contention: (1) Oliver's representation of Price was compromised by a conflict of interest; (2) Oliver was ineffective in withdrawing the motion to sever the second-degree murder charge from the felon-firearm charge; (3) Oliver was ineffective in allowing Price to testify at trial; (4) the racial composition of the *venire* was a denial of Price's due process rights; and (5) Oliver was ineffective in failing to pursue the racial-composition issue before *voir dire* commenced.

a. Conflict of Interest

Price urges that Oliver's election to the office of Garland County prosecuting attorney on November 7, 2000, created a material conflict of interest during Price's trial, which began on November 20, 2000. He points to several specific incidents which, he asserts, illustrate that conflict. First, Oliver told the jury panel about his recent election during *voir dire*. As a result, Price argues, Oliver lost credibility with the jury as a defense attorney, because Oliver ran his campaign for prosecutor on a law-and-order platform of aggressive prosecution. Oliver also tried the case against a deputy prosecuting attorney, Dan Turner, who was to become his employee in less than two months. Finally, Price contends that Oliver was on a tight schedule to wind down his practice by January 1, 2000, when he would take office as prosecutor. For this reason, Price claims that Oliver did not pursue his September 11, 2000 motion to sever the offenses but instead bargained with the deputy prosecutor to withdraw the motion if the deputy prosecutor agreed not to oppose Oliver's motion for a continuance. In essence, Price contends that Oliver's representation was materially compromised by his political campaign and by his status at trial of prosecutor-elect.

The State responds that Price waived any conflict of interest that Oliver may have had when he continued to allow Oliver to represent him after learning of Oliver's decision to seek the office

and his subsequent election. Price replies that if there was any waiver, it was not intelligently made. He notes that Oliver did not explain the conflict to him as such, but rather told him that he was planning to seek the office of prosecuting attorney. Also, Price notes that he received no outside legal advice on the conflict. He adds that he had no way of knowing the niceties of the adversarial process and any breakdown of that process that might occur due to Oliver's recent election victory.

Prejudice will be presumed from a counsel's conflict of interest only when the defendant demonstrates that counsel actively represented conflicting interests. *Cuyler v. Sullivan,* 446 U.S. 335 (1980); *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995). In *Cuyler,* the United States Supreme Court set forth the applicable standard for assessing whether a conflict of interest gives rise to presumptive prejudice:

> [A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. But until a defendant shows that his counsel *actively represented conflicting interests*, he has not established the constitutional predicate for his claim of ineffective assistance.

Cuyler, 446 U.S. at 348-50 (citing *Holloway v. Arkansas,* 435 U.S. 475 (1978); *Glasser v. U.S.,* 315 U.S. 60 (1942)) (emphasis added). The adverse effect on counsel's performance must be real and have a demonstrable detrimental effect, and not merely have some abstract or theoretical effect. *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997); *Johnson v. State, supra*; *Simmons v. Lockhart*, 915 F.2d 372 (8th Cir. 1990). A defendant is not entitled to relief under the *Cuyler* test unless he satisfies both the conflict and deficient performance prongs of the test. *Johnson v. State, supra*; *Salam v. Lockhart,* 874 F.2d 525 (8th Cir. 1989) (citing *Lightborne v. Dugger,* 829 F.2d 1012 (11th Cir. 1987)). The defendant bears the burden of proving a conflict of interest on the part of his counsel as well as deficient performance. *Johnson v. State, supra*; *Dumond v. State,* 294 Ark. 379, 743 S.W.2d 779 (1988).

To demonstrate a conflict of interest, Price points to (1) Oliver's lack of credibility with the jury due to his election as prosecutor, (2) his decision not to pursue the motion to sever the two charges, and (3) the fact that he would soon be the deputy prosecutor's boss. We disagree that these facts rise to the level of sufficient proof of a material conflict of interest under *Cuyler v. Sullivan, supra.* But, more importantly, Price was aware of Oliver's status as a

political candidate and prosecutor-elect throughout his representation, but never complained of those circumstances.

It is clear under our caselaw that a criminal defendant is able to waive his attorney's conflict of interest. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001) (conflict waived when circuit court elicited express waiver on the record in open court); *Myers v. State*, 333 Ark. 706, 972 S.W.2d 227 (1998) (conflict waived when appellant was informed of the conflict and voluntarily proceeded with his retained counsel). However, we have said that any waiver of the Sixth Amendment right to counsel must be made knowingly, intentionally, and voluntarily. *Murray v. State*, 280 Ark. 531, 659 S.W.2d 944 (1983).

In *Murray v. State*, *supra*, the circuit court held that a valid waiver had taken place in the context of joint representation of a husband and wife. This court recited the pertinent facts:

> Appellant's trial attorney . . . had represented appellant and his wife in other criminal and civil matters for a period of four years. No conflict had surfaced during that time. Appellant and his wife both retained the attorney and both paid him out of a joint bank account. The attorney and appellant appeared at a hearing on December 17, 1980, and appellant mentioned no possible conflict. They conferred at other times and there was no mention of a conflict.
>
> . . . .
>
> During the trial there was neither objection, nor claim, nor notice to the court of any potential conflict. The alleged conflict was not mentioned until the post-conviction proceeding was commenced on December 20, 1982, over 17 months after the trial.

Murray, 280 Ark. at 531, 533, 659 S.W.2d at 945. We went on to hold that Murray "knew of the alleged conflict, intentionally did not disclose it and voluntarily proceeded with his retained counsel. 'Appellant cannot now, after knowingly completing the trial with such counsel, urge that he was prejudiced.' " *Id.* at 534, 659 S.W.2d at 946 (quoting *United States v. James*, 505 F.2d 898 (5th Cir. 1975)).

It is clear to this court that Price was well aware of Oliver's status both before and after the election. Oliver testified at the new-trial hearing that he had visited with Price about being prosecutor-elect, and Price had no objection to his representation.

Indeed, they agreed that having a prosecutor-elect as defense counsel could well be a selling point before the jury. And, of course, Price was present when Oliver told the jury panel that he was prosecutor-elect during *voir dire*. Still, Price voiced no objection. We hold that an actual conflict of interest was not shown by Price, but even if it had been, that he waived it.

b. Ineffective assistance of counsel

We turn next to Price's assertion that Oliver was ineffective as his counsel. In conducting our analysis of ineffective counsel, we turn to *Strickland v. Washington*, 466 U.S. 668 (1984), which sets forth the appropriate standard:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show 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 defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687; *see also Hill v. State*, 347 Ark. 441, 65 S.W.3d 408 (2002); *Williams v. State*, 347 Ark. 371, 64 S.W.3d 709 (2002); *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000). Thus, a defendant must first show that counsel's performance fell below an objective standard of reasonableness and then that counsel's errors actually had an adverse effect on the defense. *Sanford v. State*, *supra*; *Peebles v. State*, 331 Ark. 188, 958 S.W.2d 533 (1998).

In our review, this court indulges in a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Peebles v. State*, *supra*; *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 499 (1992). The defendant claiming ineffective counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Wainwright v. State*, *supra*. The petitioner must show that there is a reasonable

probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt and that the decision reached would have been different absent the errors. *Thomas v. State*, 322 Ark. 670, 911 S.W.2d 259 (1995). We have held that the issue of ineffective counsel may be raised on direct appeal, when it has been raised in a motion for a new trial. *Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993).

The principle that a defendant should start a criminal trial with a clean slate and not with the black mark of a felony conviction is one that has been often stated by this court. *See, e.g.*, *Elliot v. State*, 335 Ark. 387, 984 S.W.2d 362 (1998); *Sutton v. State*, 311 Ark. 435, 844 S.W.2d 350 (1993). In *Elliot*, the prosecutor had referred to a prior conviction in opening statement, and we said: "Thus, from the commencement of the State's case, the State labeled Elliot a habitual criminal, thereby removing one of the constitutional benefits afforded all defendants in a criminal case — a right to a fair and impartial jury." *Elliot*, 335 Ark. at 392, 984 S.W.2d at 365. We reversed the conviction. In *Sutton*, we held that the defendant was entitled to a new trial due to the failure of the circuit court to sever a felon-firearm charge from first degree murder. We said in those circumstances: "Where a felon/firearm charge is tried with a second felony, the jury is confronted at the opening of the trial with the stark and highly significant fact that the defendant is a convicted felon." *Sutton*, 311 Ark. at 440, 844 S.W.2d at 353.

In the case before us, Price contends that prejudice accrued in his trial and that Oliver was ineffective in not pursuing the motion to sever. Oliver conceded at the hearing on the new-trial motion that if he had pursued the motion for severance, it would have been granted. However, he also testified that the reason why he did not pursue the motion was because he discussed the matter with Price "several times," and they agreed to try the two cases together and "go for it." Moreover, Oliver stated that they weighed the fact that if the cases were severed, the felon-firearm charge would have been tried first and Price would have been convicted. This meant that the jury would have learned of this new conviction during the sentencing phase of the second-degree murder trial, and if Price took the stand during the guilt phase, at that time also by way of impeachment. The new conviction would also have been added to his prior convictions for enhancement purposes. Thus, it was Oliver's contention that these factors counterbalanced the prejudice arising from a joint trial of the two charges.

While the fact that Oliver did agree with the prosecutor to withdraw his motion to sever in exchange for the prosecutor's agreement not to oppose his motion to continue the trial raises suspicions in Price's eyes, we do not agree that it automatically amounts to ineffective counsel. We said in *Sutton v. State*, *supra*, that we were disinclined to conclude that a joint trial of a felon-firearm charge with a second charge constituted prejudice in all instances. 311 Ark. at 441, 844 S.W.2d at 354. And as Oliver points out, had the severance been successful, this could have caused additional problems under the scenario described above. Oliver testified that he discussed the pros and cons of severance with Price and that they agreed to gamble on one trial. This falls within the category of a tactical decision, and we do not reverse on grounds of ineffective counsel when the decision was based on strategy. *Williams v. State*, 347 Ark. 371, 64 S.W.3d 709 (2002); *Dunham v. State*, 315 Ark. 580, 868 S.W.2d 496 (1994).

Price, of course, maintains that he would not have taken the stand at the second-degree murder trial but rather would have relied on his statement to police officers to tell his story. Thus, he claims that he would not have been impeached by the new felon-firearm conviction. This directly contradicts Oliver's testimony, however, and we question whether Price would, indeed, have foregone testifying when his defense was accidental homicide.

We affirm the circuit court on this point.

c. Price as a witness

Price's third point regarding ineffectiveness focuses on his taking the stand during his case-in-chief. Price asserts that Oliver advised him to take the stand, and that this constituted deficient performance under *Strickland* which led to prejudice.

We have held that a criminal defendant has the right to choose whether to testify in his own behalf. *Dansby v. State*, 347 Ark. 674, 66 S.W.3d 585 (2002); *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988). Counsel may only advise the defendant in making the decision. *Watson v. State*, 282 Ark. 246, 667 S.W.2d 953 (1984). Hence, the decision to testify is purely one of strategy. *Dansby v. State*, *supra*; *Isom v. State*, 284 Ark. 426, 682 S.W.2d 755 (1985).

Oliver's representation could not be deficient when Price's decision to testify was ultimately his own. We affirm on this point as well.

III. Racial Composition of the Panel

Price next contends that the racial composition of the *venire* violated his right to due process. His argument is really in two parts. First, he challenges the *venire* directly, and, next, he argues that Oliver was ineffective in not raising the issue before *voir dire*.

Selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial. *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996); *Davis v. State*, 325 Ark. 194, 925 S.W.2d 402 (1996). It is axiomatic that the prosecutor may not deliberately or systematically deny to members of a defendant's race the right to participate, as jurors, in the administration of justice. *Davis v. State, supra*; *Sanders v. State*, 300 Ark. 25, 776 S.W.2d 334 (1989). In order to establish a *prima facie* case of deliberate or systematic exclusion, a defendant must prove that: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in *venires* from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Duren v. Missouri*, 439 U.S. 357 (1979). In *Davis v. State, supra*, however, we said: "We have noted in particular where proof of a systematic exclusion of the distinctive group is completely lacking, there is no basis for a motion to quash the jury panel." 325 Ark. at 196, 925 S.W.2d at 404. The same holds true in the instant case. Price submitted no statistical evidence in support of his motion that systematic exclusion occurred. We affirm the circuit court's ruling denying Price's motion to quash.

At his hearing on his motion for a new trial, Price, with his new counsel, also offered no statistical evidence regarding the racial composition of any body relevant to the *venire* such as the Garland County population, registered voters in Garland county, or the *venire* itself. Nor did he allege how the argued systemic exclusion had taken place. But, in addition, as the State points out, at the posttrial hearing, Price failed to obtain a ruling from the circuit court on the issue that Oliver was ineffective in raising the question of racial composition of the *venire* after *voir dire* rather than before.

Regardless of the timing of Oliver's motion to quash, the motion still would have been denied. This court has said:

> Under Ark. Code Ann. § 16-32-103 (Repl. 1994), the jury *venire* is chosen at random by computer selection from voter registration lists. This court has frequently upheld this process and has stated that it guarantees that there can be no purposeful exclusion of African-Americans. *See, e.g., Lee v. State,* 327 Ark. 692, 942 S.W.2d 231 (1997). We have also noted that "[w]hile it is clear that juror selection may not be the result of discrimination against groups defined by race, color, creed, or sex, the Supreme Court has made it equally clear that this does not mean that each jury must have on it persons representative of each distinctive group in the population from which it is chosen." *Mitchell v. State,* 299 Ark. 566, 568, 776 S.W.2d 332, 333 (1989).

MacKintrush v. State, 334 Ark. 390, 405, 978 S.W.2d 293, 300 (1998). Given the multiple decisions from this court upholding the method by which a *venire* is randomly selected, we cannot say that prejudice accrued to Price on this ground, absent some evidence of systematic exclusion. Neither Oliver nor Price's new attorney, Louis Etoch, presented any proof in this regard. Accordingly, Oliver's performance was not deficient in this regard. The circuit court did not err in denying Price a new trial on this ground.

Affirmed.

Kenneth D. WILLIAMS *v.* STATE of Arkansas

CR 01-364 67 S.W.3d 548

Supreme Court of Arkansas
Opinion delivered February 21, 2002
[Petition for rehearing denied March 21, 2002.]

[redacted]

[redacted]

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

Mark Pryor, Att'y Gen., by: *Michael C. Angel* and *Jeffrey A. Webber*, Ass't Att'ys Gen., for appellee.

JIM HANNAH, Justice. Kenneth D. Williams was convicted of capital-felony murder and theft of property. He was sentenced to death on the capital-murder conviction and to forty years

on the theft conviction under habitual-offender enhancement. While the elements of capital-felony murder may be met by sufficient proof of any of the listed felonies in the statute, the jury found by separate unanimous verdicts that the State had proven both the underlying felony of first-degree escape and the underlying felony of aggravated robbery.

We take jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(a)(2). On appeal, Williams raises twelve points for reversal. We determine additional points merit discussion, and that Williams correctly asserts that the issue of escape in the first degree as an underlying felony in capital murder was submitted to the jury in error. However, we hold the capital-murder conviction and sentence of death may be affirmed on the underlying felony of aggravated robbery, and that the remaining points lack merit. Williams's other convictions and sentence are affirmed.

Facts

This case involves an escape from the Cummins unit of the Arkansas Department of Correction and a number of crimes, including the murder of Cecil Boren near the prison and the death of Michael Greenwood in Missouri. On September 15, 1999, Williams arrived at the Cummins unit of the Arkansas Department of Correction. Earlier this same day he was sentenced to life without parole on convictions of capital murder, attempted capital murder, kidnapping, aggravated robbery, theft, and arson in Jefferson County. These convictions arose from events that occurred on December 13, 1998.

Earlier on August 26, 1999, Williams had been convicted of aggravated robbery, theft, kidnapping, and arson in Jefferson County. These convictions arose from events that occurred on December 5, 1998.

Williams's convictions and sentences arising from the December 5, 1998, crimes were affirmed by the court of appeals on November 29, 2000. His convictions and sentences arising from the crimes of December 13, 1998, were affirmed by this court on February 2, 2001.

On October 3, 1999, Cummins's Warden Warren Dale Reed received a call about 7:15 p.m. from his chief of security, Captain Donald Tate, telling him that Williams was missing. Major Wendell

Taylor, the unit's tracker, began a "drag around the compound" using dogs to try to pick up Williams's scent. This attempt was unsuccessful because too much time had passed since Williams's escape that morning. Emergency notifications were commenced.

The Department of Correction determined that Williams was released from his barracks that morning at 7:27 on a "religious call." It was determined that this allowed Williams to get into the area where the slop tanks for the kitchen are kept. These are devices that are used to hold, cook, and transport slop to hogs outside the prison. The slop tanks are 500-gallon tanks that are large enough for a man to fit into. The primary tank had a grating welded over the top opening. However, the alternate slop tank was in use due to a flat tire on the primary tank trailer. The secondary tank had no grate over the opening. The Department of Correction determined Williams got down inside this tank and was carried outside the prison confines when the tank was taken from the prison by the Department of Correction. Once outside the prison confines, Williams jumped from the tank in transit and hid in a ditch. He hid there for some time because local farmer Jimmy Dreher testified that that morning at about 9:42 he saw a man running across Highway 65 away from the prison. From the tracks the Department of Correction found, it appears Williams headed toward Highway 65, which took him in the direction of Cecil and Genie Boren's home. Williams's prison shirt showing his name and prison number was found a few months later hanging on a tree limb about a mile from the Boren home, substantiating his path.

Williams made it to the Boren home sometime in the morning. Earlier that morning, Genie Boren had gone to church leaving her husband Cecil Boren at home working in the yard. When she returned sometime after noon, she found he was no longer there. She called Kay McLemore, who lived about a mile from the Borens. Genie was frantic because her husband was not home, and their house had been ransacked. Kay drove over. They determined all the firearms were gone, except a muzzle loader. Kay went outside and began to look for Cecil and call for him. She found Cecil near a bayou not far from the house. He was lying face down without shoes or socks. He was dead. He had been shot seven times. Scrape marks on his body were later determined to show that his body had been dragged to that location, and that he had been shot closer to the home. A pool of blood was found closer to the home. The investigation at the Boren home revealed that Cecil Boren's wallet was missing, that other valuables from the home

were missing, that some clothing had been taken, and that a number of firearms as well as Cecil Boren's truck were missing.

Eddie Gatewood was a friend of Williams, and testified that on October 3, 1999, Williams showed up at his house asking for a map. He was driving the truck that was identified as Cecil Boren's. Gatewood testified that Williams told him he had done something to someone to get the truck. Gatewood further testified that prior to this date, he had visited Williams at prison, and Williams had told him he had to get out because he could not spend his life in prison. He also testified that Williams asked him during that visit to get him some clothes, a dress, and a wig, and leave them out on the highway close to the prison.

The next day, on October 4, 1999, Cecil Boren's truck was spotted in Lebanon, Missouri, by police officer Dennis Mathis. Officer Mathis attempted to pull over the truck being driven by Williams. Initially, Williams pulled over, but he then drove off. A high-speed chase commenced involving multiple police units covering approximately sixty miles. Speeds ranged as high as 120 miles per hour. Williams was only stopped when he struck a water truck that was turning left in front of him. Williams struck the truck in the cab. The driver, Michael Greenwood, was ejected and killed. Williams's truck was disabled by the collision. He then fled on foot before he was apprehended.

More than 114 personal items belonging to Cecil and Genie Boren were removed from Cecil's truck, including the firearms stolen from their home. At the time of his arrest, Williams was wearing Cecil's coveralls and two rings belonging to Cecil. He was also wearing clothing belonging to Genie Boren.

The State was unsuccessful in linking the firearms found to the .22 caliber fragments taken from Cecil's body. There was testimony that the fragments likely came from one of six manufacturers, including Ruger, and there was testimony that Cecil had a Ruger .22 caliber semi-automatic pistol that was not found. A clip to a Ruger .22 automatic was found in the truck when Williams was apprehended.

Dr. Frank Peretti, the State's medical examiner, testified that Cecil had suffered seven gunshot wounds. According to Dr. Peretti's testimony, all the wounds were inflicted from some distance, and the cause of death was the gunshot wounds.

Williams asserts that the trial court erred in denying his motion for a directed verdict on first-degree escape. A motion for a directed verdict is a challenge to the sufficiency of the evidence, and the test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001).

The jury found that the elements of first-degree escape were present. This was one of two felonies that the State relied upon in charging and prosecuting Williams for capital-felony murder under Ark. Code Ann. § 5-10-101(a)(1) (Repl. 1997). Williams now argues that the trial court was in error in failing to grant his directed-verdict motion on this issue because the State failed to prove the elements of first-degree escape in that the State failed to prove the threat of, or use of, a deadly weapon in Williams's escape from a correctional facility. As noted, Williams fled the penitentiary by climbing in a hog-slop tank and waiting to be hauled outside where he jumped from the tank. From there he went on foot to the Boren home where he robbed and killed Cecil Boren.

The facts show the murder of Cecil Boren occurred at least five miles from the prison and took place at least three hours after Williams departed the prison in the slop tank. According to the testimony of Warden Reed, prison records showed Williams was present at the 6:00 a.m. count. Again, according to Reed's testimony, Williams left his barracks at a 7:27 a.m. church call. Reed testified that this allowed Williams to get into a kitchen area and get into the slop tank. Reed further testified that the slop tank left the prison at 8:03 a.m., and that foot tracks were later located about 3/4 mile from the prison where the road turned. It was here, Reed concluded, that Williams jumped from the tank. Reed also testified that knee prints were found at the road ditch where Williams came to rest from his jump. Reed further testified that there were additional tracks showing Williams headed off in the direction of Highway 65 and that this was the first area where a person could hide during the day and effect an escape. According to Major Wendell Taylor, the ditch was about four feet deep with grass to either side providing the only cover in the area because the farmland all around had been plowed over after harvesting. Taylor further testified that they found footprints showing Williams had hidden there, and that he had then made his way along this and other ditches. Taylor then testified that a few months after the murder, he and others retraced

Williams's path on horseback. During the course of this, they found Williams's ADC shirt which had his name and ADC number printed on the front. It was found between the prison and the Boren home. Taylor further testified that they reenacted the escape with another man on foot following the path they believed Williams took. Moving as fast as he could, the man made it to the Boren home in an hour and twenty minutes. How long it took Williams to make this journey depended on how long he may have stopped and waited from time to time to be sure he was not seen or for some other purpose.

Kay McLemore testified that she went by to see the Borens that morning on her way home from church between 11:30 a.m. and noon. When she reached a point where she could see the carport and home, she saw that Mr. Boren's truck was gone. Seeing that the truck was gone, Kay went to her own home and then later received the call from Genie Boren telling her Cecil was missing.

Thus, based upon these facts, it appears Williams escaped from the prison at 8:03 a.m., that he hid in the grass and cover near the prison until at least 9:42 a.m., and that he then made his way to the Boren home five miles away. He was not reported missing until that night, so no one was out looking for him. Williams asserts these facts will not support the charge of first-degree escape.

The elements of first-degree escape pertinent to the facts of this case are set out in Ark. Code Ann. § 5-54-110(a)(2) (Repl. 1997):

> (a) A person commits the offense of first-degree escape if:
>
> . . . .
>
> (2) He uses or threatens to use a deadly weapon in escaping from custody, from a correctional facility, from a juvenile detention facility, or from a youth services facility.
>
> (b) First-degree escape is a Class C felony.

The elements of second degree escape pertinent to the facts of this case provide that second-degree escape is committed where a felon escapes from the correctional facility. No use of force is required. Arkansas Code Annotated § 5-54-111 (Repl. 1997) provides in pertinent part:

(a) A person commits the offense of second degree escape if:

(1) He uses or threatens to use physical force in escaping from custody; or

(2) Having been found guilty of a felony, he escapes from custody; or

(3) He escapes from a correctional facility;

. . . .

(b) Second degree escape is a Class D felony.

Thus, first-degree escape requires the threat or use of deadly force in escaping, and second degree merely requires escaping. Where a person is committed to and present in a facility of the Department of Correction, the word "escape" is defined as the unauthorized departure of a person from a correctional facility. Ark. Code Ann. § 5-54-101(3) (Repl. 1997). *See also, Bush v. State*, 338 Ark. 772, 2 S.W.3d 761 (1999); *Wade v. State*, 290 Ark. 16, 716 S.W.2d 194 (1986). Although this statute has been cited, the phrase "unauthorized departure" has not been interpreted. First-degree escape requires the threat of or use of a deadly weapon in escaping custody. No such weapon was used in entering the slop tank and exiting the confines of the prison, but a deadly weapon was used in the robbery and murder of Mr. Boren. The question we must answer is whether the robbery and murder of Mr. Boren may be construed as part of "escaping from custody." As noted, escape is defined simply as an unauthorized departure. Ark. Code Ann. § 5-54-101(3).

We strictly construe criminal statutes and resolve any doubts in favor of the defendant. *Sansevero v. State*, 345 Ark. 307, 45 S.W.3d 840 (2001); *Hagar v. State*, 341 Ark. 633, 19 S.W.3d 16 (2000). "There is no better settled rule in criminal jurisprudence than that criminal statutes must be strictly construed and pursued. The courts cannot, and should not, by construction or intendment, create offenses under statutes which are not in express terms created by the Legislature." *Holford v. State*, 173 Ark. 989, 1000, 294 S.W. 33 (1927). It is also axiomatic that in statutory-interpretation matters, we are first and foremost concerned with ascertaining the intent of the General Assembly. *Sanservro, supra*. In cases of statutory interpretation, we give words their ordinary and usually accepted meaning. *Hagar, supra*; *Bush, supra*.

Although this court has not interpreted the pertinent language of the present statute, the concept has been before this court. The crime of escape is committed when a prisoner under lawful arrest and restraint "goes away from his place of lawful custody before he is released or delivered by due course of law." *Williams v. State*, 259 Ark. 549, 550, 534 S.W.2d 760 (1976); *Cassady v. State*, 247 Ark. 690, 692, 447 S.W.2d 144 (1969). More particularly, with respect to a convict, the crime is committed when the convict leaves the "bounds" within which he is required to remain. *Jenks v. State*, 63 Ark. 312, 314, 39 S.W. 361 (1896).

Our current statute was adopted by Act 280 of 1975; however, the discussion in the earlier cases is helpful. The earlier use of "goes away" or leaving the "bounds" are both consistent with the word "departure" in Ark. Code Ann. § 5-54-101(3). Under this reasoning, Williams escaped custody when he departed the confines of the prison or, in other words, as the slop tank left the gate. At that point, he was criminally liable for the escape. At that point he was no longer within the bounds of his confinement and was no longer under the control of the Department of Correction. We also note that it was three hours later and five miles away that he acquired and used deadly force.

Similar to our statute, the Texas Penal Code defines escape as an "unauthorized departure." Tex. Penal Code Ann. § 38.01(2) (Vernon 2001). In *Lawhorn v. State*, 898 S.W.2d 886, 890 (Tex. Crim. App. 1995), the Court of Criminal Appeals of Texas stated:

> While the State urges that we view escape as a "continuing" offense, the language of the statute precludes such a construction. In the instant context the phrase "departure from custody" denotes the act of leaving a state of detention or restraint by a peace officer and once the act is done the escape is accomplished. The Legislature did not include as an element of the offense of escape the notions of flight thereafter and/or continued evasion of arrest.

Earlier, this same court stated even more specifically that when the criminal defendant moved beyond the bounds of the unit of the department of correction where he was confined, the offense was complete. *Fitzgerald v. State*, 782 S.W.2d 876 (Tex. Crim. App. 1990). Other courts have found likewise. In *People v. Guevara*, 88 Cal. App. 3d 86, 151 Cal. Rptr. 511 (1979), the California Court of Appeals stated that the escape at issue was complete when the criminal defendant departed the limits of the facility he was in with

the intention of escaping. *See also, People v. Johnson*, 62 Mich. App. 240, 233 N.W.2d 246 (1975).

We must conclude that Williams escaped custody when he left the confines of the prison in the slop tank. This means that the element of use or threat of use of a deadly weapon in escaping custody required by first-degree escape is missing. The trial court was in error in submitting the issue of first-degree escape to the jury as a felony underlying capital-felony murder.

Death Penalty and Felony Murder

Williams next argues that if there was insufficient evidence of first-degree escape, his conviction for capital murder must be overturned because this court cannot determine whether the felony capital-murder conviction was based upon the underlying felony of first-degree escape or the underlying felony of aggravated robbery. Williams is mistaken. The verdict forms show the jury found that Williams was guilty of capital murder as well as the underlying felony of aggravated robbery and the underlying felony of first-degree escape. Although we hold there was insufficient evidence of first-degree escape to submit that felony as an element of felony capital murder to the jury, that in no way affects the jury's finding of guilt of the underlying felony of aggravated robbery.

Proof of the felonies was offered to satisfy the elements of capital-felony murder. Under capital-felony murder, the State must first prove the felony, so the felony becomes an element of the murder charge. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). Proof of each felony was presented separately, and each felony may be examined separately.

The jury was instructed that Williams was charged with capital murder, which included the lesser crime of murder in the first degree. The jury was further instructed that they could find him guilty of capital murder, of first-degree murder, or they could acquit him. The jury was then instructed that the charge of capital murder was dependent upon a finding that Williams committed the crime of first-degree escape or that he committed the crime of aggravated robbery, and that in the course and furtherance of the commission or in immediate flights there from each felony he caused the death of a person under circumstances manifesting extreme indifference to the value of human life. The jury was also instructed that the verdicts must be unanimous.

The jury returned a verdict finding Williams guilty of capital murder. In this case, there were separate verdict forms on both underlying felonies showing the jury found the elements of each were met. The jury found the State met its burden of proof on first-degree escape and on aggravated robbery. Although we now find the felony of first-degree escape was submitted to the jury in error, the statute requires but one, and the felony of aggravated robbery found by the jury is sufficient. The crime of aggravated robbery in this case was an element of capital murder. *McClendon v. State*, 295 Ark. 303, 748 S.W.2d 641 (1988). The jury was instructed that for the State to sustain the charge of capital murder, the State had to prove beyond a reasonable doubt that Williams "committed the crime or crimes of aggravated robbery or escape in the first degree." Thus, the jury was instructed that if either felony was proven, the charge of capital murder was sustained. The jury returned verdicts finding both crimes were proven beyond a reasonable doubt. As discussed above, the crime of first-degree escape must be disregarded; however, that in no way affects the verdict on aggravated robbery. The jury was instructed that capital murder was sustained if either felony was proven. Here, the verdict form provides the juries findings. The verdict states, "We the jury find Kenneth Williams guilty of capital murder." It also plainly states, "We the jury find Williams guilty of aggravated robbery." There is no issue of whether aggravated robbery was the basis of the jury's verdict. They were so instructed and so found. That the findings on first-degree escape must be ignored is of no impact. Capital-felony murder only requires one felony. Ark. Code Ann. 5-10-101; *Richie v. State*, 298 Ark. 358, 767 S.W.2d 522 (1989).

Prison Garb

Williams also asserts that he was denied the presumption of innocence when the trial court required him to wear prison garb while being tried in this case. At issue is whether Williams received a fair trial. The presumption of innocence is a fundamental right in the American system "antedating any constitution and an essential element of due process of law." *Williams v. State*, 259 Ark. 667, 672, 535 S.W.2d 842 (1976). This presumption puts in issue the truth and credibility of all of the evidence offered against an accused. *Williams, supra*. In *Clemmons v. State*, 303 Ark. 265, 268, 795 S.W.2d 927 (1990) (citing *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)), this court stated that central to the issue of a fair trial is the principle that "one accused of a crime is entitled to have his guilt or

innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." In this context, the accused is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man. *Miller v. State,* 249 Ark. 3, 457 S.W.2d 848 (1970) (citing 21 AM. JUR. 2d *Criminal Law* § 239).

Further, in *Miller, supra,* this court set out the rule in this State that absent a waiver, the accused may not be forced to go to trial in prison garb. Later, in 1976, the United States Supreme Court cited this court's opinion in *Miller,* as well as a number of other state supreme court decisions, in its discussion of the issue of prison garb in the federal context. The Court concluded that under the Fourteenth Amendment to the United States Constitution, a State may not compel an accused to stand trial before a jury dressed in prison garb, although the Court went on to hold that under the federal requirements a failure to object negates any compulsion necessary to establish a violation under the United States Constitution. *See Estelle v. Williams,* 425 U.S. 501 (1976).

However, in this case Williams committed the acts during the course of an escape from the custody of the Arkansas Department of Correction. The acts included escape, capital murder, aggravated robbery, and theft. The United States Supreme Court in *Estelle* noted that courts have refused to find error in requiring the defendant to wear prison garb in such situations. It is obvious that during the course of the trial, Williams's incarceration would be revealed to the jury. It is equally obvious that during trial the jury would be told these crimes were committed after he escaped and while he was trying to avoid apprehension. One crucial piece of evidence admitted in this trial was his white ADC shirt showing Williams's name and identification number found a mile from the Boren home.

We have recognized in the context of restraints that when the defendant is an inmate at the state prison at the time of the trial, and these facts will be revealed during the course of the trial, any prejudice that may have resulted from having the defendant in restraints would be rendered harmless because the restraints add nothing to the trial that was not already apparent from the nature of the case. *Tucker v. State,* 336 Ark. 244, 983 S.W.2d 956 (1999). *See also, Glick v. State,* 286 Ark. 133, 689 S.W.2d 559 (1985). As the United States Supreme Court noted in this regard, no prejudice can result from seeing that which is already known. *Estelle.* As one who

was prosecuted for crimes committed in the course of his escape and flight from prison, that Williams wore prison garb was something that was known, or by necessity would become known during trial and could pose no prejudice. The trial court did not commit error in requiring Williams to wear his prison garb during the trial and the related proceedings.

Restraints

Williams also argues he was denied a fair trial because he was deprived of the presumption of innocence in that he was shackled during trial. The photographs offered show Williams in handcuffs and, in addition, show his hands and feet were shackled. Although the jury's view of Williams was obscured somewhat, they may have seen his restraints when he got a drink of water and when he wrote notes to his attorneys.

In *Johnson v. State*, 261 Ark. 183, 546 S.W.2d 719 (1977), this court stated that being brought in to a courtroom in handcuffs is not *per se* prejudicial, and that there was no prejudice or abuse of discretion shown in *Johnson* where the appellant was on trial for escape from the Department of Correction. A trial court may take such steps as are reasonably necessary to maintain order in the courtroom, especially where the criminal defendant has engaged in disruptive behavior, attempted escape, or is charged with violent felonies. *Townsend v. State*, 308 Ark. 266, 824 S.W.2d 821 (1992). *See Stanley v. State*, 324 Ark. 310, 920 S.W.2d 835 (1996).

Restraints are not *per se* prejudicial, and the defendant must affirmatively demonstrate prejudice. We will not presume prejudice when there is nothing in the record to indicate what impression may have been made on the jurors or where the appellant did not offer any proof of prejudice. *Tucker, supra; Hill v. State*, 285 Ark. 77, 685 S.W.2d 495, 496 (1992).

Williams has a long criminal past, including a conviction for capital murder, and two convictions for kidnapping and arson. He was on trial for capital murder, aggravated robbery, theft, and escape. Additionally, evidence was offered to show that at the prior trial for capital murder, Williams had taunted the victims and victims' relatives and had ended up in an altercation with one. This required officers to carry Williams from the courtroom. It would be difficult to imagine a criminal defendant that would better fit the

definition of a high-risk defendant. Williams offers no proof of prejudice beyond the general assertion that he could not be tried in restraints, with the exception of one prospective juror during voir dire who was excused for cause. The remainder of the jurors stated that they understood the necessity for the security and that it would not influence their decision as to whether Williams was guilty of these felony charges. The trial court did not abuse its discretion, and Williams's right to a fair trial was not violated. The restraint was reasonably necessary to maintain order in the courtroom. *Terry v. State*, 303 Ark. 270, 796 S.W.2d 332 (1990).

Presence of Guards

Williams next argues he was prejudiced by the presence of multiple officers in the courtroom in that this conveyed to the jury that he was already guilty. The photographs show that three officers were present behind Williams and were seated in the first row in the gallery. At times there were two officers present. Williams was already convicted of capital murder and other serious crimes of violence. He was again on trial for capital murder and on trial for escape. In the prior trial he had engaged in disruptive behavior, had taunted the victim's family, and had ended up in an altercation that required officers to subdue him. Williams presented a serious threat to those present and to the proceedings. He was a high-risk criminal defendant. As discussed above, Williams's situation was known to the jury or was made known to them during the trial. The presence of the guards under these circumstances does not demonstrate that their presence was prejudicial to Williams. *Glick, supra.* The trial judge is in a better position to judge the dangers posed by a criminal defendant than this court is on appeal. *Tucker, supra.* We also note that Williams's own conduct brought about the need for multiple officers. It required three officers at his prior trial to subdue him. Williams shows no prejudice, and maintaining order and control is a matter within the discretion of the trial court. *Terry, supra; Rayburn v. State*, 200 Ark. 914, 141 S.W.2d 532 (1940).

Impartial Jurors

Williams also argues he was denied a fair trial because the trial court seated juror Washington and juror Patrick. He alleges that juror Washington was so biased in favor of the death penalty that she would not weigh the evidence and follow the instructions. He

alleges juror Patrick was likewise biased because her nephew had been murdered, and the murder was prosecuted.

As to juror Washington, Williams admits he did not move to excuse her for cause. To challenge a juror on appeal, appellant must show he exhausted his peremptory challenges and was forced to accept a juror who should have been excused for cause. *Branstetter v. State*, 346 Ark. 62, 57 S.W.3d 105 (2001). Thus, this issue was not preserved for review on appeal and will not be considered.

As to juror Patrick, the decision to excuse a juror for cause rests within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of discretion. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 737 (1999); *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995), cert. denied, 517 U.S. 1143 (1996). Persons comprising the venire are presumed to be unbiased and qualified to serve. *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001). The burden is on the party challenging a juror to prove actual bias, and when a juror states that he or she can lay aside preconceived opinions and give the accused the benefit of all doubts to which he is entitled by law, a trial court may find the juror acceptable. *Bangs, supra*. However, we have also recognized that the bare statement of a prospective juror that he can give the accused a fair and impartial trial is subject to question. *Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998). Nonetheless, any uncertainties that might arise from the response of a potential juror can be cured by rehabilitative questions. *Taylor, supra; Cox v. State*, 313 Ark. 184, 853 S.W.2d 266 (1993). Finally, even if the trial court abuses its discretion, appellant must show prejudice, a prerequisite to a reversible-error claim. *See Williams v. State*, 327 Ark. 97, 938 S.W.2d 547 (1997).

Juror Patrick stated in *voir dire* that she believed in the death penalty in certain cases. Patrick also stated that her nephew had been murdered and that someone was convicted for his murder. She denied that the murder and conviction would influence her decision in this case. She denied the murder of her nephew caused her to feel sympathy for the Boren family. She also stated she could weigh both the death penalty and life without parole, and that she would have to listen to the evidence to decide. She also stated she could consider mitigating circumstances and weigh them against aggravating circumstances. Also, juror Patrick further stated that she could lay aside any preconceived opinions and give the accused the benefit of all doubts to which he was entitled by law. Williams

moved to excuse Patrick for cause and asserts he would have used a peremptory challenge had he had one remaining. Williams fails to show actual bias or prejudice. Once the issue of her nephew's murder was raised, the questions posed and the responses given cured any issue of bias. The trial court correctly found juror Patrick acceptable. *Bangs, supra*; *Cooper, supra.*

The High-Speed Chase in Missouri

Williams next asserts the trial court erred in admitting evidence of the events in Missouri in the guilt and penalty phases of trial. Williams more specifically argues that the evidence of events in Missouri should have been excluded as more prejudicial than probative under Ark. R. Evid. 403. The trial court limited admission of the evidence of Mr. Greenwood's death to the penalty phase.

We first note that evidence crucial to show Williams murdered Cecil Boren was obtained as a consequence of this chase. First, Cecil's truck was discovered in Williams's possession. Second, firearms and other personal effects belonging to Cecil were discovered in the truck and tended to show Williams had robbed Cecil. Cecil's rings were on Williams's hand. Third, a .22 Ruger magazine was found in Williams's possession in Missouri. The testimony regarding this evidence necessarily required mention of the events in Missouri. Williams argues that it did not require, however, evidence of the death of Mr. Greenwood, and that this acted to his prejudice.

Williams argues that even if the evidence was relevant it was so prejudicial that under Ark. R. Evid. 403, the trial court abused its discretion when it refused to exclude it on that basis. The standard of review on admission of evidence is abuse of discretion. *Branstetter, supra.* The evidence of the chase quite clearly showed how desperate Williams was to avoid arrest. The evidence was that he attained speeds of 120 miles per hour. Further, the evidence shared that he plowed into the water truck, and then, rather than being concerned about the man he had injured or killed, he fled on foot. Evidence of flight to avoid arrest may be considered by the jury as corroborative of guilt. *Flowers v. State*, 342 Ark. 45, 25 S.W.3d 422 (2000); *Cooper v. State*, 317 Ark. 485, 879 S.W.2d 405 (1994). Further, evidence of the events in Missouri were part of the same criminal episode that began at Cummins and ended with Williams's final attempts to avoid apprehension in Missouri. *Wilson v. State*, 298 Ark. 608, 770 S.W.2d 123 (1989). These events occurred on the morning after Williams had murdered Cecil Boren

and then fled in his victim's truck with every weapon and thing of value he could take from the victim's home. We find no error in admission of the complained-of evidence. Because we find it was relevant and admissible in the guilt phase, and would have thus been known by the jury, there can be no claim of prejudice as to the penalty phase.

Mitigation Evidence

Williams also argues that the record shows the jury impermissibly ignored mitigation evidence it was bound to consider. More specifically, he alleges that he put on unrefuted expert evidence that he suffered from mental and familial dysfunction and that his mind was defective and did not function as it should. Williams argues that because this was unrefuted expert evidence beyond the understanding of lay persons, the jury erred when it concluded this testimony was insufficient to establish a mitigating factor.

There is no merit to this claim. In *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863 (1992), this court stated:

> It has consistently been held . . . that a jury is not bound to accept opinion testimony of experts as conclusive, and it is not compelled to believe their testimony any more than the testimony of other witnesses. Even when several competent experts concur in their opinions, and no opposing expert evidence is offered, the jury is bound to decide the issue upon its own judgment. Testimony by expert witnesses is to be considered by the jury in the same manner as other testimony and in light of other testimony and circumstances in the case. The jury alone determines what weight to give the evidence, and may reject it or accept all or any part of it they it believes to be true. *Robertson v. State,* 304 Ark. 332, 802 S.W.2d 448 (1991); *Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979).

See also, *Haynes, supra*. We also note, as the State argues, that the expert testimony was subjected to cross-examination that challenged the conclusions. Further, there was other testimony of familial conditions and Williams's past, education, and challenges in growing up. Thus, the expert testimony offered under examination by defense counsel was not the only evidence. It is the jury's decision as to what weight to give evidence. *Davasher, supra.*

Lack of a Correction Expert

Williams next argues that the trial court abused its discretion in denying his motion for funds to retain a corrections expert who would have testified that the Department of Correction was negligent in handling Williams, and that the violent acts committed upon his escape were predictable given his past history. To be admissible, evidence of mitigating circumstances must be relevant to the issue of the defendant's punishment. *Simpson v. State*, 339 Ark. 467, 6 S.W.3d 104 (1999); *McGehee v. State,* 338 Ark. 152, 992 S.W.2d 110 (1999).

Where the offered evidence of mitigation has nothing to do with a criminal defendant's character, record, background, history, condition, or the circumstances of his crime, it is not relevant on the issue of punishment. Williams's argument is essentially that because the Department of Correction knew he was a violent man, it should have protected him against himself by assuring he did not escape and that somehow the alleged negligence of the Department of Correction diminished Williams's responsibility for the carnage he wreaked upon his escape.

Even the slightest evidence of a mitigating circumstance may be submitted to the jury. *Willett v. State*, 335 Ark. 427, 983 S.W.2d 409 (1998). The proposed evidence, however, casts no light on Williams's culpability. It does not have any tendency to diminish Williams's responsibility. It is not a mitigating circumstance. It was inadmissible.

Victim-Impact Evidence

Williams asks this court to overturn its prior decisions finding victim-impact evidence constitutional. He asserts that victim-impact testimony causes the jury to punish based upon sympathy for the victim and his or her family rather than based upon what the criminal defendant did. This argument has been considered and rejected by this court. *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000). *See also, Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998); *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996).

Williams also argues error in the following victim-impact testimony:

Q. Ms. Knight, you, obviously, are aware of why we're here and the purpose. This is your opportunity to explain to the members of the jury the effects and the impact that the death of your brother had on you and if you would, take this opportunity to do so.

A. . . . The meeting of my brother and sisters when we get together it'll never be the same. We ask ourselves what we can do in situations like this. Well, we can't do anything as a family but hold together and pray together. But you can do something. You are in a position to do that. What would you do if it was your brother or your sister or your baby that someone stole away from you. I can't do anything, but you can. . . .

Williams did not object until after Knight finished testifying. Williams asserts he had a continuing objection to this type of testimony; however, the record reveals no such objection. This court will not consider arguments on appeal in the absence of a specific, contemporaneous objection at trial. *Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001).

Multiple Deaths

Williams next argues there is a lack of evidence of multiple deaths, and that it was error to submit this aggravator. Williams argues that escape may not constitute a continuing offense allowing inclusion of the death of Greenwood in Missouri as a death in the multiple-death aggravating circumstance.

What is before us is a number of crimes committed in the course of a single criminal episode. Williams made it clear to Gatewood in a visit to the prison that he would not, and could not, spend his life in prison. Williams made plain his intent to escape and sought Gatewood's assistance in providing him clothing, which Gatewood refused to do. Then, Williams did escape. Williams went to Cecil Boren's house where he robbed and murdered Boren and obtained money, firearms, and a truck. Williams then went to Gatewood to try to get help. Gatewood did not help him, but in the course of the discussion, Williams told Gatewood he had to do something to someone to get the truck he had. He then fled to Missouri where the very next morning he was spotted and his flight continued and resulted in Greenwood's death. All of these acts grew out of the same criminal episode which commenced with the escape and murder in Lincoln County and ended with the crash and

apprehension in Missouri. *Wilson v. State, supra.* Both deaths were properly put before the jury. There was no error in submitting the aggravator on multiple deaths.

Murder to Avoid Arrest

Williams then asserts there was no evidence of murder to avoid arrest and that, therefore, submission of this as an aggravating circumstance to the jury was error. Williams mischaracterizes the aggravating circumstance. The aggravator presented to the jury was that "[t]he capital murder was committed for the purpose of avoiding an arrest or affecting [sic] an escape from custody." As discussed above, the evidence presented tended to show Cecil Boren was murdered because he had things Williams wanted, including Boren's truck, and these things were needed by Williams to effectuate his escape from the area of the prison. There is no merit to the claim there was no evidence underlying submission of this aggravating circumstance.

We review the sufficiency of the State's evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *Kemp v. State,* 324 Ark. 178, 919 S.W.2d 943 (1996). The rule continues to be that the jury may consider those mitigating and statutory aggravating circumstance for which evidence, however slight, exists. *Willett, supra.* However, as also there stated, we will continue to review all findings relating to aggravating circumstances that support the imposition of a death penalty to determine whether there existed substantial evidence for the jury to find beyond a reasonable doubt that one or more aggravating circumstances existed, that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt, and that the aggravating circumstances justified a sentence of death beyond a reasonable doubt. *Willett, supra.* In this case there was substantial evidence showing the capital murder was committed for the purpose of avoiding an arrest.

Arkansas Code Annotated
§ 5-4-604(2) and (5)

Williams next asserts that Ark. Code Ann. § 5-4-604(2) and (5) (Supp. 2001) are duplicative and, therefore, the case must be

reversed. Section 5-4-604, aggravating circumstances, provides in pertinent part:

> (2) The capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;
>
> . . . .
>
> (5) The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

These two aggravating circumstances are not duplicative. Paragraph (2) is more general and does arguably cover Mr. Boren's murder as it was committed while Williams was unlawfully at liberty. Paragraph (5), however, is much more narrow, covering murders committed while trying to avoid arrest or committed in the course of escape from custody.

Alternate Juror

Finally, Williams argues he suffered reversible error when the trial court replaced juror Lori Heiles with an alternate juror for the penalty phase. Juror Hieles was excused when her sister became gravely ill. Williams argues that, under Ark. R. Crim. P. 32.3(c)(1), the trial court erred when it failed to offer Williams the opportunity to be sentenced by the trial court. Arkansas Rule of Criminal Procedure 32.3 provides in pertinent part:

> (c) In the case of a capital murder trial or any other bifurcated trial in which the court cannot fix punishment pursuant to Ark. Code Ann. § 5-4-103(b), and in which there are alternate jurors remaining after the jury has returned a verdict of guilty, the next alternate jurors, not to exceed two, shall be placed in the jury box along with the regular jurors. Any alternate jurors in addition to these two shall be dismissed. The trial will proceed with the penalty phase. When the jury retires to deliberate the penalty, the remaining alternate juror or jurors will again remain at the courthouse during deliberation.
>
> (1) If at any time after a verdict of guilty, but before a verdict fixing punishment, a juror who participated in the guilt phase of a capital murder trial or other trial described above dies, becomes ill,

> or is otherwise found to be unable or disqualified to perform his or her duties, such juror shall be discharged. The court may in its discretion, as an alternative to mistrial or any other option available by statute or these rules, replace such juror with the next alternate. However, in such event, the court may first give the defendant, with the agreement of the prosecution, the option to waive jury sentencing, in which case the court shall impose sentence, or to accept a verdict by the remaining jurors. If the defendant does not waive jury sentencing, or agree to accept a verdict by the remaining jurors, the trial will continue with the alternate participating in the penalty phase. In such event, the court shall instruct the jury to commence deliberation anew as to the sentencing phase only.
>
> (2) Notwithstanding Ark. Code Ann. § 5-4-602(3), which requires that the same jury sit in the sentencing phase of a capital murder trial, the court may in its discretion proceed pursuant to this rule and seat an alternate juror.

This is an issue of first impression and requires us to interpret our rules of criminal procedure. We construe court rules using the same means, including canons of construction, that are used to interpret statutes. *Smith v. Smith*, 341 Ark. 590, 19 S.W.3d 590 (2000). The above language provides that the trial court may in its discretion, as an alternative to mistrial or any other option available by statute or these rules, replace a juror with the next alternate. The rule then goes on to state that in such event, the court may first give the defendant, with the agreement of the prosecution, the option to waive jury sentencing, in which case the court shall impose sentence or to accept a verdict by the remaining jurors. Williams asserts that the trial court was required to consult him and give him the above-mentioned choice. However, the word "may" is usually employed as implying permissive or discretionary, rather than mandatory, action or conduct and is construed in a permissive sense unless necessary to give effect to an intent to which it is used. *Marcum v. Wengert*, 344 Ark. 153, 40 S.W.3d 230 (2001). The rule that provides the trial court may substitute as it did in this case. The rule further allows the court in its discretion to involve the parties as discussed in the rule; however, there is no obligation for the court to do so. Thus, there was no error when the trial court substituted the alternate juror without discussing it with the parties.

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 has been found.

Affirmed.

IMBER, J., concurring.

ANNABELLE CLINTON IMBER, Justice, concurring. I agree with the majority, but write separately only to point out the trial court instructed the jury in a manner that would permit it to return a guilty verdict against Williams on the capital murder count if it found him to have committed *either* one or both of the underlying felonies, first-degree escape or aggravated robbery. The jury returned a general verdict of guilty on the capital felony murder charge. The majority opinion concludes that a directed verdict should have been granted on the first-degree escape charge because the State produced insufficient evidence to prove that Williams committed first-degree escape. Specifically, there was no proof of the element of "use or threat [to] use . . . a deadly weapon in escaping custody" as required under our criminal statutes for first-degree escape. Ark. Code Ann. § 5-54-110(a)(2)(Repl. 1997).

Williams cites no case in which a general verdict has been set aside not because one of the possible bases of conviction was unconstitutional, as in *Stromberg v. California*, 283 U.S. 359 (1931), but merely because it was unsupported by sufficient evidence. In *Griffin v. United States*, 502 U.S. 46 (1991), the United States Supreme Court declined to set aside a general verdict on a multiple-object conspiracy where the evidence was inadequate to support conviction as to one of the objects. In so holding, the Supreme Court quoted with approval the following language from *United States v. Townsend*, 924 F.2d 385, 474 (7th Cir. 1991):

> It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance — remote, it seems to us — that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.

Accordingly, the conviction of capital murder in this case should be affirmed without regard to the State's proof on the charge of first-degree escape because there was sufficient evidence to convict Williams of capital murder committed in connection with the underlying felony of aggravated robbery.

Billy Mack NICHOLS *v.* P. ARNOLD

01-961 66 S.W.3d 652

Supreme Court of Arkansas
Opinion delivered February 21, 2002

Appellant, pro se.

No response.

PER CURIAM. ■ Appellant, an inmate in the Arkansas Department of Correction, brings this appeal from the Jefferson County Circuit Court's dismissal without prejudice of his motion for declaratory judgment. Prior to this court's modification of Ark. Sup. Ct. R. 4-2, appellant's claims would not have been considered, because he has failed to abstract the material parts of the record that are necessary to an understanding of the questions presented for decision. However, under the modified rule, cases in which the record is lodged in the Arkansas Supreme Court or Arkansas Court of Appeals on or after September 1, 2001, will no longer be affirmed because of the insufficiency of the abstract without the appellant first having the opportunity to cure the deficiencies. *See In re: Modification of the Abstracting System — Amendments to Supreme Court Rules 2-3, 4-2, 4-3, 4-4*, 345 Ark. Appx. 626 (2001) (*per curiam*).

■ Because appellant's brief contains no abstract, we find it to be deficient such that we cannot reach the merits of the case. Therefore, he has fifteen days from the date of this opinion to file a substituted abstract, Addendum, and brief to conform to Rule 4-2(a)(5) and (7). *See In re: Modification of the Abstracting System, supra*; Ark. Sup. Ct. R. 4-2(b)(3). Mere modifications of the original brief will not be accepted. *Id.* According to Rule 4-2(b)(3), if appellant fails to file a complying abstract, Addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the Rule.

Rebriefing ordered.

Clinton FLOWERS *v.* Larry NORRIS, Director,
Arkansas Department of Correction

01-852 68 S.W.3d 289

Supreme Court of Arkansas
Opinion delivered February 28, 2002

Appellant, pro se.

Mark Pryor, Att'y Gen., by: *O. Milton Fine II*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Clinton Flowers appeals the order of the Jefferson County Circuit Court denying his petition for a writ of habeas corpus. An appeal is the proper procedure for the review of a circuit court's denial of a petition for a writ of habeas corpus. *Davis v. Reed*, 316 Ark. 575, 873 S.W2d 524 (1994); *Waddle v. Sargent*, 313 Ark. 539, 855 S.W.2d 919 (1993). Appellant's sole argument on appeal is that the trial court erred in denying his petition because the trial court lacked jurisdiction to convict and sentence him for kidnapping and aggravated robbery, as those offenses were the underlying felonies used to support his conviction for attempted capital murder. Appellant argues that the convictions and sentences for those underlying felonies should be vacated. We affirm the trial court's denial of Appellant's petition, but we modify the judgment of conviction.

The facts underlying this appeal stem from events that occurred on April 12, 1997, beginning in Crittenden County. On that day,

Flowers and three other men kidnapped sixty-five-year-old Roberta Thompson and put her in the trunk of her car. After driving around for approximately eight hours, Appellant and the others removed Thompson from the trunk. They then stabbed her repeatedly, cut her throat, and ran over her with the stolen car. Miraculously, Thompson survived the ordeal.

Appellant was charged by felony information with aggravated robbery, kidnapping, and attempted capital murder. Kidnapping and aggravated robbery were specified as the underlying felonies supporting the attempted capital murder charge. Appellant executed a guilty-plea statement on December 12, 1997, in which he pled guilty to all three charges. The Crittenden County Circuit Court then sentenced him to concurrent sentences of forty years' imprisonment each on the aggravated robbery and attempted capital-murder convictions. In addition, Appellant was sentenced to twenty-five years' imprisonment on the kidnapping conviction. The trial court, however, suspended imposition of the sentence on the kidnapping charge.

Appellant filed a petition for writ of habeas corpus in the Jefferson County Circuit Court on March 20, 2001. In his petition, Appellant alleged that the Crittenden County Circuit Court lacked jurisdiction to sentence him, and that his commitment order was invalid on its face, because he was sentenced for both the conviction of attempted capital murder, as well as each of the underlying felonies used to support that conviction, namely aggravated robbery and kidnapping. According to Appellant, because the aggravated robbery and kidnapping charges were the underlying felonies used to support the charge of attempted capital murder, it was improper for the circuit court to convict and sentence him on those charges as well.

In an order entered on April 6, 2001, the trial court denied Appellant's petition. Therein, the trial court ruled that Appellant had failed to show that he was entitled to habeas relief, because his claims were insufficient to demonstrate that the commitment order was invalid on its face or that the trial court lacked jurisdiction to sentence him. From that order, comes the instant appeal.

It is well settled that a writ of habeas corpus will only be issued if the commitment was invalid on its face, or the sentencing court lacked jurisdiction. *Cleveland v. Frazier*, 338 Ark. 581, 999 S.W.2d 188 (1999), *cert. denied*, 528 U.S. 1173 (2000); *Renshaw v. Norris*, 337 Ark. 494, 989 S.W.2d 515 (1999). Thus, in order to

obtain habeas relief, a petitioner must plead either the facial invalidity or the lack of jurisdiction and make a "showing, by affidavit or other evidence, [of] probable cause to believe" he is so detained. *See* Ark. Code Ann. § 16-112-103 (1987). This court has recognized that detention for an illegal period of time is precisely what a writ of habeas corpus is designed to correct. *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000) (*per curiam*); *Renshaw*, 337 Ark. 494, 989 S.W.2d 515. In *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992), this court stated that it treats allegations of void or illegal sentences as it does issues of subject-matter jurisdiction, in that it reviews such allegations whether or not an objection was made in the trial court. Thus, the issue on appeal is whether Appellant has demonstrated that the trial court lacked jurisdiction or that his commitment order was invalid on its face.

Appellant contends that it was improper for the trial court to sentence him for attempted capital murder, as well as both of the underlying felonies used to support that conviction. According to Appellant, his sentence violates the prohibition against double convictions set forth in Ark. Code Ann. § 5-1-110 (Repl. 1997). The State counters that Appellant has failed to sufficiently demonstrate that he is entitled to habeas relief.

A sentence is void when the trial court lacks authority to impose it. *Bangs*, 310 Ark. 235, 835 S.W.2d 294. This court has held that when a criminal offense, by definition, includes a lesser offense, a conviction cannot be had for both offenses. *See McClendon v. State*, 295 Ark. 303, 748 S.W.2d 641 (1988); *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982) (*per curiam*); *Barnum v. State*, 276 Ark. 477, 637 S.W.2d 534 (1982) (*per curiam*). Recently, in *Meny*, 340 Ark. 418, 13 S.W.3d 143, this court held that where the appellant was convicted of three counts of rape, one count of kidnapping, and one count of attempted capital murder, one conviction for an underlying felony had to merge with the conviction for attempted capital murder. This court then modified the appellant's convictions and sentences by setting aside one of the convictions and sentences for rape, and leaving the remaining convictions and sentences in effect.

Here, in order to convict Appellant of attempted capital murder, it was necessary for the State to prove either the elements of aggravated robbery or kidnapping. *See e.g., Richie v. State*, 298 Ark. 358, 767 S.W.2d 522 (1989). The State set forth its case on the attempted murder charge by specifying both aggravated robbery and kidnapping as the underlying felonies for the charge of

attempted capital murder. The trial court then convicted and sentenced Appellant on all three charges. Because the State was required to establish the elements of one underlying felony in order to convict Appellant of attempted capital murder, it was error for the trial court to convict and sentence Appellant for attempted capital murder and both of the underlying felonies.

The State mistakenly argues that Appellant's three separate convictions and sentences are valid, because the legislature amended section 5-1-110 to authorize such cumulative punishments. We strictly construe criminal statutes and resolve any doubts in favor of the defendant. *Sansevero v. State*, 345 Ark. 307, 45 S.W.3d 840 (2001); *Hagar v. State*, 341 Ark. 633, 19 S.W.3d 16 (2000). The first rule of statutory construction is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.*; *Bush v. State*, 338 Ark. 772, 2 S.W.3d 761 (1999). Nothing is taken as intended that is not clearly expressed. *State v. Lewis*, 335 Ark. 188, 979 S.W.2d 894 (1998). 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). With these rules of statutory interpretation in mind, we turn to section 5-1-110.

In passing Act 657 of 1995, the General Assembly amended section 5-1-110 to allow for separate convictions and sentences for certain specified offenses. The amended version of this statute provides:

> (d)(1) Notwithstanding any provision of law to the contrary, separate convictions and sentences are authorized for:
>
> (A) Capital murder, § 5-10-101, and any felonies utilized as underlying felonies for the murder;
>
> (B) Murder in the first degree, § 5-10-102, and any felonies utilized as underlying felonies for the murder; and
>
> (C) Continuing criminal enterprise, § 5-64-414, and any of the predicate felonies utilized to prove the continuing criminal enterprise.

A plain reading of this statute reveals that the legislature did not exempt the offense of attempted capital murder and its underlying felonies from the prohibition against double convictions.

Our conclusion is further supported by a review of the legislative intent underlying this statutory change. In amending section 5-1-110, the legislature stated as follows:

> It is the intent of the legislature, pursuant to *Missouri v. Hunter*, 459 U.S. 359 (1983), to explicitly authorize separate convictions, sentences, and cumulative punishments *for the offenses specified in Section 2 of this act.* Cases such as *McClendon v. State*, 295 Ark. 303, 748 S.W.2d 641 (1988), which prohibit separate convictions, sentences, and cumulative punishments for such offenses are hereby overruled.

Act 657 of 1995 (emphasis added). The offense of attempted capital murder is not specifically enumerated in any part of Act 657. Moreover, the Supreme Court's decision in *Hunter*, the case relied on by the legislature in amending section 5-1-110, further evidences the conclusion that in order to except punishments from the double-jeopardy prohibition, it must be clear that the legislature intended such a result. There, the Supreme Court stated that when a legislature specifically authorizes cumulative punishments under separate statutes, there is no need for a court to resort to statutory construction; instead; the court may impose cumulative punishment under each statute in a single trial. In reaching this conclusion, the Court relied on the fact that the Missouri legislature clearly expressed its intent to allow for cumulative punishment. There is no such clearly expressed intent in the present case.

Absent a clear expression of legislative intent, we decline to expand the scope of section 5-1-110 to include the offense of attempted capital murder. Therefore, the conviction and sentence for one of the underlying felonies used to support Appellant's conviction for attempted capital murder must merge with that conviction. *See Meny*, 340 Ark. 418, 13 S.W.3d 143. The doctrine of merger then prevents conviction and sentencing on the underlying felony. *Id.*; *Richie*, 298 Ark. 358, 767 S.W.2d 522. By statute, this court may reverse, affirm, or modify the judgment or order appealed from, in whole or in part and as to any or all parties. Ark. Code Ann. § 16-67-325(a) (1987); *Richards v. State*, 309 Ark. 133, 827 S.W.2d 155 (1992). We hold that the charge of kidnapping is the underlying felony supporting Appellant's conviction for attempted capital murder. Accordingly, the conviction and sentence for kidnapping merged with the conviction for attempted capital murder. Appellant's conviction and sentence for aggravated robbery remains in effect.

In addition, a review of Appellant's commitment order reveals a facial invalidity that must also be corrected. Specifically, attempted capital murder is a Class A felony, as correctly marked on Appellant's commitment order. *See* Ark. Code Ann. § 5-3-203(1) (Repl. 1997). The trial court, however, sentenced Appellant to a term of 480 months' imprisonment, or forty years, on the conviction for attempted capital murder. Pursuant to Ark. Code Ann. § 5-4-401 (Repl. 1997), the maximum sentence that may be imposed for a Class A felony is thirty years' imprisonment. Thus, Appellant was illegally sentenced for attempted capital murder to a term of years in excess of the statutory maximum sentence. We now modify Appellant's sentence for attempted capital murder to a term of thirty years' imprisonment. This sentence is to run concurrently with the forty-year sentence imposed for aggravated robbery.

Affirmed as modified.

John T. SCOTT *v.* STATE of Arkansas

CR 00-1373 67 S.W.3d 567

Supreme Court of Arkansas
Opinion delivered February 28, 2002

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

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

ANNABELLE CLINTON IMBER, Justice. Appellant John T. Scott was charged with manufacturing a controlled substance (methamphetamine), attempt to manufacture a controlled substance (methamphetamine), and possession of drug paraphernalia with intent to manufacture methamphetamine. Mr. Scott contended below that the search of his home was unlawful and that evidence seized as a result of the search should be suppressed. The trial court denied the motion to suppress, and Mr. Scott entered a conditional plea of guilty to possession of drug paraphernalia with intent to manufacture methamphetamine pursuant to Ark. R. Crim. P. 24.3(b), reserving the right to appeal the trial court's suppression ruling. Mr. Scott was sentenced to twenty-four months in the Arkansas Department of Correction, followed by five years' suspended imposition of sentence. He now appeals the trial court's ruling on his motion to suppress. We affirm.

At the suppression hearing, Deputy Sheriff Robert Rounsavall of the Mississippi County Sheriff's Department testified that he received a tip from an anonymous caller, as well as calls from the Arkansas State Police and the Leachville Police Department, indicating that Mr. Scott was manufacturing methamphetamine in his home. All three calls were received "within a few weeks" of January 12, 2000. Deputy Rounsavall enlisted the assistance of two other law enforcement officers, Investigator Danny Foster and Sergeant Reggie Moore. The officers agreed that they did not have enough information to get a search warrant, but they hoped to get consent to search the Scott residence. As a result, all three officers

approached the Scott residence on the afternoon of January 12, 2000. According to the police report, the officers arrived at the home at 2:35 p.m. Deputy Rounsavall indicated this was an approximate time of arrival based on his recollection of looking at his watch as the officers "headed to the residence from Leachville." Before the officers got out of their truck, they decided that Investigator Foster and Sergeant Moore would go up to the front porch of the house and knock on the door. Meanwhile, Deputy Rounsavall was to go "beside the house and watch the side and the back of the house . . . [for] an officer-safety issue. . . ." All three officers were in plain clothes, wearing badges around their necks and carrying handguns.

After the officers knocked, Mr. Scott yelled, "Who is it?" Investigator Foster responded that it was the police, and, a few moments later, Mr. Scott came to the door. Sergeant Moore testified that Mr. Scott opened the door, but there was still a screen door between them and Mr. Scott. According to Mr. Scott, he opened both the wooden door and the screen door. Mr. Scott also testified that, when he opened the door, all three officers were on his front porch, and he put one of his hands on the door facing, causing all three officers to reach for their guns. However, this testimony was disputed by the officers who denied reaching for their guns when Mr. Scott opened the door. Investigator Foster told Mr. Scott they had information that he might be cooking methamphetamine in his residence and asked him if the officers could search the residence.[1] Mr. Scott denied that he was making methamphetamine and gave the officers verbal consent to search his residence and the grounds. The officers did not initially tell Mr. Scott that he had a right to refuse consent or a right to make them get a search warrant. Mr. Scott claims Investigator Foster told him that, if he did not consent to a search they would get a search

[1] Appellant's brief asserts that the officers told Mr. Scott they had information from a "confidential informant." The brief also asserts that both Investigator Foster and Sergeant Moore were led to believe that a confidential informant existed such that a search warrant would be easily ascertainable. The record, however, does not support these assertions. Investigator Foster clearly testified as to his knowledge: "Sergeant Rounsavall received an anonymous call or some kind of call in reference to Mr. Scott manufacturing methamphetamine." He also acknowledged that the officers were going to the Scott residence "in hopes of getting a consent to search." Sergeant Moore testified that he knew they were going to perform a "knock and talk" at Mr. Scott's residence. He also stated that Investigator Foster told Mr. Scott "the information they had received," but he could not say "exactly where [Investigator Foster] said he got it from." Deputy Rounsavall acknowledged that the reference in his report to a "confidential informant" was a "typo mistake."

warrant and confiscate all of his property. All three officers, however, denied making any such statement.

According to Investigator Foster, he went back to the vehicle to get a "Consent to Search" form after obtaining Mr. Scott's verbal consent; whereas, Sergeant Moore testified that he believed Investigator Foster had the consent form with him when they arrived at the porch. The officers' testimony was also inconsistent with respect to whether Deputy Rounsavall could hear what was being said on the porch. Nonetheless, all three officers agreed that Investigator Foster had informed Deputy Rounsavall that Mr. Scott had verbally consented to the search before the deputy walked from the driveway to the back of the house where he noticed several tanks with a turquoise-blue color around the fittings. That color, according to Deputy Rounsavall, indicated the tanks were being used for anhydrous ammonia. He then walked back around to the front of the house, where Investigator Foster was reading the written consent form to Mr. Scott. It was at this point that Mr. Scott was advised of his right to refuse consent. Though Mr. Scott testified to initially telling the officers he did not want to sign the form, the officers maintained that Mr. Scott never denied consent. In fact, he signed the written consent form at 2:50 p.m., whereupon Deputy Rounsavall advised him that he was under arrest and read him the standard Miranda warnings. Mr. Scott then told the officers they could find the methamphetamine lab in the attic, purportedly because he did not want them to tear up his house.

Based upon the evidence introduced at the suppression hearing and arguments of counsel, the trial court denied the motion to suppress. In its order, the court made the following findings:

> 1. That officers proceeded to the home of the defendant based upon an anonymous tip and such information did not result in the officers having a reasonable suspicion or probable cause that the defendant was involved in criminal activity.
>
> 2. That the officers in acting upon the tip had a consensual contact with the defendant and the Court hereby finds that the initial encounter occurred when the officers knocked on the defendant's door and the defendant promptly responded; the Court further finds that the officers did not engage in conduct that was threatening or that in any manner reflected a showing of force. That the officers' contact with the defendant was of a consensual nature and such contact did not constitute a seizure so as to implicate the Fourth Amendment.

3. That the State has met its burden of proof in establishing by clear and positive evidence that the defendant consented to search of his premises.

In reviewing a ruling denying a defendant's motion to suppress, we make an independent determination, based on the totality of the circumstances, and view the evidence in the light most favorable to the State. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998). We reverse only if the trial court's ruling is clearly against the preponderance of the evidence. *Id.* We defer to the trial court in assessing the credibility of witnesses. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001).

Mr. Scott's first contention on appeal is that the officers had no reasonable suspicion to contact him and that the initial contact constituted an illegal seizure in violation of his rights under the Fourth Amendment to the United States Constitution, thereby negating the subsequent consent and search as "fruits of the poisonous tree."[2] He claims that, once he answered the door, he did not feel free to terminate his encounter with the police. The State argues that Mr. Scott's encounter with the police was voluntary, pointing out that Mr. Scott verbally consented to the search and signed a consent-to-search form. The State contends that a "knock and talk" procedure is not a seizure under the Fourth Amendment, and, therefore, a reasonable suspicion is not required.

A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. Ark. R. Crim. P. 2.2(a) (2001). The officer may request the person to respond to questions or to comply with any other reasonable request. *Id.* In making such a request, no officer shall indicate that a person is legally obligated to furnish information or cooperate if no legal obligation exists. Ark. R. Crim. P. 2.2(b) (2001). Compliance with such requests shall not be regarded as involuntary or coerced solely on the ground that such a request was made by a law enforcement officer. *Id.*

This court has interpreted Rule 2.2 to provide that an officer may approach a citizen much in the same way a citizen may approach another citizen and request aid or information. *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997); *Thompson v. State*,

[2] Mr. Scott makes no argument under Article 2, Section 15, of the Arkansas Constitution.

303 Ark. 407, 797 S.W.2d 450 (1990). Not all personal intercourse between policemen and citizens involves "seizures" of persons under the Fourth Amendment. *Id.* A "seizure" of a person occurs when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *See Terry v. Ohio*, 392 U.S. 1 (1967).

Police-citizen encounters have been classified into three categories. *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797.

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

Id. at 21, 938 S.W.2d at 799. (Citations omitted.) Rule 2.2(a) provides the authority for a police officer to act in the first category of nonseizure encounters. *Id.* A balancing test must be used in these situations:

> the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom. To be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter.

Id. (citing *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935, *cert. denied*, 457 U.S. 1118 (1982)). Our case law has consistently held that Rule 2.2 authorizes an officer to request information or cooperation from citizens where the approach of the citizen does not rise to the level of being a seizure and where the information or cooperation sought is in aid of an investigation or the prevention of crime. *Id.*

In *Miller v. State*, 342 Ark. 213, 27 S.W.3d 427 (2000), this court said that entry onto private property by police can be justified

by the legitimate police objective of determining if anyone is present to interview as part of an investigation of drug-related activity. There, two officers approached a home and knocked on its front door several times. *Id.* After receiving no answer, the officers followed a little path leading around the house to the back door where they knocked again. *Id.* We held that the police acted reasonably, even in going to the rear of the home, where they entered the property for a legitimate police objective and did not exceed the scope of their purpose for going to the residence. *Id.* In *Burdyshaw v. State*, 69 Ark. App. 243, 10 S.W.3d 918 (2000), the Arkansas Court of Appeals recently concluded that the police do not need reasonable suspicion to approach a residence and request consent to search. In that case, police drove up a long and narrow driveway, past "no trespassing" signs, and onto the appellant's property at 7:45 p.m. to request a consent to search the property based on an anonymous tip that the appellant was operating a methamphetamine lab at his residence. *Id.* The appellate court held that entry onto the property was not a violation of the Fourth Amendment and the consent was not a fruit of the poisonous tree. *Id.*

It is clear to this court that the officers in the instant case were justified in approaching Mr. Scott's residence to question him about potential criminal activity, even without reasonable suspicion or probable cause. In fact, appellant's counsel conceded as much to this court at oral argument.

The next inquiry must be whether the initial encounter between the officers and Mr. Scott rises to the level of a Fourth Amendment seizure. The United States Supreme Court, in *Florida v. Bostick*, 501 U.S. 429 (1991), held that it was not *per se* unconstitutional for police to board a bus and ask at random, without articulable suspicion, for consent to search a passenger's luggage. A seizure does not occur simply because a police officer approaches an individual and asks a few questions. *Id.* A seizure occurs when a reasonable person would not feel "free to leave." *Michigan v. Chesternut*, 486 U.S. 567 (1988). The "free to leave" analysis, however, is not an accurate measure of the coercive effect of an encounter in situations where a person would have no desire to leave, such as where the person is seated on a bus. *Florida v. Bostick,* 501 U.S. 429. "In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 436. The crucial test is whether, taking into account all circumstances, the police conduct would have communicated to a reasonable person "that he was not at liberty to ignore the police presence and go about his business." *Id.*

at 437 (citing *Michigan v. Chesternut*, 486 U.S. at 569). It is important to note that the "reasonable person" test presupposes an innocent person. *Id.* at 438.

As with a passenger on a bus, a person approached by police officers at his home would have no desire to leave. Thus, the appropriate inquiry is whether a reasonable person, in the same circumstances, would have felt free to decline the officers' request to search. In this case, the officers approached Mr. Scott's residence and attempted to gain consent to search by utilizing a procedure known as a "knock and talk." Our court of appeals has quoted the North Carolina Supreme Court's description of the procedure:

> The "knock and talk" procedure is a tactic used by law enforcement in Winston-Salem when they get information that a certain person has drugs in a residence but the officers don't have probable cause for a search warrant. The officers then proceed to the residence, knock on the door, and ask to be admitted inside. Thereafter gaining entry, the officers inform the person that they're investigating information that drugs are in the house. The officers then ask for permission to search and apparently are successful in many cases in getting the occupant's "apparent consent."

Hadl v. State, 74 Ark. App. 113, 116, 47 S.W.3d 897, 899-900 (2001) (quoting *State v. Smith*, 346 N.C. 794, 796, 488 S.E.2d 210, 212 (1997)). The question of whether the "knock and talk" procedure automatically violates the Fourth Amendment is an issue of first impression in this State. We thus look to other jurisdictions for guidance.

Every federal appellate court which has considered the question, including the Eighth Circuit United States Court of Appeals, has concluded that the "knock and talk" procedure is not *per se* violative of the Fourth Amendment. For example, in *Rogers v. Pendleton*, 249 F.3d 279 (4th Cir. 2001), the Fourth Circuit Court of Appeals suggested that police may approach the door of a residence to "knock and talk," seeking to speak to the inhabitants, without probable cause, a warrant, or exigency. Likewise, the Fifth Circuit Court of Appeals, in *United States v. Jones*, 239 F.3d 716 (5th Cir. 2001), concluded that the "knock and talk" investigative tactic is not inherently unreasonable. In *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999), the Seventh Circuit Court of Appeals held that a "knock and talk" is not automatically unconstitutional but warned that police must realize the inherent limitations in the more informal way of proceeding. The Seventh Circuit did find a "knock and

talk" to be in violation of the Fourth Amendment under a specific set of extreme circumstances in *United States v. Jerez*, 108 F.3d 684 (7th Cir. 1997). The *Jerez* court held that a "knock and talk" investigation became a seizure when the officers' persistence prevented the appellants from ignoring the police and maintaining their privacy and solitude. In that case, two officers approached the appellants' motel room at 11:00 p.m., took turns knocking loudly on the hotel room door for about three minutes, proceeded outside to knock on the room's exterior window for one to two minutes, and directed light from a flashlight into the room. *Id.*

The United States Court of Appeals for the Eighth Circuit has upheld a district court's determination that a defendant voluntarily consented to a search of his hotel room after officers knocked on the door of his motel room, identified themselves as law enforcement officials, were invited into the room, and obtained consent to search without the use of force. *United States v. Severe*, 29 F.3d 444 (8th Cir. 1994). Likewise, the Ninth Circuit Court of Appeals has recognized "knock and talk" as a valid procedure for nearly forty years:

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal *per se*, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof whether the questioner be a pollster, a salesman, or an officer of the law.

United States v. Cormier, 220 F.3d 1103, 1109 (9th Cir. 2000) (quoting *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964)). In *Cormier*, the Ninth Circuit held that use of the "knock and talk" procedure to gain access to a motel room was permissible, in the absence of reasonable suspicion, and did not result in a seizure of the defendant or vitiate his consent to search. *Id.*

Similarly, other state courts have come to the same conclusion. These states include: Iowa in *State v. Reinier*, 628 N.W.2d 460 (Iowa 2001); Maryland in *Scott v. State*, 366 Md. 121, 782 A.2d 862 (2001); and North Carolina in *State v. Smith*, 346 N.C. 794, 488 S.E.2d 210 (1997).

In the instant case, we hold that the police did not need a reasonable suspicion in order to approach Mr. Scott's residence and request his assistance in a criminal investigation. As previously stated, we make an independent determination based on the totality of the circumstances, viewing the evidence in the light most favorable to the State. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998); *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). While two officers went to the front porch, knocked on the front door, and identified themselves as police officers, another officer remained to the side of the house. After Mr. Scott responded and opened the door, one officer told him they had information that he was making methamphetamine and asked for consent to search his home. The officers did not indicate to Mr. Scott that he was legally obligated to cooperate. Taking into account all of the circumstances of the encounter and viewing the evidence in the light most favorable to the State, we cannot say that the officers' conduct here would have communicated to a reasonable person that he was not free to "ignore the police presence and go about his business." *Florida v. Bostick,* 501 U.S. at 436.[3] Thus, we conclude that the "knock and talk" investigation in this case did not amount to a "seizure" in violation of the Fourth Amendment. Accordingly, Mr. Scott's consent to search is not a fruit of the poisonous tree of an illegal seizure under *Wong Sun v. United States*, 371 U.S. 471 (1963). We affirm the trial court on this point.

Mr. Scott's second contention on appeal is that the State failed to demonstrate by clear and positive evidence that his consent to search the premises was voluntary. A warrantless entry into a private home is presumptively unreasonable. *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999). The burden is on the State to prove the warrantless activity was reasonable. *Id.* As a general matter, a warrantless entry made with consent does not violate the Fourth Amendment. *Id.* Under Ark. R. Crim. P. 11.1, an officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search or seizure. Ark. R. Crim. P. 11.1 (2001). The Fourth and Fourteenth Amendments require that consent not be coerced, by explicit or implicit means, by implied threat or covert force. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The voluntariness of consent must be judged in light of the totality of the circumstances. *Id.* It is the State's burden to prove by clear and positive evidence that consent

[3] The inquiry does not focus on what motivates the officers' conduct; rather, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' request to search. *Florida v. Bostick*, 501 U.S. 429 (1991).

was given freely and voluntarily. *Rodriquez v. State*, 262 Ark. 659, 559 S.W.2d 925 (1978). This burden cannot be discharged by showing no more than mere acquiescence to a claim of lawful authority; it must be shown that there was no duress or coercion, actual or implied. *Id. See also Bumper v. North Carolina*, 391 U.S. 543 (1968).

Mr. Scott contends that the case of *Smith v. State*, 265 Ark. 104, 576 S.W.2d 957 (1979), wherein a search and seizure was found to violate the Fourth Amendment, has "strikingly similar facts to the present matter." Contrary to Mr. Scott's argument, that case is easily distinguishable from the situation now before this court. In *Smith*, the appellant was arrested at his home on hot check charges. *Id.* While he was dressing, officers asked for consent to search his home. *Id.* There was no doubt that the officers went to the home to search for a stolen TV and used the hot check warrant to effectuate that purpose. *Id.* During the search, they confirmed that the serial number on a TV in the home matched the one they were searching for. *Id.* Later, at the police station, Smith was asked to sign a written consent to search form. *Id.* We held that the State has a particularly heavy burden to prove that a warrantless search is voluntary *where the defendant is already under arrest and in the custody of the officers at the time it was alleged that consent was given. Id.* (Emphasis added.) Clearly, the "particularly heavy burden" analysis does not apply to the present case. Mr. Scott was not under arrest at the time he gave verbal consent to search his residence.

Next, Mr. Scott urges us to apply the case of *Evans v. State*, 33 Ark. App. 184, 804 S.W.2d 730 (1991), in which the court of appeals reversed the trial court's denial of a motion to suppress. In that case, a North Little Rock police officer responding to a telephone call from a woman indicating that her daughter was being held at gunpoint at 1600 North Main, approached a home at 1516 North Main. After knocking and receiving no response, the officer entered the home and found several marijuana plants. *Id.* As the officer stood behind the house, the appellant arrived. In response to the officer's inquiry, he admitted that he was the owner of the home. *Id.* After an officer showed him the marijuana plants and advised him that he could either consent to a search or the officers could go get a search warrant, he admitted the plants were his. *Id.*

The court of appeals held that the initial entry into the appellant's residence, in the absence of probable cause, was in violation of the constitutional guarantees against unreasonable search and seizure. *Id.* Thus, the court held that the appellant's consent to search and the items found as a result of the search were fruits of the

prior illegal search. The court also concluded that the appellant's consent was not freely and voluntarily given in light of the fact that he was confronted with the incriminating evidence and told that if he did not consent they could go get a search warrant. The court equated the situation to that in *Bumper v. North Carolina, supra,* wherein the Supreme Court found coercion where officers falsely claimed to have a search warrant. The situation before us is distinguishable. Here, the officers admittedly had no probable cause, but they began to search only after approaching Mr. Scott and receiving his consent. Moreover, they did not confront him with items found during an illegal search and then attempt to secure his consent.

In *Holmes v. State*, 347 Ark. 530, 65 S.W.3d 860 (2002), this court recently held that consent to the entry of a home was not proven by clear and positive testimony where the evidence showed that the inhabitant of the house, who "appeared to be under the influence," never gave verbal consent but merely opened the door, stepped back, and may have nodded. In that case, we noted that it was not clear whether the inhabitant was inviting the officer in or merely "reacting to the command of a law enforcement officer who . . . was accompanied by at least two other officers who had already taken away the person who resided in the house." *Id.* at 540, 65 S.W.3d at 866. Here, however, there is clear and positive testimony that Mr. Scott verbally consented to the search and then signed a "consent-to-search" form. Furthermore, while the evidence indicates that Mr. Scott was aware of the presence of three officers, two on his porch and one standing to the side of his house in the driveway, we cannot say that the officers had asserted their authority in such a way as to taint Mr. Scott's verbal and written consent to search his residence.

Finally, Mr. Scott claims that it is clear his consent was not voluntarily given based on the following circumstances: (1) Mr. Scott asserts that all three officers put their hands on their guns when he answered the door; (2) the officers told him they had information from someone else that he was making methamphetamine; (3) the officers did not inform him of his right to refuse consent at the time he gave verbal consent; (4) the officers were inconsistent in their testimony as to whether Officer Rounsavall heard or was told of Mr. Scott's verbal consent before leaving to search the back of the home; (5) there was an unexplainable fifteen-minute delay between the arrival of the officers and Mr. Scott's signing of the consent form, as well as inconsistent testimony as to whether the officers had to go to their vehicle to look for a consent form; (6) Mr. Scott insists that he initially declined to sign the

consent form; and (7) Mr. Scott asserts that the officers told him they would get a search warrant and confiscate his property if he did not consent.

Once again, in making an independent determination based on the totality of the circumstances, we must view the evidence in the light most favorable to the State and defer to the trial court's assessment of the credibility of witnesses. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998); *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). In this case, the only evidence of potentially coercive conduct by the officers, *i.e.*, putting their hands on their guns and threatening to take his property, came from Mr. Scott himself, which testimony the trial court was not required to believe. *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999). We cannot say that the encounter in question was the result of coercive contact by the police because the police arrived in the middle of the afternoon and knocked on Mr. Scott's door only long enough to wake him from a nap. Also, Mr. Scott was notified that policemen were knocking before he opened the door. The officers informed Mr. Scott about the information they had received and that they were seeking aid in a criminal investigation. As for Mr. Scott's knowledge of his right to refuse consent, this court has stated in *Chism v. State*, 312 Ark. 559, 853 S.W.2d 255 (1993), that knowledge of the right to refuse consent to search is not a requirement to prove the voluntariness of consent.[4] A finding of voluntariness will be affirmed unless that finding is clearly against the preponderance of the evidence. *Id.*

It is well settled that any inconsistencies in testimony are for the trier of fact to resolve. *Dansby v. State, supra.* In this case, any inconsistency in the officers' testimony was credibly resolved by the State's witnesses. As to Deputy Rounsavall's knowledge of Mr. Scott's consent, Investigator Foster eventually testified that he thought Deputy Rounsavall was close enough to hear the verbal consent but stated that he also informed Deputy Rounsavall of the consent. As for the fifteen-minute delay, the officers' time of arrival was merely an approximation based upon one officer's glance at his watch as they drove to the residence. Furthermore, Sergeant Moore

[4] Likewise, the Supreme Court has said that whether a person is considered to have given voluntary consent is not contingent upon the person's being informed in advance of his right to refuse to give consent. *United States v. Mendenhall*, 446 U.S. 544 (1980). Whether a person had knowledge of the right to refuse consent is recognized as a factor to take into account when determining from the totality of the circumstances whether the person voluntarily consented to the search. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

testified that he did not think the officers were present for fifteen minutes before the consent-to-search form was signed. As we must view the evidence before us in the light most favorable to the State, we also acknowledge that, according to the officers, Mr. Scott never refused consent or declined to sign the written consent form. We, therefore, hold that the State demonstrated by clear and positive evidence that Mr. Scott voluntarily consented to a search of his home.

In conclusion, police officers do not need reasonable suspicion to approach a citizen in order to ask questions relating to the investigation of a crime. The facts surrounding the "knock and talk" investigation in this case did not amount to a "seizure" in violation of the Fourth Amendment. Accordingly, Mr. Scott's consent to search was not a fruit of the poisonous tree. Additionally, there was clear and positive evidence that Mr. Scott voluntarily consented to a search of his home. Viewing the totality of the evidence in the light most favorable to the State, the trial court's denial of Mr. Scott's motion to suppress was not clearly against the preponderance of the evidence.

Affirmed.

THORNTON and HANNAH, JJ., concur.

JIM HANNAH, Justice, concurring. I agree with the result in this case but write to highlight my concerns about the factual underpinnings of the decision and to note that had this case been decided under our state constitution, I would have reached a different result.

We have recognized that the Fourth Amendment is not implicated when police approach the common entryways of residences, including the rear of a home, for legitimate purposes, including questioning a suspect. *See Miller v. State*, 342 Ark. 213, 27 S.W.3d 427 (2000) (citing *United States v. Anderson*, 552 F.2d 1296 (8th Cir. 1977)). Once there, however, the Supreme Court applies the second of two tests to determine whether a person has been "seized" within the meaning of the Fourth Amendment. This second approach applies when the police approach an individual in a confined space such as a bus, a motel room, or a home. In such a situation, it no longer "makes sense to inquire whether a reasonable person would feel free to continue walking" as is the concern under the first approach to this question. *Florida v. Bostick*, 501 U.S. 429, 435 (1991). Because a person on a bus or in an otherwise confining

space "has no desire to leave" and would wish to remain even if police were not present, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Id.* at 435-36. When a person's "freedom of movement [is] restricted by a factor independent of police conduct — *i.e.*, by his being a passenger on a bus . . ., the appropriate inquiry is whether a reasonable person would feel free to decline the officers' request or otherwise terminate the encounter." *Id.* at 436; *Michigan v. Chesternut*, 486 U.S. 567, 576 (1988) (seizure occurred if "respondent could reasonably have believed that he was not free to disregard the police presence and go about his business"). Like the person seated on the bus in *Bostick*, a person staying in a motel room or at home has no desire to leave and would remain whether police were present. A person, therefore, is "seized" within the meaning of the Fourth Amendment if a reasonable person would not have felt free to decline. The test, as with the "free to leave" formulation, is an objective one and requires a contextual approach. *United States v. Rodriguez*, 69 F.3d 136, 141 (7th Cir.1995); *United States v. Notorianni*, 729 F.2d 520, 522 (7th Cir. 1984). The determination of whether an encounter is a seizure is made on the basis of the "totality of the circumstances" surrounding the encounter. *Bostick*, 501 U.S. at 437; *Chesternut*, 486 U.S. at 572-73. In making the assessment as to whether a seizure occurred, the circumstances must, of course, be assessed in terms of the values protected by the Fourth Amendment.

It is under these parameters that the facts of this case must be reviewed. Here, Mr. Scott was clearly at his home at the time of the "knock and talk" conducted by the police. Therefore, this court's analysis must focus on whether a reasonable person in Scott's position "would feel free to decline the officers' request or otherwise terminate the encounter." *Bostick*, 501 U.S. at 436. This inquiry, then, is conducted within the confines of the facts of the case, and those facts generally depend on a judgment of the credibility of the witnesses. While we defer to the trial court on such credibility decisions, *see Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001), I take this opportunity to highlight facts that cause me great concern here. First, according to the police officers's testimony and the police report, the officers arrived at Mr. Scott's home at 2:35 p.m., and two officers approached the front door while the third stood to the side of the house in view of the front door. Immediately upon engaging Mr. Scott in conversation, the police indicated that they had information that he was making methamphetamine at his house, and they wanted his consent to search. With the officers's

beginning their questioning with such an accusation, would a reasonable person believe that he was free to disregard the police presence and go about his business? I suspect not.

After this, the police officers's facts become sketchy at best. One officer testified that Mr. Scott agreed to sign a consent form, and the pair of officers stepped inside the house and presented the consent form that they had with them. The second officer at the door testified that they did not have a consent form available, so he had to return to the car and find one. Regardless, the facts indicate that fifteen minutes passed between the initial encounter and Mr. Scott's signing the consent form. So what happened during those fifteen minutes? Because the officers's stories are contradictory, this places the entire fifteen minutes into question, and tends to question whether verbal consent was immediately given. Certainly, Mr. Scott testified that he originally denied the officers's requests for consent to search, but that after they spoke with him for several minutes telling him that they would not confiscate all of his property if he signed the consent form, Mr. Scott signed the form for fear that they would take all of his belongings. This, of course, would explain the passage of a quarter of an hour before written consent was provided for the search. Furthermore, with such a passage of time, the inquiry regarding whether Mr. Scott, again, felt free to disregard the police presence and go about his business is countered with the fact that he felt compelled to stand at his front door for a quarter of an hour discussing the situation with the police before granting written consent to search. As noted, however, the trial court chose to believe the officers here, and we defer to that credibility determination, despite the fact that these officers admittedly went to Mr. Scott's home without any evidence that would constitute even reasonable suspicion to get a search warrant, and admittedly doing so "in hopes of getting a consent to search."

I submit, however, that had this search and seizure been challenged under Article 2, section 15, of the Arkansas Constitution, the outcome may have been different. Here, the court decided this case according to the Fourth Amendment of the United States Constitution, and is bound by federal decisions regarding the search. However, we may interpret our constitution obviously without restrictions from other jurisdictions. And, pursuant to our constitution, I would be inclined in this case to find that the police officers here had no business spending fifteen minutes attempting to gain consent to search. Rather, while Arkansas Rule of Criminal Procedure 2.2 would allow the initial approach by the officers under the facts here, once the defendant denies any involvement in

the alleged crime for which the police have no evidence even to support a reasonable suspicion, contact should cease. The very presence of armed police officers on one's doorstep and at the side of the house, coupled with the bald accusation of drug manufacturing, would cause a reasonable person to feel compelled to continue speaking with those officers rather than feel free to disregard the police presence and close the door. As such, the initial encounter, prior to any signed consent to search, is questionable in this case.

Furthermore, that we perhaps would offer more protection to a defendant in this type of situation under our constitution is evidenced in part by Arkansas Rules of Criminal Procedure 2.2 and 2.3 requiring at least that police officers may not assert that compliance with their requests is required, and at the greatest that they must advise a defendant of his right to refuse compliance with the request for information. Certainly, under Rule 2.3 "Warning to persons asked to appear at a police station," a law enforcement officer must "take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request." Rule 2.2 "Authority to request cooperation," also requires that "no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists." The commentary to these rules indicates that some notice that compliance is not required should be given to the person being questioned. This is particularly important under Rule 2.2 where multiple officers, armed with weapons, spouting accusatory questions, and circling the house, may approach a person's home to assert allegations for which they have no actual proof.

At least two other states have interpreted their state constitutions to require police officers conducting a "knock and talk" to inform a person that he may refuse consent, revoke consent, or limit the scope of consent, *see State v. Ferrier*, 960 P.2d 927 (Wash. 1998), or to at least get a "knowledgeable waiver" from the person indicating that he was informed that he has a right to refuse to give consent, and must be cognizant of his rights in the premises, *see Graves v. State*, 708 So.2d 858 (Miss. 1997). These decisions were based on the search and seizure provisions in Washington's and Mississippi's constitutions. These provision are substantially similar to both the Fourth Amendment and to Article 2, section 15, of the Arkansas Constitution, and contain no specific directive requiring officers to inform defendants of the right to refuse consent. While I am cognizant of the fact that we have stated that we interpret Article 2, section 15, as the Supreme Court interprets the Fourth Amendment, *see Rainey v. Hartness*, 339 Ark. 293, 5 S.W.3d 410

(1999), this new breed of search and seizure law, the "knock and talk," warrants our departure from federal examples where the citizens of Arkansas face yet another attack limiting the protection of their homes against unlawful intrusion.

THORNTON, J., joins in this concurrence.

David GRIFFIN *v.* STATE of Arkansas

CR 00-1475 67 S.W.3d 582

Supreme Court of Arkansas
Opinion delivered February 28, 2002
[Petition for rehearing denied April 11, 2002.]

Miler Law Firm, by: *Leslie Borgognoni* and *Randel Miller*, for appellant.

Mark Pryor, Att'y Gen., by: *Katherine Adams*, Ass't Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellant, David Griffin, entered a conditional plea upon which he was convicted of drug-related offenses following the trial court's denial of his motion to suppress evidence obtained during a warrantless late-night search of his residence near Jonesboro. Griffin argues three points for reversal. We agree with his first argument that the covert nighttime intrusion upon his property by four police officers violated the provisions of Article 2, Section 15, of the Arkansas Constitution, and we reverse and remand with instructions to suppress the evidence obtained as a result of the unlawful intrusion upon his property.

I. Principles of law

We note that the provisions of Article 2, Section 15, of the Arkansas Constitution are similar to those contained in the Fourth Amendment to the United States Constitution, and it may be that the late-night intrusion upon appellant's property may have also violated the provisions of federal constitutional law. We have in many cases harmonized the protections afforded by Article 2, Section 15, of our state constitution with those provided by the Fourth Amendment to the United States Constitution. *See Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997); *Stout v. State*, 320 Ark.

552, 898 S.W.2d 457 (1995). However, we base our analysis of this case upon our own state law as expressed by our state constitution, statutes, and cases, recognizing that while we lack authority to extend the protections of the Fourth Amendment beyond the holdings of the United States Supreme Court, we do have the authority to impose greater restrictions on police activities in our state based upon our own state law than those the Supreme Court holds to be necessary based upon federal constitutional standards. *See Arkansas v. Sullivan*, 532 U.S. 769 (2001).

In many states, the principle that a person should be protected against unreasonable searches and seizures of their persons, houses, papers, and effects was well-established before the 1786 Constitutional Convention adopted a similar restriction, the Fourth Amendment, forbidding the central government from issuing warrants without probable cause. Elisa Masterson White, *Criminal Procedure—Good Faith, Big Brother, and You: The United States Supreme Court's Latest Good Faith Exception to the Fourth Amendment Exclusionary Rule. Arizona v. Evans*, 115 S. Ct. 1185 (1995), 18 UALR L.J. 533 (1996) (citing Jacob W. Landynski, *Search and Seizure and the Supreme Court: A Study in Constitutional Interpretaion* 30-48 (1966)). The 1780 Massachusetts Declaration of Rights was the first to use the phrase "unreasonable searches and seizures." *Id.* (citing Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 13 (1937)). The public furor over the issuance by the King of writs of assistance granting customs officials unlimited power of search and seizure had fueled the spirit of independence of the colonies. *Id.* (citing *Lasson, supra*).

The principle that a man's home is his castle, and that even the King is prohibited from unreasonably intruding upon that home, was particularly well-developed in the rough-and-ready culture of the frontier, and no less pronounced in the Arkansas Territory. In our 1836 Constitution, the people of our newly admitted state expressed this principle succinctly in the following language:

> § 9. That the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and that general warrants, whereby any officer may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named whose offenses are not particularly described and supported by evidence, *are dangerous to liberty, and shall not be granted.*

Id. (emphasis added).

This principle is now articulated in Article 2, Section 15, of the present Arkansas Constitution, which provides that "the right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." *Id.*

With reference to the protections contained in Arkansas's own state laws against unreasonable searches and seizures, the Supreme Court recently noted in *Arkansas v. Sullivan, supra*:

> We reiterated in *Hass* [*Oregon v. Hass*, 420 U.S. 714 (1975)] that while "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them."

Arkansas v. Sullivan, supra (citation omitted). In *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000), we erred because we based our decision limiting police officers' discretion to intrude on individual liberty and privacy upon principles of federal constitutional law. *Arkansas v. Sullivan, supra.*

In the case *sub judice*, we apply Arkansas law, while observing that our decision does not impose lesser restrictions upon police activity than those guaranteed by the Fourth Amendment to the U.S. Constitution. It is also a principle of law in our state that the exclusionary rule commands that where evidence has been obtained in violation of search and seizure protections, the illegally obtained evidence cannot be used at the trial of the defendant. *See Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001).

In Arkansas, there are rigorous standards to be followed in obtaining a search warrant, especially for a nighttime search. We note that nighttime searches with a warrant must be based upon exigent circumstances. Arkansas law allows for search warrants to be executed at night in three circumstances: (1) the place to be searched is difficult of speedy access; (2) the objects to be seized are in danger of imminent removal; or (3) the warrant can only be safely or successfully executed at night or under circumstances the occurrence of which is difficult to predict with accuracy. Ark. R. Crim. P. 13.2(c).

In *Butler v. State*, 309 Ark. 211, 829 S.W.2d 412 (1992), we cited with approval the following:

We find the United States Supreme Court case of *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed.2d 732 (1984), to be instructive. In that case, the Supreme Court held that a warrantless, nighttime entry into a home to arrest an individual for driving while under the influence of an intoxicant was prohibited by the Fourth Amendment. The Court stated:

> It is axiomatic that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. It is not surprising, therefore, that the Court has recognized, as "a basic principle of Fourth Amendment law," that searches and seizures inside a home without a warrant are presumptively unreasonable.
>
> Consistently with these long-recognized principles, the Court decided in *Payton v. New York*, 445 U.S. 573 [100 S. Ct. 1371, 63 L. Ed.2d 639 (1980)] (1980), that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. . . . Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.

Butler, supra. We have also held that, in order to enter a residence or private dwelling without violation of prohibitions against unreasonable searches, both probable cause and exigent circumstances must be present. *Mitchell v. State*, 294 Ark. 264, 742 S.W.2d 895 (1988).

Under Ark. R. Crim. P. 11.1, an officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search and seizure. *Id.* The consent for a warrantless search of an individual's home must be given freely and voluntarily, and the burden rests upon the State to prove such consent by clear and positive evidence, and this burden is not met by showing only acquiescence to a claim of lawful authority. *Holmes v. State*, 347 Ark. 530, 65 S.W.3d 860 (2002).

As a general rule, where consent is freely and voluntarily given, the "knock and talk" procedure has been upheld as a consensual encounter and a valid means to request consent to search a house. *See United States v. Cormier*, 220 F.3d 1103, 1110-09 (9th Cir.2000); *United States v. Taylor*, 90 F.3d 903, 909 (4th Cir.1996); *United States v. Kim*, 27 F.3d 947, 951 (3d Cir.1994); *United States v. Tobin*, 923 F.2d 1506, 1511-12 (11th Cir.1991); *Cruz*, 838 F. Supp. at 543; *State v. Green*, 598 So. 2d 624, 626 (La. Ct. App.1992); *State v. Land*, 106 Or. App. 131, 806 P.2d 1156, 1157-59 (1991).

We believe that this "knock and talk" procedure has been well-defined in *Davis v. United States*, 327 F. 2d 301, 303 (9th Cir. 1964), where the Ninth Circuit Court of Appeals stated:

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal *per se*, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof whether the questioner be a pollster, a salesman, or an officer of the law.

Id.

In some other jurisdictions, a police officer conducting a "knock and talk" must inform a person that he may refuse consent, revoke consent, or limit the scope of consent. *See State v. Ferrier*, 960 P.2d 927 (Wash. 1998). Other jurisdictions require a knowledgeable waiver. *See Graves v. State*, 708 So. 2d 858 (Miss. 1997).

II. Facts

Informed by these principles of law, we consider the following factual circumstances. Griffin was an optician with his office on Highway 49 near Jonesboro. The offices are near the highway, and a two-story residence belonging to Griffin's parents is located a couple of hundred yards behind the office, accessible by a private drive. Griffin's parents own the house and occupy the main part of the house. Their residence is accessible through a front door. Griffin's residence is in the basement or lower floor, accessible by a sliding glass door. This apartment residence has a sitting room into which the sliding glass door opens, and two small bedrooms are adjacent to the sitting room. Separate from the residence and the

office are a shed and several other out buildings, which are some distance from the house and the office. Some two weeks before August 25, 1999, Griffin encountered Officer Bobbie Johnson walking across the property from the back fence toward the road during daylight hours. There is no indication that Griffin gave consent to this intrusion upon his property.

Officer Johnson testified that during daylight hours on August 25, 1999, he received an anonymous tip through another officer that Griffin was selling drugs from his office or home, and Johnson testified that the circumstances of the tip did not constitute probable cause upon which a search warrant could be issued.

Notwithstanding the lack of probable cause, Officer Johnson recruited Deputy Wes Baxter and auxillary deputies Bobby Phillips and Rod Abernathy, and the four officers went to the premises at about 10:10 p.m. that night. According to their testimony, it was pitch black, and they parked their vehicles fifteen to twenty yards from the house where they could not be seen from the sliding glass door that opened into Griffin's basement apartment. They made an inspection of one of the parked vehicles between the police cars and the house when they discovered the doors of the vehicle were open. No contraband was discovered in the vehicle. All four of the officers were carrying flashlights.

One of Griffin's guests, Karen Horton, testified that she was in the living room of Griffin's basement residence when she saw a bunch of flashlights out in the vicinity of the shed coming through the woods. She advised Griffin, who was in a back room on the telephone with his daughter, that four or five men were approaching the house. Horton testified that the officers told her not to move, and then ordered her to open the door. As she moved forward to open the door, Griffin emerged from the back room where he had been on the telephone with his daughter, and he stepped to the door to meet the officers.

Officer Johnson testified that the patrol cars were not visible from the house, that the officers looked in the parked car because it had an open door, and confirmed that the officers had walked around the premises before talking with Griffin. Johnson then stated he believed they first knocked, then walked around because nobody came to the door, and then returned to knock again, at which time Griffin answered the door. He then asserts, contrary to his earlier testimony, that the search did not begin until consent was given.

It is undisputed that no consent to search was signed, no advice was given that Griffin could refuse to consent to search, and no *Miranda* rights were read before the search began. It is disputed whether Griffin imposed limitations upon his consent to a search, or whether he later revoked his consent and demanded that the officers obtain a search warrant. The officers found a sealed container containing methamphetamine in a locked cabinet in Griffin's bedroom. They also discovered drug paraphernalia and a firearm.

III. Standard of review

In reviewing a ruling denying a defendant's motion to suppress, we make an independent determination based on the totality of the circumstances and view the evidence in the light most favorable to the State. We reverse only if the trial court's ruling is clearly against the preponderance of the evidence. *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997); *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). We defer to the trial court in assessing witness credibility. *E.g., Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999); *Wright v. State*, 335 Ark. 395, 983 S.W.2d 397 (1998); *Tabor v. State*, 333 Ark. 429, 971 S.W.2d 227 (1998).

The trial court denied Griffin's motion to suppress evidence obtained by means of an illegal search and seizure, and accepted Griffin's conditional guilty plea and sentenced him to an aggregate of twenty-five years' imprisonment on the charges of possession of methamphetamine with intent to deliver and simultaneous possession of drugs and a firearm with an additional ten years suspended on the charge of possession of drug paraphernalia. Appellant does not raise an issue of insufficient evidence.

IV. Analysis

For his first point on appeal, Griffin argues that the initial entry upon his premises constituted a prohibited search under Article 2, Section 15, of the Arkansas Constitution. He contends that the law enforcement officers made an unlawful intrusion onto his property late at night without a search warrant or probable cause to obtain a warrant. He argues that the search was not the result of a freely and voluntarily given consent to the search.

The State urges that the protections of Article 2, Section 15, of the Arkansas Constitution are not applicable because there was a consent to the search. The trial court's findings on this point relate in large part to an evaluation of Griffin's conduct after he answered his door, and began a conversation with the police officers seeking permission to come in and look for a methamphetamine lab. However, we must first address the threshold question of whether an illegal search had commenced before the police officers engaged Griffin in conversation at the sliding glass door.

Accordingly, we address the issue whether an illegal search had already begun before Griffin answered his door. The trial court's only finding relating to this threshold issue was that the officers did not violate Griffin's right to privacy by merely knocking on the door and requesting permission to enter his home. This finding might be appropriate to circumstances like those described in *Davis, supra,* where it is declared that there is no invasion of privacy "for anyone open and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof . . . [.]" *Id.*

However, those factual circumstances are not found in this case. The facts in this case bear little resemblance to those described in *Davis, supra.* With regard to whether the initial approach by officer Johnson was with an honest intent of asking questions, we note that Officer Johnson freely testified that the officers lacked probable cause to get a warrant, thereby giving rise to the warrantless "knock and talk" tactic. On cross-examination of Officer Johnson, the following colloquy occurred:

> Q: And you received this information from Officer Etter, Gary Etter?
>
> A: That's correct.
>
> Q: Now at that point, what information did you have besides Mister Etter's statement?
>
> A: None.
>
> Q: At that point, did you think you could stop and get a search warrant?
>
> A: No. But I've heard in the past where he was selling' drugs at his optical place down at Valley View.

Q: Well, based on that hearsay or rumor, could you have gone and got a search warrant.

A: No sir.

Q: Okay. In fact, did ya'll even discuss getting a search warrant?

A: No sir.

Q: Did you attempt in any way to find out the basis for Officer Etter's statement to you that day or the day before?

A: No sir.

Q: Did he offer you any explanation as to where that information came from?

A: No. People call in and tell us, and we go and check. And if they wanna let us in we do. Eighty percent of 'em let us come in and look.

Q: Eighty percent of them?

A: Well, I'd say fifty to eighty percent. I mean you ask 'em if you can come in and look, and they just say come in.

Officer Johnson admitted on cross-examination that any attempt to obtain a search warrant would have been futile because no probable cause existed to support a search warrant. The only information that the officers had was a tip from a fellow officer, and Officer Johnson admits that this information was not enough to obtain a warrant. According to Officer Johnson's testimony, the officers received the tip earlier in the day, but decided to act on the tip at 10:10 in the evening. This evidence supports a conclusion that the nighttime approach was an effort to search Griffin's premises without a warrant and without probable cause.

With regard to the issue as to when the search actually began, the predominance of the evidence clearly shows that the four law enforcement officers approached the sliding-glass door of Griffin's basement residence through the woods from the vicinity of a shed, carrying flashlights so they could see in the pitch-black darkness. We do not consider that these actions conform to the *Davis, supra* test "for anyone openly and peaceably, at high noon, to walk up the steps and knock on the door of any man's castle. . . ." *Id.* Not only

did the actions of the officers not meet the standards related in *Davis, supra,* the predominance of the evidence clearly shows that an unlawful search had begun before Griffin was summoned to the door.

The officers employed stealth, parking their vehicles where they could not be seen from the entry of Griffin's residence. They then inspected a parked car because the door was open, and then, either before or after an initial knock, checked out a shed and walked around the premises. Whether the walk around of the shed was before or after an initial knock is of little consequence. We know of no authority for a "knock and *search*" doctrine holding that after knocking, it is permissible to begin a warrantless search before anyone comes to the door.

Based upon an independent determination of the totality of the circumstances under *Burris, supra,* we conclude that an illegal search prohibited by Article 2, Section 15, of the Arkansas Constitution had begun before Griffin was summoned to his door and asked for consent to search.

Accordingly, we must reverse and remand for the suppression of evidence obtained by the illegal search. Because this resolves the issue of suppression of the evidence, we need not address the other issues raised by appellant.

Reversed and remanded.

CORBIN, BROWN, and HANNAH JJ., concur.

IMBER, J., not participating.

DONALD L. CORBIN, Justice, concurring. I agree with the majority that the evidence in this case was obtained illegally because the officers began their warrantless search before they even attempted to obtain consent. I write separately to emphasize my concern about "knock and talk" searches in general. Before this type of consent search became so fashionable, the police were forced to investigate anonymous or unreliable tips before they could attempt to seize evidence. For example, in this case, the police would have had to attempt a controlled drug buy from Appellant, using the services of a confidential informant or an undercover police officer. With the advent of "knock and talk" procedures, however, the police are free to dispense with actual police work and "cut to the chase" of seizing evidence. In my opinion, "knock and

talk" procedures should be used only as an investigative tool, not as a complete substitute for investigation.

Furthermore, I agree with the majority that this type of warrantless intrusion into a person's home should only be permitted between the hours of 6:00 a.m. and 8:00 p.m., as provided in Ark. R. Crim. P. 13.2(c). If searches conducted pursuant to a warrant, based on a judge's finding of probable cause, cannot be served after 8:00 p.m. unless the judge makes one of three specific findings, then "knock and talk" searches, based on even less than reasonable suspicion, likewise should be limited. Otherwise, officers will attempt to use the darkness of the night to their advantage, as they did here. It troubles me that the officers in this case intentionally snuck up on Appellant after dark, parking their cars far enough away so that the occupants of the house would not see them.

Even more troubling is that the lead officer in this case, Officer Johnson, admitted that he made a conscious decision not to inform Appellant of his right to refuse consent. He explained that he was better off not offering any information because, on some occasions in the past, he has informed suspects of their right to refuse and they denied consent to search. In other words, Officer Johnson intentionally refrained from informing Appellant of his right to refuse because he was afraid that Appellant might actually invoke his right. On this issue, I agree with Justice BROWN that we should interpret the Arkansas Constitution as requiring that the right to refuse consent be explained before "knock and talk" searches will be upheld.

BROWN and HANNAH, JJ., join in this concurrence.

ROBERT L. BROWN, Justice, concurring. In recent years, the phenomenon of the "knock and talk" procedure has come into vogue as a substitute for obtaining either a nighttime or a daytime search warrant. Police officers simply accost a person at his or her home, because they do not have sufficient proof to establish probable cause for a search warrant. The police officers obtain a verbal consent to search the home from the homeowner and proceed with the search. The procedure has been upheld as passing muster under the Fourth Amendment to the U.S. Constitution, regardless of whether it takes place during the day or at night. *See, e.g.*, *Rogers v. Pendleton*, 249 F.3d 279 (4th Cir. 2001); *United States v. Jones*, 239 F.3d 716 (5th Cir. 2001); *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999).

What is troublesome about the "knock and talk" procedure, particularly when it occurs at night which was the circumstance in the case before us, is the intimidation factor (usually two to four police officers are involved) and the message conveyed, either verbally or by insinuation, that if a consent is not given, the police officers will simply get a search warrant and come back. "Knock and talk" has become the subject of much debate, in part because it is unclear whether the consenting individual is ever fully aware that he or she can invoke constitutional protections and refuse to give consent. *See, e.g., United States v. Jerez*, 108 F.3d 684, 691 (7th Cir. 1997) (particularly discussing the inherent coerciveness of a knock-and-talk which occurs "in the middle of the night"); *Scott v. State*, 366 Md. 121, 782 A.2d 862 (2001); *State v. Ferrier*, 960 P.2d 927 (Wash. 1998).

The Washington Supreme Court has interpreted its state constitution to require that police officers must inform homeowners of their right to refuse a consent to search before a valid search may commence. *See State v. Ferrier, supra.* In that case, four police officers conducted a "knock and talk" on the appellant's home because they did not want to reveal the identity of their informant to a magistrate in order to get a search warrant. The appellant argued that the "knock and talk" at her home violated her right to privacy under the Washington Constitution. The Washington Supreme Court agreed and determined that the Washington Constitution provided greater protection than the U.S. Constitution with respect to the right to be free from unreasonable searches and seizures, *id.* at 111 (citing *State v. Gunwall*, 720 P.2d 808 (Wash. 1986)),[1] and held as follows:

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[1] In *Gunwall*, the Washington Supreme Court developed six factors which govern whether or not it will extend greater protection under its constitution than the federal courts extend under the federal constitution. One of those factors is whether the wording of relevant state and federal constitutional provisions is similar.

While Arkansas's analog to the Fourth Amendment is worded similarly, that is not a barrier to our extending greater protections under the Arkansas Constitution. Other state courts have done so. *See, e.g., Virmani v. Presbyterian Health Serv. Corp.*, 350 N.C. 449, 515 S.E.2d 675 (1999) ("We have said that even where provisions of the state and federal Constitutions are identical, 'we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.' "); *People v. Belton*, 55 N.Y.2d 49, 447 N.Y.S.2d 873, 432 N.E.2d 745 (1982) (finding greater protection under state constitution despite similar wording of relevant federal and state search and seizure provision).

> [W]e conclude that the knock and talk, as carried out here, violated Ferrier's state constitutional right to privacy in her home and, thus, vitiated the consent she gave. This is so because she was not advised, prior to giving her consent to the search of her home, that she could refuse consent.

Id. at 115. In imposing the new requirement, the Washington Supreme Court did not distinguish between "knock and talk" searches conducted at day or night. *Id. See also Graves v. State*, 708 So. 2d 858, 862 (Miss. 1998) (interpreting the Mississippi state constitution to require a "knowledgeable waiver" of the right to refuse consent to search, which is defined as "consent where the defendant knows that he or she has a right to refuse, being cognizant of his or her rights in the premises").

No state, either by statute or court decision, currently requires that a homeowner sign a *written consent form* advising that homeowner of a right to refuse the search before the search can begin. Yet, such consent forms are being used by individual law enforcement agencies in Arkansas as came to light in a recent "knock and talk" case submitted to this Court for decision. *See Scott v. State*, S. Ct. No. CR2000-51 (submitted on review Jan. 10, 2002). I think using consent forms has merit. Requiring a homeowner to execute a consent form before the search begins would be tangible proof that a consent was given. The language of the form, in addition, would ensure that the individual is presented with the fact that consent can be refused. It would not eliminate all controversy surrounding a "knock and talk" consent, but it would remove some of the credibility battles between police officers and homeowners as well as other evidentiary quagmires that currently afflict our courts in this context, much as the *Miranda* waiver form has done for police interrogations.

A requirement for execution of a written consent form would be consistent with other actions this court has taken to guard against unreasonable searches and seizures under our state constitution. For example, this court has been in the vanguard of other jurisdictions in protecting a person and his or her "castle" against unreasonable searches and seizures at night. *See* Ark. R. Crim. P. 13.2(c) (setting out specific findings a magistrate must make for a nighttime search). We have strictly enforced this rule and made certain that police officers satisfy its criteria when presenting an affidavit for a nighttime search to a judge. *See Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999); *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993); *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991).

Though I agree with the majority that an invalid search began before the consent was given in this case, I offer the written consent form as additional protection against unreasonable daytime or nighttime searches.

CORBIN and HANNAH, JJ., join.

JIM HANNAH, Justice, concurring. I concur in the decision in this case, but would argue for greater restraints on police use of the "knock and talk." Article 2, section 15, of the Arkansas Constitution is a limitation on the power of government and provides protection against unlawful search and seizure. *Grimmett v. State,* 251 Ark. 270-A, 476 S.W.2d 217 (1972). In this case, we are dealing with the search of a home. On a number of occasions, this court has stated the old cliche that "a man's home is his castle." *Guzman v. State*, 283 Ark. 112, 672 S.W.2d 656 (1984); *Haynes v. State*, 269 Ark. 506, 602 S.W.2d 599 (1980). The protection of the home against unlawful intrusion is of paramount concern. This court has stated that a person's home should be free from intrusion by outsiders, including the government and its officers. *Haynes, supra.* In terms of the rights against search and seizure arising under the United States Constitution, the United States Supreme Court in earlier decisions confirmed the statement that illegal entry into a person's home is the chief evil guarded against by the Fourth Amendment. *United States v. United States District Court,* 407 U.S. 297 (1972); *McDonald v. United States*, 335 U.S. 451 (1948). It is also so presently under the Constitution of the State of Arkansas.

In the majority opinion, we now depart from our earlier decisions wherein this court has declared that the Arkansas Constitution provides no greater protection than the Fourth Amendment to the United States Constitution. *Rainey v. Hartness*, 339 Ark. 293, 5 S.W.3d 410 (1999); *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998). We previously noted that the wording of each document is comparable, and through the years, in construing this part of the Arkansas Constitution, we have followed the United States Supreme Court's cases. *Stout v. State*, 320 Ark. 552, 898 S.W.2d 457 (1995). Current interpretation of the United States Constitution in the federal courts no longer mirrors our interpretation of our own constitution.

In Arkansas, our constitution requires us to continue to lend greater protection in the area of warrantless searches. This is evident in the fact that a warrantless search is presumptively unreasonable.

McFerrin v. State, 344 Ark. 671, 42 S.W.3d 529 (2001). More particularly, in this case, we must deal with the issue of oral consent to search and police conduct known as a "knock and talk."

Here the State claims the right against unlawful search and seizure was waived during the course of the discussion arising from the "knock and talk." Certainly, the right may be waived. *Williams v. State*, 237 Ark. 569, 375 S.W.2d 375 (1965). However, in the situation where the police choose to go to a person's home to seek the opportunity to search, we must be very careful that the police do not abuse their position of power and authority. As noted, a man's home is still his castle, and of this, this court stated, "The right to this protection is too valuable to entrust to those who are charged with the duty of apprehending criminals and whose duties also require them to locate evidence to prove the guilt of suspects." *Guzman,* 283 Ark. *at* 117.

In *Guzman,* in expressing this concern, we cited to the United States Supreme Court in *McDonald v. United States*, 335 U.S. 451, 456 (1948), wherein that Court stated:

> Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that Constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

The "knock and talk" practice of police poses a serious threat to the right of privacy and right against unlawful search and seizure. Our constitution requires that consent to search a home cannot be coerced, explicitly or implicitly, or by threats whether implied or overt. *Guzman, supra.* Where police go out with bare unsubstantiated allegations of illegal activity and try to gain access to residences and businesses by obtaining oral consent to search, the intent of the police is understandable and clear. The encumbrances placed on police by the requirements of obtaining a search warrant doubtless make the police less effective. However, this court has long held that consent to a warrantless search of one's home must be given freely and voluntarily. *Humphrey v. State,* 327 Ark. 753, 940 S.W.2d 860 (1997); *Guzman v. State, supra.* The State has a heavy burden to prove by clear and positive testimony that consent was freely and voluntarily given. *Scroggins v. State*, 268 Ark. 261, 595 S.W.2d 219

(1980); *Humphrey, supra. See also Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999). The State failed to meet its burden in this case.

The facts of this case make clear the danger the police "knock and talk" poses. As the majority opinion notes, the federal courts compare police coming to the front door to salespersons or others who may lawfully approach a person's door. The validity of this comparison is highly questionable. While there is no doubt a police officer might approach one's door to sell tickets to the policeman's ball, or sell raffle tickets to a charity function in the same capacity as a salesperson might, in approaching the door to question an occupant about alleged illegal activities or the presence of contraband, the police officer's purpose is wholly inconsistent with that of a salesperson. In that case, he or she comes to the door clothed literally in the authority of the State, and likely in the eyes of the house's occupant, with the greatest power of the State that the average person may ever deal with face to face in his or her life. We ought also to note that the average salesperson generally does not come armed, although that might arguably increase sales.

The facts of this case simply will not support the idea that these police officers were just like the Avon lady or the child selling Girl Scout cookies. First, the average salesperson would likely avoid showing up at the door at 10:00 p.m. While bothering someone so late would likely result in lower sales of cookies, the police showing up so late would make a deeper impression and raise the level of pressure and intimidation. Second, a salesperson would not accuse a person of a felony. That, too, raises the level of anxiety and makes coercion more likely. Third, parking where their car could not be seen is not the likely tactic of the average salesperson who would not perceive taking the customer by surprise as a helpful sales technique. It would, however, have a tendency to catch the occupant of the house off guard and increase pressure to submit. Fourth, although the facts of the number of police officers at the door is in conflict, it is clear there were at least two initially and then four. Avon ladies generally do not travel in packs. Again, the intent is clear — to intimidate and make it more likely the person will give oral consent. Fifth, salespersons don't generally carry flashlights and check the yard and cars on the way to the door. Sixth, a salesperson would likely go to the front door, not a sliding glass door on the side of the house.

In short, there is nothing in these facts to support a claim that the police were on Griffin's property for a lawful purpose. It is difficult to imagine that given these facts a person would feel free to

decline the officer's request even under the Fourth Amendment analysis of the federal courts. *See Florida v. Bostick*, 501 U.S. 429 (1991). In fact, Officer's Johnson's testimony indicates he recognized that people he approached on "knock and talks" did not always feel they were free to ignore him.

The "knock and talk" practice is designed to gain entry for a search without obtaining a warrant, and in fact without any form of reasonable cause, or really even reasonable suspicion. It is designed to avoid the encumbrances of all the protections afforded by both the Arkansas and the United States Constitutions. From that perspective alone, the "knock and talk" should be viewed with disfavor.

The intent to avoid obtaining a warrant is apparent from the facts of this case and from the facts of other cases on this issue. The plan is simple. The police show up in force and intimidate the person into giving oral consent. Officer Johnson testified that he would conduct "knock and talks" until midnight, and it is apparent that late at night was the favored time. Absent a showing of exigent circumstances, Johnson could not have executed a search warrant at so late an hour. Ark. R. Crim. P. 13.2(c).

He also testified that using the method noted above, he got consent up to eighty percent of the time. Officer Johnson further testified that he had consent forms, but that he did not use them, and believed he was under no compulsion to advise a person they need not consent to the search. That statement in and of itself reveals acknowledgment that some persons may well have believed they had no choice but to submit to the search. The "knock and talk" raises significant issues, and unfortunately reinforces the concern that law enforcement should not be acting on their own.

The better approach would be to do the necessary police work to entitle the police to a search warrant. The preference in the law is for a warrant, and it is so strong that less persuasive evidence than would support a warrantless search will justify the issuance of a search warrant. *State v. Broadway*, 269 Ark. 215, 599 S.W.2d 721 (1980).

The police in this case were not faced with any exigent circumstances at all. There was no reason the police had to proceed on the night the police chose to act. The oral consent obtained under the facts of this case is simply not valid consent. Rather than struggle with oral consent in these cases, I believe the better

approach, which would be more consistent with our past cases on search and seizure, would be to require signed consent that advises the person of their rights. That would protect against the erosion of the right against unlawful search and seizure posed by the "knock and talk" method being increasingly used by police. The "knock and talk" search carries too high a danger of coerced consent. This has been recognized by other courts. In *State v. Ferrier*, 960 P.2d 927 (Wash. 1998), the Washington Supreme Court held that in a search arising from a "knock and talk,"police must inform the person that he may refuse consent, revoke consent, or limit the scope of consent. The Mississippi Supreme Court held that under a search resulting from a "knock and talk," there must be a knowledgeable waiver. *Graves v. State*, 708 So.2d 858 (Miss. 1997). These courts reached these conclusions based on their state constitutional provisions against unlawful search and seizure, and we should do the same under Article 2, section 15, of the Arkansas Constitution. These courts recognize the danger posed by the "knock and talk," and that danger is evident here in the high percentage of people who consent. Given the nature of the police conduct, there is a real danger that the persons consenting may believe themselves under restraint, and in consenting, are actually simply obeying the orders of the police they believe they must obey. There is a high likelihood they do not understand they have the right to refuse consent. Thus, I concur in the result in reversing this case, but I would require that in the future, the police obtain written consent notifying the person of their rights and a knowledgeable waiver.

CORBIN and BROWN, JJ., join in this concurrence.

Charles WORTHEM *v.* STATE of Arkansas

CR 01-1207 66 S.W.3d 665

Supreme Court of Arkansas
Opinion delivered February 28, 2002

Appellant, pro se.

Mark Pryor, Att'y Gen., by: *O. Milton Fine, II*, Ass't Att'y Gen., for appellee.

PER CURIAM. Appellant was convicted of committing rape by engaging in deviate sexual activity with another person who was less than fourteen years of age. He was sentenced to thirty

years' imprisonment in the Arkansas Department of Correction. On direct appeal, the Court of Appeals affirmed. *Worthem v. State,* No. CACR 00-1021 (Ark. App., May 2, 2001) (unpublished). The mandate issued May 22, 2001.

On July 3, 2001, Appellant filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37. The State moved for dismissal of the petition, asserting that it was not verified pursuant to Ark. R. Crim. P. 37.1(d). Appellant then filed a verified petition on August 6, 2001. The State again moved for dismissal of the petition on the ground that the second, verified petition was not filed within sixty days of the entry of judgment as required by Ark. R. Crim. P. 37.2(c), and therefore, the circuit court did not possess jurisdiction to grant the requested relief. The circuit court thereafter dismissed the petition without conducting a hearing, finding that appellant's first petition lacked verification, and concluding that appellant's second petition was untimely filed. We find no error and affirm.

Rule 37.1(d) requires that a party seeking to attack a sentence must file a verified petition in the court which imposed the sentence. This court has recognized that the verification requirement of Rule 37.1 is one of substantive importance to prevent perjury. *Carey v. State,* 268 Ark. 332, 333, 596 S.W.2d 688, 689 (1987). Petitions that are not in compliance will not be filed without leave of the court. Ark. R. Crim. P. 37.1(e). Rule 37.2(c) states that if an appeal was taken of the judgment of conviction, a petition claiming relief under this rule must be filed in the circuit court within sixty days of the date the mandate was issued by the appellate court. *Porter v. State,* 339 Ark. 15, 18, 2 S.W.3d 73, 75 (1999). We have held that the filing deadlines imposed by this section are jurisdictional in nature and that if they are not met, a circuit court lacks jurisdiction to consider a Rule 37 petition or a petition to correct an illegal sentence on its merits. *Id.*

Appellant's first petition lacked verification, and therefore, was invalid. Appellant's second petition was not filed within the sixty-day time limit of Rule 37.2(c). As such, the circuit court lacked jurisdiction to grant the relief requested. Accordingly, the circuit court did not err in dismissing appellant's Rule 37 petitions.

Affirmed.

Wendy A. COLLINS *v.* EXCEL SPECIALTY PRODUCTS
and Crawford & Company

01-820 69 S.W.3d 14

Supreme Court of Arkansas
Opinion delivered March 7, 2002

Stephen M. Sharum, for appellant.

Hardin, Jesson & Terry, PLC, by: *J. Rodney Mills* and *J. Leslie Evitts, III*, for appellees.

W.H. "DUB" ARNOLD, Chief Justice. Appellant, Wendy Collins, appeals from the decision of the Workers' Compensation Commission (hereinafter Commission) denying appellant's claim. The Commission adopted the Administrative Law Judge's decision finding that appellant was not performing employment services at the time of her injury. The court of appeals, in a 6-3 decision, reversed and remanded this case to the Commission for further consideration of appellant's claim in light of the court's recent decision in *Matlock v. Arkansas Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001). *Collins v. Excel Spec. Prod.*, 74 Ark. App. 400, 49 S.W.3d 161 (2001). Appellee Excel Specialty Products petitioned this Court for review from the court of appeals's decision reversing the Workers' Compensation Commission. We granted the petition for review. We reverse and remand the Commission's decision, thereby affirming the court of appeals.

I. Standard of Review

Upon a petition for review, we consider a case as though it had been originally filed in this Court. *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000); *Maxey v. Tyson Foods, Inc.*, 341 Ark. 306, 18 S.W.3d 328 (2000); *Woodall v. Hunnicutt Construction*, 340 Ark. 377, 12 S.W.3d 630 (2000); *White v. Georgia-Pacific Corporation*, 339 Ark. 474, 6 S.W.3d 98 (1999); *Burlington Indus. v. Pickett*, 336 Ark. 515, 988 S.W.2d 3 (1999). We view the evidence in a light most favorable to the Commission's decision, and we uphold that decision if it is supported by substantial evidence. *Id.*; *Deffenbaugh Indus. v. Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Pickett*, 336 Ark. 515, 988 S.W.2d 3; *ERC Contr. Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998).

II. Summary of Facts and Procedural History

Appellant was employed with appellee, Excel Specialty Products, as a production worker. Her job consisted of carving blocks of beef into beef steaks of sizes by weight as specified by her employer. Her production work included incentive pay for a certain production quota, and the employees on her production line were required to clock in and out on a time clock. Appellant and her co-workers were given fifteen-minute breaks in the morning and in the afternoon and a thirty-minute lunch break.

On November 2, 1999, sometime between the morning break and the lunch break, appellant left the production line to go to the bathroom for the purpose of urination. Between the production line and the restroom, appellant suffered a fall sustaining a fracture to her right wrist and arm.

The Administrative Law Judge denied appellant's claim reasoning as follows:

> In the present case, the circumstances surrounding the claimant's alleged injury are not in dispute. The claimant testified that the respondent allowed employees to leave the line and go to the restroom whenever necessary and without "clocking out." She stated that the alleged accident and injury occurred after she had

left her work station and while she was actually on her way to the restroom to relieve herself.

Clearly, at the time of her alleged accident and injury, the claimant was not engaged in the performance of any employment tasks which she had been specifically assigned by her employer, nor was she engaged in any activity which would directly benefit or advance the interests of her employer. Nor would her actions be considered inherently necessary for the performance of her required tasks. At most, her actions would only indirectly benefit her employer. Under the Court's ruling the *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), this is not sufficient to case the activity to be considered "employment services."

Based upon existing precedent, I am compelled to find that the claimant's alleged accident and injuries occurred at a time when she was not performing "employment services" as required by Ark. Code Ann. § 11-9-102(4)(B)(iii). Therefore, her alleged injury cannot be considered a "compensable injury" within the meaning of the Act.

As previously stated, the Commission adopted the Administrative Law Judge's decision and the court of appeals reversed and remanded the case for further consideration in light of *Matlock, supra*. We agree with the court of appeals that the case must be reversed and remanded; however, we hold that the Commission erred in this case in denying benefits to appellant.

III. Employment Services

The pivotal issue presented by this case is whether, pursuant to Act 796 of 1993, codified at Ark. Code. Ann. §§ 11-9-101, *et seq.* (Repl. 1996, Supp. 2001), appellant was performing employment services when she sustained an injury while on a restroom break at an employer-provided restroom located on the employer's premises.[1] To evaluate appellant's claim and the full Commission's decision, we are called upon to interpret the phrase "in the course of employment" and the term "employment services" as used in

[1] Because the issue to be resolved in this appeal is whether appellant was performing employment services at the time of the accident, we need not address the nature and extent of her injuries.

Ark. Code Ann. §§ 11-9-102(4)(A)(i) and 11-9-102(4)(B)(iii) (Supp. 2001). When interpreting a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001); *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998).

Act 796 of 1993 made significant changes in the workers' compensation statutes and in the way workers' compensation claims are to be resolved. *White v. Georgia-Pacific Corp., supra.* Claims arising from injuries occurring before the effective date of Act 796 (July 1, 1993) were evaluated under a liberal approach. *Eddington v. City Electric Co.*, 237 Ark. 804, 376 S.W.2d 550 (1964); Ark. Stat. Ann. § 81-1325(b)(4) (Supp.1979). However, Act 796 requires us to strictly construe the workers' compensation statutes. Ark. Code. Ann. § 11-9-704(c)(3); *White v. Georgia-Pacific Corp., supra.* The doctrine of strict construction directs us to use the plain meaning of the statutory language. *Edens v. Superior Marble & Glass, supra*, and *Lawhon Farm Servs. v. Brown, supra.*

Act 796 defines a compensable injury as "[a]n accidental injury . . . arising out of and in the course of employment. . . ." Ark. Code Ann. § 11-9-102(4)(A)(i). A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when *employment services* were not being performed. . . ." Ark. Code Ann. § 11-9-102(4)(B)(iii) (emphasis added). However, Act 796 does not define the phrase "in the course of employment" or the term "employment services," *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). It, therefore, falls to this Court to define these terms in a manner that neither broadens nor narrows the scope Act 796 of 1993. Ark. Code Ann. § 11-9-1001 (Repl. 1996). When the meaning of a statutory term is ambiguous, 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. *Stephens v. Arkansas Sch. for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000).

Since 1993, we have twice been called upon to construe the statutory language found in sections 11-9-102(4)(A)(i) and 11-9-102(4)(B)(iii). *See White v. Georgia-Pacific Corp., supra,* and *Olsten Kimberly Quality Care, supra.* We have held that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer. . . ." *White v. Georgia-Pacific Corp.*, 339 Ark. at 478, 6 S.W.3d at 100. We use the

same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." *White v. Georgia-Pacific Corp., supra; Olsten Kimberley, supra.* The test is whether the injury occurred "within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly." *White v. Georgia-Pacific Corp.,* 339 Ark. at 478, 6 S.W.3d at 100 and *Olsten Kimberly, supra.*

It is well-settled that any interpretation of a statute by this court subsequently becomes a part of the statute itself. *Night Clubs, Inc. v. Fort Smith Planning Comm'n,* 336 Ark. 130, 984 S.W.2d 418 (1999); *Burns v. Burns,* 312 Ark. 61, 847 S.W.2d 23 (1993). The General Assembly is presumed to be familiar with this court's interpretations of its statutes, and if it disagrees with those interpretations, it can amend the statutes. Without such amendments, however, our interpretations of the statutes remain the law. *Lawhon Farm Servs. v. Brown, supra.*; *Sawyer v. State,* 327 Ark. 421, 938 S.W.2d 843 (1997). Although aware of our interpretation of the term "employment services" in *White v. Georgia-Pacific Corp.* and *Olsten Kimberley,* the General Assembly has not changed section 11-9-102(4)(A)(i) or section 11-9-102(4)(B)(iii), other than to renumber those sections. *See* 2001 Ark. Acts 1757 and 1999 Ark. Acts 20. Accordingly, this court's interpretation of the pertinent statutory language remains the law.

Appellant would have this Court either reaffirm the personal-comfort doctrine[2] or hold that a restroom break is a necessary function and directly or indirectly advances the interests of the employer. Conversely, the appellees contend that an employee is not performing employment services during a restroom break, or any personal break, because the personal-comfort doctrine is not

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[2] The personal-comfort doctrine states that:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

Arthur Larson, *The Law of Workmen's Compensation* § 21 (2001). Prior to Act 796 of 1993, this court adopted the personal-comfort doctrine in workers' compensation cases. *Coleman's Bar-B-Que v. Fuller,* 262 Ark. 645, 559 S.W.2d 714 (1978).

consistent with a strict construction of Act 796. Since the enactment of Act 796, we have not directly addressed the personal-comfort doctrine.[3] To automatically accept a personal-comfort activity as providing employment services would impermissibly broaden the requirements of Act 796. On the other hand, to automatically reject a personal-comfort activity as not providing employment services would impermissibly narrow the requirements of Act 796. Instead of following either extreme position, the critical issue is whether the employer's interests are being advanced either directly or indirectly by the claimant at the time of the injury. In addressing this issue, we decline to adopt the factors identified by the court of appeals in *Matlock v. Blue Cross Blue Shield, supra.*

We note that the activity of seeking toilet facilities, although personal in nature, has been generally recognized as a necessity such that accidents occurring while an employee is on the way to or from toilet facilities, or while he or she is engaged in relieving himself or herself, arise within the course of employment.[4] As the court of appeals reasoned in *Matlock v. Blue Cross, supra*:

> Restroom facilities are provided in work settings because eliminating bodily toxins and wastes are natural and ordinary biological processes. Employers provide restroom facilities for the benefit of their customers, to be sure. But they also provide those facilities to accommodate their workers so as to avoid the work interruptions and delays that would certainly occur if workers were forced to leave the employment premises in order to find a public restroom at some distance from the work, their supervisors, and customers.

Matlock v. Blue Cross Blue Shield, 74 Ark. App. at 341-42, 49 S.W.3d at 139. Like the appellant in *Matlock*, Ms. Collins had gone to a restroom provided by her employer when the accident occurred that resulted in her injuries. Her conduct was entirely consistent

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[3] We disagree with the statement by the court of appeals in *Beavers v. Benton County*, 66 Ark. App. 153, 991 S.W.2d 618 (1999), that "the personal-comfort doctrine is no longer the law." *Id.* at 155. This court agreed in *White v. Georgia-Pacific Corp.* that the claimant's injury was not compensable under the personal-comfort doctrine. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). However, we reversed the Commission's decision in that case on the ground that substantial evidence did not support the Commission's determination that the claimant was not performing employment services at the time of his injury. *Id.*

[4] "[T]he wants ministered to are so obviously in the category of necessities that no question arises about their being basically in the course of employment. The only issue on which compensation is sometimes denied is that of seeking these facilities in an unreasonable manner." Arthur Larson, *The Law of Workmen's Compensation* § 21.05 (2001).

with the employer's interest in advancing the work. Everything in the record before us indicates that appellant was engaged in conduct permitted by the employer, if not specifically authorized by the employer, and that the employer provided restroom facilities on its premises.

Based on the record in this case, we hold that appellant's restroom break was a necessary function and directly or indirectly advanced the interests of her employer. Consequently, her injury is not excluded from the definition of "compensable injury" under section 11-9-102(4)(B)(iii) because the injury did not occur at a time when she was not performing employment services. The Commission's decision based on an incorrect interpretation of the law must, therefore, be reversed. In so holding, we overrule all prior decisions by the Arkansas Court of Appeals to the extent that they are inconsistent with this opinion.

Reversed and remanded for a determination of benefits.

James HATHCOCK and Zoeanna Hathcock *v.*
ARKANSAS DEPARTMENT OF HUMAN SERVICES,
S.J. and J.H., Minor Children

01-885 69 S.W.3d 6

Supreme Court of Arkansas
Opinion delivered March 7, 2002
[Petition for rehearing denied April 11, 2002.]

Jeff Rosenzweig, for appellant James Hathcock.

Arkansas Department of Humans Services, by: *Dana McClain*; and *Lana Parks Davis*, for appellee.

TOM GLAZE, Justice. The Arkansas Department of Human Services (DHS) initiated this proceeding by obtaining an emergency order, dated April 23, 2000, which resulted in the removal of juveniles, S.H., J.H., and T.J.H. from the custody of their parents, Zoeanna and James Hathcock. In that order, the trial court set a probable cause hearing on April 30, 2001, which was held as scheduled. After the probable cause hearing, the trial court ordered T.J.H. to be returned to his parents, but directed the daughters, S.H. and J.H. to continue in DHS's custody. The trial court ordered that the father, James Hathcock, have no contact with his daughters, and in the same order, set an adjudication hearing for June 1, 2001.

On May 25, 2001, Hathcock filed a motion for continuance, asserting there was a possibility of criminal charges being filed against him involving allegations that Hathcock had sexually and physically abused his daughters, S.H. and J.H. Hathcock submitted that so long as he was the subject of a pending criminal investigation, he had no alternative but to decline to testify at the adjudication hearing, thereby exercising his Fifth Amendment rights. The

trial court denied Hathcock's request for continuance, finding that (1) any criminal charges filed against Hathcock were independent of the court's adjudication holding on the issues of dependency/neglect, (2) any adjudication order would be based on relevant information provided by persons other than Hathcock, and (3) under Ark. Code Ann. § 9-27-315(d)(2) (Repl. 2002), the trial court was under a mandated deadline to complete the adjudication.

The court conducted an adjudication hearing on June 1st and 15th of 2001, and continued DHS's custody of S.H. and J.H., finding, among other things, that Hathcock had returned to the parents' home, and the girls' mother, Zoeanna, had previously demonstrated she would not protect the girls. The court provided liberal supervised visitation for the mother, Zoeanna, but barred James Hathcock from having any contact with his daughters.

Hathcock now appeals the trial court's adjudication pursuant to Rule 2(c)(3) of our Rules of Appellate Procedure—Civil. His sole point for reversal is that the trial court erred in denying him a continuance of the adjudication proceeding, which included the same abuse allegations for which the State was criminally investigating him. We affirm.

Hathcock argues the trial court erred in ruling it could not grant a continuance of an adjudication hearing for more than fifty days after the emergency hearing. In reaching that decision, the trial court relied on section 9-27-315(d)(2) which reads as follows:

> The adjudication hearing *shall* be held within thirty (30) days of the emergency hearing, but *may be continued for no more than twenty (20) days following the first thirty (30) days* on motion of any party for good cause shown.

(Emphasis added.)

Citing *Ramirez v. White County Circuit Court*, 343 Ark. 372, 38 S.W.3d 298 (2001), Hathcock submits the word "shall," as used in section 9-27-315(d)(2), should be regarded as directory and not mandatory. Hathcock argues that the purpose of section 9-27-315(d)(2) is to provide a forum for the litigation of emergency issues and to return a child to his home if there is no probable cause or if the evidence does not support it. He contends the purpose of the statute is not defeated by the court's delaying the adjudication proceedings when he is willing to allow the status quo to continue

during the delay. In addition, Hathcock urges his argument is consistent with our general rule covering continuance requests under Rule 40(b) of the Rules of Civil Procedure, which provides that a trial court *may*, upon motion and for good cause shown, continue any case previously set for trial. Hathcock further argues that, unlike the continuance language in section 9-27-315(d)(2), the grant or denial of a motion for a continuance is generally within the sound discretion of the trial court, and the trial court's ruling will be reversed only if there is an abuse of discretion. *Jacobs v. Yates*, 342 Ark. 243, 27 S.W.3d 934 (2000).

Hathcock's arguments are misplaced for several reasons. 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. *Ramirez*, 343 Ark. 372, 38 S.W.2d 298. 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.* Moreover, this court has consistently held that the word "shall," in a statute, means the legislature intended mandatory compliance with the statute unless such an interpretation would lead to an absurdity. *Id.*

In the instant case, section 9-27-315(d)(2) is quite clear, and the statute's employment of the word "shall" merely assures that the statute's purpose will be met. The purposes of the provisions of the Arkansas Juvenile Code are set out in Ark. Code Ann. § 9-27-302 (Repl. 2002).[1] The paramount objective of the Act is best

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[1] This subchapter shall be liberally construed to the end that its purposes may be carried out:

(1) To assure that all juveniles brought to the attention of the courts receive the guidance, care, and control, preferably in each juvenile's own home when the juvenile's health and safety are not at risk, which will best serve the emotional, mental, and physical welfare of the juvenile and the best interest of the state;

(2)(A) To preserve and strengthen the juvenile's family ties when it is in the best interest of the juvenile;

(B) To protect a juvenile by considering the juvenile's health and safety as the paramount concerns in determining whether or not to remove the juvenile from the custody of his or her parents or custodians, removing the juvenile only when the safety and protection of the public cannot adequately be safeguarded without such removal;

(C) When a juvenile is removed from his or her own family, to secure for him or her custody, care, and discipline as nearly as possible equivalent to that which should have been given by his or her parents, with primary emphasis on ensuring the health and safety of the juvenile while in the out-of-home placement; and

(D) To assure, in all cases in which a juvenile must be permanently removed from the custody of his or her parents, that the juvenile be placed in an approved family home and

stated in the emergency clause of Act 1337 of 1995 — an amendment to section 9-27-315 — which provides as follows:

> [I]n instances where a determination is to be made as to whether a child should remain in an abusive home, that decision should be made based upon the best interest [of] the child; . . . and . . . this act should go into effect as soon as possible so that the standard is made clear immediately that *the best interest of the child should always be the paramount consideration in determining whether a child is to remain in an abusive home.*

(Emphasis added.)

To achieve the foregoing purpose, the Code provides for six-month periodic reviews, and, no later than twelve (12) months after the date the juvenile enters an out-of-home placement, the court shall hold a permanency planning hearing in order to enter a new disposition in the case. *See* Ark. Code Ann. §§ 9-27-337 and -338 (Repl. 2002). In the instant case, Hathcock's request for a continuance that could extend the statutorily required hearings past the fifty-day period established in section 9-27-315(d)(2) may well serve his purposes, but it unquestionably impedes Arkansas' statutory scheme, which is designed to expedite and insure that the children's best interests will be achieved. As for Hathcock's reliance on our Rule 40(b), we hold that the limited continuance provided in section 9-27-315(d)(2) of the Juvenile Code controls, since that statute deals with expediting hearings involving children in out-of-home placement situations and, as such, serves a specific purpose which is not in conflict with Rule 40(b). *See Citizens for a Safer Carroll County v. Epley*, 338 Ark. 61, 991 S.W.2d 562 (1999) (as a general rule, statutes are given deference so long as they are compatible with our rules).

Finally, Hathcock quotes extensively from the case of *Security Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C.

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be made a member of the family by adoption;

(3) To protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution, recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases; and

(4) To provide means through which the provisions of this subchapter are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

Cir. 1980), in support of his assertion that the refusal to continue the adjudication hearing impinged on his constitutional rights against self incrimination. He refers to *Dresser* and quotes the following:

> The Constitution, therefore, does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *See Baxter v. Palmigiano*, 425 U.S. 308, 98 S. Ct. 1551, 47 L. Ed. 2d 810 (1976); *DeVita v. Sills*, 422 F.2d 1172, 1181 (3d Cir. 1970). Nevertheless, a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions "when the interests of justice seem to require such action, sometimes at the request of the prosecution, . . . sometimes at the request of the defense[.]" *United States v. Kordel, supra,* 397 U.S. at 12 n. 27, 90 S. Ct. at 770 (citations omitted); *see Horne Brothers, Inc. v. Laird*, 463 F.2d 1268, 1271-1272 (D.C. Cir. 1972). The court must make such determinations in the light of the particular circumstances of the case. Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter. The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.

Dresser Indus., 628 F.2d at 1375-76.

Even the foregoing passage on which Hathcock relies fails to help him. For example, the court in *Dresser* points out the general rule that the Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings, but a court *may, in its discretion,* decide to stay such civil proceeding where the intent of justice seems to require a stay. *See also United States v. Kordel*, 397 U.S. 1 (1970) (recognizing that to require the government to choose between foregoing recommendation of a criminal prosecution once it seeks civil relief and deferring civil proceedings pending the ultimate outcome of a criminal trial would "stultify enforcement of federal law"). The public interests at stake here in Arkansas' Juvenile Code are to protect the State's juveniles who have been

reported abused, removed from their parents' custody, and placed in a foster-care home.

As already indicated above, any delay in affording children protection or in providing them with a permanency plan works against those children's welfare and best interests. In other words, delays in the noncriminal, dependency/neglect proceeding would only serve to injure the public interest and run counter to the purpose of Arkansas' adjudication hearings like the one now before us. Therefore, we conclude that the trial judge did not err in denying Hathcock's motion for continuance.

Affirmed.

WAL-MART STORES, INC. *v.* REGIONS BANK TRUST DEPARTMENT, Guardian of the Estate of Michael Burkeen; Linda Burkeen, Individually, and as Guardian of the Person of Michael Burkeen

01-839 69 S.W.3d 20

Supreme Court of Arkansas
Opinion delivered March 7, 2002

Quattlebaum, Grooms, Tull & Burrow PLLC, by: *Leon Holmes*, *Thomas G. Williams*, and *Patrick D. Wilson*, for appellant.

Taylor, Halliburton, Ledbetter & Caldwell, by: *Mark Ledbetter*; and *Lane, Muse, Arman & Pullen*, by: *Richard S. Muse*, for appellees.

TOM GLAZE, Justice. This is an appeal from a jury verdict in favor of Michael and Linda Burkeen in their negligence action against Wal-Mart. In addition to asking this court to determine the sufficiency of the evidence, Wal-Mart also poses a challenge to two of the trial court's evidentiary rulings. Because the appeal presents a substantial question of law concerning the construction of a rule of evidence, jurisdiction is properly in this court under Ark. Sup. Ct. R. 1-2(b)(6).

We first turn to the facts of this case. About 6:45 p.m. on November 12, 1992, Michael Burkeen slipped and fell on a liquid substance on the floor of a Wal-Mart store in Hot Springs; the liquid apparently came from a broken snow globe that had been part of a Christmas display. He hit his head on the floor, and later reported that he had begun to experience memory problems. Through Linda, Michael sued Wal-Mart for negligence, alleging first, that the store had been negligent in how it stacked the display of snow globes, and second, that it had failed to inspect the floors and clean the liquid substance on the floor.[1]

During discovery, Wal-Mart disclosed that it wanted to introduce evidence that Linda had pled guilty to theft of property. This felony conviction resulted from a check-kiting scheme in which she had been involved after Michael's slip-and-fall accident; however, upon her successful completion of probation, Linda's record was expunged. The expungement occurred prior to Michael's filing this

[1] When the complaint was filed, Linda Burkeen was named plaintiff "individually and as guardian of the person and estate of Michael Burkeen." Just prior to trial, however, Regions Bank was substituted for Linda Burkeen as guardian of the estate. Linda remained as a named party in the action, individually, and as guardian of Michael's person.

suit. Wal-Mart also suggested that it would introduce the fact that Michael had pled *nolo contendere* to misdemeanor criminal mischief. Michael responded by filing a motion *in limine* to exclude evidence of his and Linda's convictions. Wal-Mart responded that the evidence of Linda's conviction was relevant to impeach her credibility, and that Michael's conviction — in particular, his conduct during the police investigation — was relevant to proving the extent of damages he allegedly suffered. The trial court granted the Burkeens' motion *in limine*, concluding that Linda's conviction had been expunged, and the evidence surrounding Michael's conviction would be more prejudicial than probative.

The matter proceeded to trial, and the jury found in favor of the Burkeens, awarding Michael $169,000 and Linda $67,000. From that jury verdict, Wal-Mart brings the instant appeal, arguing that 1) there was insufficient evidence to support the jury's finding of Wal-Mart's negligence; 2) the trial court erred in excluding evidence of Linda's felony conviction for theft of property; and 3) the trial court erred in excluding the audiotape and transcript of Michael Burkeen's interview with Police Chief Montie Sims regarding his knowledge of Linda's involvement in the check-kiting scheme.

For its first point on appeal, Wal-Mart argues that there was insufficient evidence to support the jury's finding that Wal-Mart was negligent. At the close of the Burkeens' case, Wal-Mart moved for a directed verdict, arguing that the Burkeens had failed to produce sufficient evidence to show that 1) Wal-Mart caused the snow globe to be on the floor, 2) the globe's liquid had been on the floor for any length of time, and 3) Wal-Mart had knowledge of the broken snow globe and of the substance on the floor, yet failed to remove it. The trial court granted Wal-Mart's motion as to the question of whether or not Wal-Mart had been negligent in its stacking of the snow globes, but denied it with respect to whether or not Wal-Mart knew or should have known of the presence of the substance on the floor.

Our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence. *Ethyl Corporation v. Johnson*, 345 Ark. 47, 49 S.W.3d 644 6 (2001); *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000). 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, supra.* 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). A motion for a directed verdict should be denied when there is a conflict in the evidence or when the evidence is such that fair-minded people might reach different conclusions. *Fayetteville Diagnostic Clinic v. Turner*, 344 Ark. 490, 42 S.W.3d 420 (2001). Under those circumstances, a jury question is presented and a directed verdict is inappropriate. *Id.*

The principles that govern slip-and-fall cases have been frequently stated by this court. Those principles are set against the general backdrop that an owner has a duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees. *Fayetteville Diagnostic Clinic, supra*; *Morehart v. Dillard Dep't Stores*, 322 Ark. 290, 908 S.W.2d 331 (1995); *Black v. Wal-Mart Stores, Inc.*, 316 Ark. 418, 872 S.W.2d 56 (1994). To establish a violation of that duty, the plaintiff must prove either: (1) that the presence of a substance upon the floor was the result of the defendant's negligence, or (2) the substance had been on the floor for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Wilson v. J. Wade Quinn Co.*, 330 Ark. 306, 952 S.W.2d 167 (1997); *Kelly v. National Union Fire Ins. Co.*, 327 Ark. 329, 937 S.W.2d 660 (1997); *Brunt v. Food 4 Less, Inc.*, 318 Ark. 427, 885 S.W.2d 894 (1994). With respect to part two of this test, the burden is on the plaintiff to show a substantial interval between the time the substance appeared on the floor and the time of the accident. *Sanders v. Banks*, 309 Ark. 375, 830 S.W.2d 861 (1992). The mere fact that a person slips and falls does not give rise to an inference of negligence. *Brunt v. Food 4 Less, Inc., supra.* Also, the presence of a foreign or slick substance which causes a slip and fall is not alone sufficient to prove negligence, but instead, it must be proved that the substance was negligently placed there or allowed to remain. *House v. Wal-Mart Stores, Inc.*, 316 Ark. 221, 872 S.W.2d 52 (1994); *Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993).

After the trial court granted a directed verdict on the issue of Wal-Mart's negligence in stacking the snow globes, the case proceeded to the jury on the second of the two theories noted above — *i.e.*, that the substance had been on the floor for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. Viewed in the light most favorable to the Burkeens, the evidence at trial showed the following series of events. On November 12, 1992, Michael Burkeen was shopping for light switches at the Wal-Mart. He said that he went to the Christmas department to find a toy for one of his children, "made a right turn, and the next thing [he] knew [he] was lying on the floor." After the fall, he remembered going through the checkout line, but as he walked back to his truck, he had to hold onto other cars for support.

When Michael had not returned home by 11:00 p.m., Linda and her daughter Kristy Johnson went out to look for him. Linda testified that when she found Michael, he was slumped over the steering wheel of his truck in the Wal-Mart parking lot; when she opened the door of the truck, he was semi-conscious. Kristy went into the Wal-Mart to call 911, and Linda waited with Michael. According to Linda, he kept asking where he was, and he had a knot on his head. When the paramedics arrived, Michael was still confused, but was able to talk some. At the hospital, Linda noticed that he had given an incorrect address, and he seemed confused and unaware of where he was. Since the accident, she testified that his personality had changed, and that he had become forgetful and unable to communicate or work.

Debra Sharp was shopping in the same department as Michael at the time of the accident; she had noticed a "puddle of stuff" on the floor moments before, and had warned her little girl to walk around the water. Out of the corner of her eye, Sharp saw Michael fall and heard a "pop" as his head hit the ground. His shopping cart rolled into her after he fell. Sharp stated that she only noticed the puddle because she was looking down at her daughter, and would probably not have noticed it if her children had not been with her. She described the puddle as having a "milky color like when wax gets wet and then it starts to dry," and the puddle "might have been a little smaller than eight-by-twelve" inches. She did not remember seeing the parts of a broken snow globe on the floor, but did notice snow globes on the shelves as she was shopping. Sharp further related that, "[b]ecause there was a discoloration around the edges of this puddle, it just told me that it had been there awhile. I worked in a motel for years and you kinda notice those kind of

things on the floors and know that water's been on it for a while." On cross-examination, she conceded that she had no way of knowing how long the puddle had been there.

David Bateman was employed by Wal-Mart at the time of the accident. He testified that he heard the accident and got over to that aisle as soon as he could; upon arriving, he saw Michael sprawled across the aisle and bleeding profusely from his hands. There was glass protruding from his hand, and there was a broken snow globe on the floor. Bateman cleaned up the puddle after his supervisor arrived and instructed him to do so. Bateman stated that he did not remember any flaking or discoloration around the edges of the spill, but he conceded that it was possible the substance could have been on the floor for as long as a day. He also testified that when he cleaned up the floor, the snow globe material had "slightly discolored the floor." There was a clean spot where the liquid had been, and it looked as though the top layer of floor wax had been removed.

The next witness to testify was Edward Sorrells, a chemist who conducted an analysis of the snow globe's contents. He noted that the substance inside the snow globe was primarily water, but also contained some "dissolved solids." His analysis stated that the liquid in the globe "would not dry simply by exposure to atmosphere, and it would only dry completely in a forced air oven at a temperature well above the boiling point of water. At a lower temperature, the liquid would not dry completely and the retained dissolved solids would regain water on cooling to regain a liquid appearance." Sorrels also concluded that for the substance in the snow globe to even begin to dry, it would take at least twenty-four hours. If the borders of the liquid were "flaky," Sorrels estimated that it would take more than a day to get that appearance.

Dale Adams, a Wal-Mart assistant manager, testified that when he got to the area where Michael fell, he saw a broken snow globe on the floor and associated that with the accident. Adams did not recall whether the area where the snow globe had fallen and broken was whitening or had changed the condition of the floor where the liquid had been spilled. He said that he could not picture a substance being on the floor long enough to change its color. Adams further testified that in his experiences with substances being on the floor in Wal-Mart, either an associate or a customer would see and report it so it could be cleaned up quickly; when anyone reported a spill, someone from Wal-Mart would grab a paper towel as quick as possible to get it cleaned up.

As noted above, the trial court granted Wal-Mart's motion for directed verdict on the question of whether or not the liquid was on the floor as the result of Wal-Mart's negligence. Thus, this court must determine whether the evidence described above was sufficient to support a finding that the substance had been on the floor for such a length of time that Wal-Mart knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *See Wal-Mart Stores, Inc. v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991). This court has recognized that the length of time a substance is on the floor is a key factor in determining negligence, and the burden is on the plaintiff to show a substantial interval between the time the substance appeared on the floor and the time of the accident. *House v. Wal-Mart Stores, Inc.*, 316 Ark. 221, 872S.W.2d 52 (1994); *Bank of Malvern v. Dunklin*, 307 Ark. 127, 817 S.W.2d 873 (1991).

In *Wilson v. J. Wade Quinn Co.*, 330 Ark. 306, 952 S.W.2d 167 (1997), there was conflicting testimony about whether or not a substance had been on the floor for any amount of time. The trial court granted summary judgment in favor of the store, but this court reversed, holding that there a fact question was presented by the affidavit of the plaintiff, Wilson, wherein he stated that there was a "dirty looking liquid," mixed with food particles, on the floor that looked like it had been walked through for quite some time and that had spread over a wide area. Such a statement "raise[d] the specter of a foreign substance having been present long enough that store employees should have known of its presence." *Wilson*, 330 Ark. at 309.

In the present case, Wal-Mart relies on *Sanders v. Banks*, 309 Ark. 375, 830 S.W.2d 861 (1992), in which this court affirmed the trial court's grant of summary judgment and held that there was no evidence tending to establish the time between the appearance of a substance on the floor and the time of the accident. There, plaintiff Sanders had no idea how long the substance was on the floor prior to her fall, and the closest evidence on this point was her "admitted guess" that the matter was tobacco juice and that it had "gelled." In affirming, this court held that, absent some showing the substance actually was tobacco juice and evidence as to how long it would have taken it to "gel," there was no evidence that the substance had been there long enough that store personnel should have had notice of it.

Here, on the other hand, Michael Burkeen offered not only the testimony of Debra Sharp, who stated that, based on her

experience working in hotels, the spill looked like it had been there for some time, but also expert testimony given by chemist Ed Sorrells. As discussed above, Sorrells testified that the liquid in the snow globe would not dry simply by exposure to the atmosphere, and that, for the substance to even begin to dry, it would take at least twenty-four hours.[2] From this testimony, as well as the concession of Wal-Mart employee David Bateman that the liquid may have been on the floor for up to a day, the jury had sufficient evidence to find that the substance had been on the floor for such a substantial interval of time that Wal-Mart employees should have known of its presence and removed it.

For its second point on appeal, Wal-Mart contends that the trial court erred in excluding evidence of Linda Burkeen's felony theft conviction, which Wal-Mart sought to introduce to impeach her credibility. Linda pled guilty to felony theft of property in Yell County in 1993; the charges arose out of a check-kiting scheme in which she engaged after Michael's fall in November of 1992. On July 6, 2000, the Yell County Circuit Court entered an order pursuant to Ark. Code Ann. § 16-93-301 (Supp. 2001), expunging her record, finding that she had "satisfactorily complied with the orders of this court, and that the petition to expunge and seal should be granted." Prior to the trial in the instant case, the trial court granted the Burkeens' motion *in limine* to exclude any evidence of Linda's 1993 conviction, ruling that "an expungement is an expungement," and the felony conviction was therefore inadmissible. Wal-Mart contends that the trial court's ruling was in error, because there was no finding that Linda had been rehabilitated as required by Ark. R. Evid. 609(c). That rule provides as follows:

> Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure *based on a finding of the rehabilitation of the person convicted*, and that person has not been convicted of a subsequent crime which was punishable by

[2] Sorrells also stated that if the liquid had a "flaky" appearance around the edges, it would have had to have been there for more than a day. Wal-Mart leans heavily on this testimony and compares it to that of Debra Sharp, who said that the puddle appeared "milky." In its reply brief, Wal-Mart argues strenuously that "flaky" and "milky" are not synonymous; however, the resolution of this case does not depend on the difference between "flaky" and "milky," as there was sufficient other testimony to support the jury's verdict.

> death or imprisonment in excess of one [1] year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(Emphasis added.) Wal-Mart contends that, because Linda's expungement was not accompanied by a finding of rehabilitation, the underlying conviction should not have been excluded from evidence.

Here, both parties cite *Steele v. State*, 280 Ark. 51, 655 S.W.2d 381 (1983). In *Steele*, the issue presented was whether or not the trial court erred in refusing to permit defense counsel to impeach one of the State's witnesses with evidence of a prior felony conviction. The trial court had refused to allow such cross-examination because the earlier conviction had been expunged by the sentencing court. This court affirmed, writing as follows:

> This being the first interpretation of Rule 609(c) as applied to a situation where a witness's prior record has been expunged, we choose to give the rule its plain and ordinary meaning. Therefore, we hold that the trial court correctly ruled that the expungement of the prior proceedings, whether it was a conviction or not, rendered such record inadmissible. *The trial court found that [the witness] had been rehabilitated prior to the entry of the order of expungement.* Rule 609(c) requires the court to refuse to allow a conviction which has been expunged, to be used for testing the credibility of a witness.

Steele, 280 Ark. at 53 (emphasis added).

Here, the Burkeens contend that, under the last sentence quoted above from *Steele*, the trial court's ruling was correct. Further, the Burkeens rely on the language of Ark. Code Ann. § 16-90-902 (Supp. 2001), that states that the effect of an expungement is that "the individual's underlying conduct shall be deemed as a matter of law never to have occurred and the individual may state that no such conduct ever occurred." However, the Burkeens' argument ignores the language in the *Steele* opinion that specifically notes that the trial court in that case "found that [the witness] had been rehabilitated prior to the entry of the order of expungement." No such finding was made in the instant case. To accept the Burkeens' contentions would require this court to read the "finding of rehabilitation" language out of Rule 609(c).

Arkansas Rule of Evidence 609(c) is identical to Federal Rule 609(c); numerous federal cases interpreting that rule have required an explicit finding of rehabilitation before an expunged conviction may properly be excluded. *See, e.g., United States v. Swanson*, 9 F.3d 1354 (8th Cir. 1993) (trial court properly held that it could not exclude evidence of an earlier conviction based on Rule 609(c) because appellant Swanson did not provide any evidence that the dismissal of the case was based on a finding of innocence or rehabilitation); *Wilson v. Attaway*, 757 F.2d 1227 (11th Cir. 1985) (Georgia First Offender Statute,[3] which permitted court to put a defendant on probation without adjudication of guilt, did not provide for rehabilitation within the meaning of Fed. R. Evid. 609(c)); *cf. Brown v. Frey*, 889 F.2d 159, 171 (8th Cir.1989) (holding that evidence of conviction was properly excluded where convicted party received pardon "based on rehabilitation"). Further, the Fifth Circuit has noted that Rule 609 "draw[s] a distinction between pardons based on actual innocence or a finding of rehabilitation (which make the underlying conviction inadmissible for impeachment) and pardons granted solely to restore civil rights (*which have no relevance to character and do not impair the admissibility of the underlying conviction*)." *United States v. Hamilton*, 48 F.3d 149 (5th Cir. 1995) (emphasis added).

Other states interpreting Rule 609(c) have reached similar conclusions. *See State v. Hettich*, 70 Wash. App. 586, 854 P.2d 1112 (1993) (Rule 609(c) bars admission of a prior conviction only where there has been an express finding that the person convicted has been rehabilitated); *State v. Fierson*, 146 Ariz. 287, 705 P.2d 1338 (Ct. App. 1985) (explicit finding of rehabilitation is necessary in order to bar use of a prior conviction under Rule 609(c)); *Durham v. State*, 571 S.W.2d 673 (Mo. Ct. App. 1978) (Rule 609 provides that pardoned convictions can be used to impeach the credibility of a witness unless the pardon was based on a finding of rehabilitation or innocence).

We conclude that, in the absence of a finding that Linda had been rehabilitated, the trial court's decision to exclude evidence of her conviction under Rule 609(c) was erroneous. Wal-

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[3] The Georgia First Offender Statute, O.C.G.A. § 42-8-60 (1982), contained language similar to Ark. Code Ann. § 16-90-902, in that it provided that a defendant is discharged upon completion of his probation, and the discharge "shall completely exonerate the defendant of any criminal purpose and shall not affect any of his civil rights or liberties," and "the defendant shall not be considered to have a criminal conviction."

Mart further points out that Linda's conviction could have been admissible under Ark. R. Evid. 609(a), which provides as follows:

> *For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime* (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) *involved dishonesty or false statement, regardless of the punishment.*

(Emphasis added.)

As previously noted, the federal rule is identical to Arkansas' rule on this point. The congressional commentary to Fed. R. Evid. 609(a) states explicitly the following:

> The admission of prior convictions involving dishonesty and false statement is not within the discretion of the court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

Fed. R. Evid. 609(a) — Senate Conference Committee Report (1999).

A leading commentator notes that such "second-prong crimes" — *i.e.*, those involving dishonesty or false statements — clearly include crimes such as perjury, criminal fraud "in many different forms," embezzlement, and false pretense, but points out that "this list is not exhaustive, and certainly forgery and counterfeiting should be included, along with other crimes involving deceit, untruthfulness, or falsehood." Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 6.32 (2d ed. 1999) (citing, as examples of such crimes, *United States v. Morrow*, 977 F.2d 222 (6th Cir. 1992) (counterfeiting); *United States v. Kane*, 944 F.2d 1406 (7th Cir. 1991) (delivering check knowing it will not be honored); *Wagner v. Firestone Tire & Rubber Co.*, 890 F.2d 652 (3d Cir. 1989) (forgery, passing bad checks)).

The crime of which Linda was convicted was check-kiting. This crime is defined as a "practice of writing a check against a bank account where funds are insufficient to cover it and hoping that, before it is deposited, the necessary funds will have

been deposited," or a "transfer of funds between two or more banks to obtain unauthorized credit from a bank during the time it takes the checks to clear." *Black's Law Dictionary* 238 (6th ed. 1990); *see also Peek v. Bank of Star City*, 237 Ark. 967, 377 S.W.2d 158 (1964). Clearly, check-kiting is a crime involving dishonesty, and as such, the trial court abused its discretion in refusing to admit evidence of Linda's earlier conviction.

Wal-Mart's third argument on appeal is that the trial court erred in excluding an audiotape and transcript of a 1993 interview Michael gave to Chief of Police Montie Sims, who was investigating the check-kiting charges against Linda and who spoke with Michael approximately six months after his fall. Wal-Mart asserted that the transcript of that interview would serve to show that Michael's memory was not as impaired as he claimed, and it argued to the trial court that the transcript was relevant to rebut Michael's claims and the testimony of his experts regarding the degree of his impairment. Prior to trial, the trial court excluded evidence of Michael's misdemeanor conviction for criminal mischief, ruling that it was not a felony that could be admitted under Rule 609. Further, the court found that the prejudicial effect of the audiotape and transcript outweighed any probative value they might have, and therefore rejected Wal-Mart's proffer of the items.

On appeal, Wal-Mart continues its argument that it should have been permitted to introduce the tape and transcript to show that, contrary to Michael's tests, he had ample memory and could carry on a normal conversation under stressful conditions. His interview with Officer Sims, Wal-Mart submits, belies the claims of Michael's expert witnesses and his family as to the severity of Michael's brain impairment and that he had no short-term memory. Wal-Mart asserts that, when confronted with possible criminal prosecution, Michael "answered the questions precisely, intelligently, and to the point" and "had vivid recall of the name of the bank officer who had contacted him, his whereabouts, conversations with his wife and other matters." Wal-Mart notes that it is readily apparent from the tenor of the conversation between Michael and Officer Sims that Michael had no problems remembering details and recent events; such evidence stood in direct contrast to testimony from one of Michael's neuropsychologists who testified that Michael "could not even remember to come in out of the rain."

Ordinarily, 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. *See, e.g., J. E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001). Here, however, the trial court rendered its decision regarding the audiotape and transcript in light of its previous decision to exclude evidence of Linda's conviction. Because the tape contained lengthy discussions of Linda's involvement in the check-kiting scheme, as well as Michael's knowledge of her involvement, the trial court ruled that to introduce the transcript and tape would be unduly prejudicial. However, as discussed above, the trial court's decision to exclude Linda's felony conviction was premised on an erroneous application of Ark. R. Evid. 609(c). That conviction should have been admitted into evidence, and had the trial court ruled properly on that evidentiary question, it is likely that the jury's hearing of Michael's interview would have posed less danger of unfair prejudice. Accordingly, we hold that the trial court likewise abused its discretion in excluding the audiotape and the transcript.

Affirmed in part; reversed and remanded in part.

HANNAH, J., dissents.

CORBIN, J., not participating.

JIM HANNAH, Justice, dissenting. I must respectfully dissent. While I agree with the majority that there is sufficient evidence to support the jury's finding that Wal-Mart was negligent, I cannot agree with the majority's holding that the expunged conviction of Mrs. Burkeen is admissible under Ark. R. Evid. 609(c) for purposes of impeachment in a civil trial. This holding is directly contrary to our holding in *Steele v. State*, 280 Ark. 51, 655 S.W.2d 381 (1983). There are two instances where an expunged conviction is admissible. Neither is applicable under the facts of this case. I find no basis for this court's holding on admissibility of expunged convictions in the law of this State and find the foreign-jurisdiction analysis provided by the majority unconvincing.

In reading the majority opinion, I must conclude that the holding is based upon a failure of Mrs. Burkeen to use the correct words in drafting her order expunging and sealing her conviction. It appears this Court now holds exact wording in the order is required by Rule 609(c) before expungement is effective. I must note that expungement is granted by statute, not by the rules of this Court.

At issue is the following language from Rule 609(c): "Evidence of a conviction is not admissible if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based upon a finding of rehabilitation of the person convicted. . . ." It seems abundantly clear from the plain language of this sentence that where a conviction has been expunged according to law it is inadmissible. This court, however, cites to *Steele, supra,* in finding confusion where there is none. In *Steele,* this court held that the evidence of the conviction was properly excluded because the "[t]rial court found that he had been rehabilitated prior to entry of the order of expungement." *Steele,* 280 Ark. at 53. Basing its decision on the literal language of the opinion in *Steele,* the majority finds meaning and direction from the opinion in *Steele* where none was intended. Relying on specific words used in the *Steele* opinion, the majority holds in the present case that because "[n]o such finding [of rehabilitation] was made in the instant case," the conviction was admissible even though it had been expunged. It is true that the word "rehabilitation" does not appear in the order in Mrs. Burkeen's case, but neither does it appear in the order in *Steele.* The majority reads more into the opinion in *Steele* than is to be found there. The court in *Steele* stated, "The order stated that LaFerney had met all the terms and conditions of the earlier order and had in fact been a model citizen." *Steele,* 280 Ark. at 52.

The word "rehabilitation" does not appear in the order expunging the witness's conviction in *Steele.* The Court just used the word "rehabilitation" in its opinion in characterizing that the terms and conditions of the earlier order had been met. The order in *Steele* provides in pertinent part "that the defendant has met all conditions pursuant to said plea and the behavior of the defendant since January 26, 1978, has been exemplary and the defendant has conducted himself as a model citizen." The order regarding Mrs. Burkeen provided more simply in pertinent part, "[t]hat the Court now finds that the Defendant has satisfactorily complied with the orders of this Court, and the Petition to Expunge and Seal should be granted." It is apparent that in both cases the defendants had done what the court required of them when they were convicted under a statute allowing later expungement, and that both had complied and received expungement as provided under the statute.

What we are engaged in is a discussion of who drafted the better order. The order in *Steele* was certainly more extensive, but no more effective than the order in this case, and neither order used

the word "rehabilitation." What is at issue is a hypertechnical definition of what Rule 609(c) requires. Arguments against hypertechnical interpretation by this court of its own rules has been the subject of other dissents. *Friend v. State*, 315 Ark. 143, 865 S.W.2d 275 (1993).

If we consider the expungement statute, this matter becomes more clear. The effect of expungement is set out in Ark. Code Ann. § 16-90-902 (Supp. 2001), wherein its provided:

> (a) An individual whose record has been expunged in accordance with the procedures established by this subchapter shall have all privileges and rights restored, shall be completely exonerated, and the record which has been expunged shall not affect any of his civil rights or liberties, unless otherwise specifically provided for by law.
>
> (b) Upon the entry of the uniform order to seal records of an individual, the individual's underlying conduct shall be deemed as a matter of law never to have occurred, and the individual may state that no such conduct ever occurred and that no such records exist.

I have found two instances where an expunged conviction is admissible in Arkansas. The present case fits into neither instance. The first instance is set out in the expungement statutes. Ark. Code Ann. § 16-90-901(a)(3) provides that expungement does not apply to the case of a sexual offense as defined therein. The second instance is where the conviction is used to determine punishment as an habitual offender. *McClish v. State*, 331 Ark. 295, 962 S.W.2d 332 (1998); *Neal v. State*, 320 Ark. 489, 898 S.W.2d 440 (1995); *Gosnell v. State*, 284 Ark. 299, 681 S.W.2d 385 (1984). Somewhat similarly to the use in enhancement of punishment of habitual offenders, Act 595 of 1995, approved March, 13, 1995, would also allow use of an expunged felony in proof of a felon in possession of a firearm; however, as noted in *Ross v. State,* 344 Ark. 364, 39 S.W.3d 789 (2001), this is still uncodified.

In holding in *Gosnell, supra,* that expunged felony convictions could be admitted for purposes of determining enhanced punishment, this court stated:

> There is good reason to follow the basic rule of statutory interpretation in this instance. Every benefit extended by this statute is of the type to encourage the offender's progress toward rehabilitation. That is, a reformed convict should be encouraged to apply for a

> job, to assert his civil rights, as by registering to vote or running for office, and to discharge a good citizen's duty to appear as a witness without fear of unnecessary embarrassment. But there is no reason either to encourage him to commit another crime or to believe that the legislature intended to do so. The trial judge was right in refusing to read into the statute a provision that is simply not there and that would actually be contrary to the over-all legislative intent.

Gosnell, 284 Ark. at 301. In *Gosnell*, the court was considering expungement of a youthful offender, but the principle is the same in the present case even though it was an adult offender under a different statute.

Resort to federal cases and cases from foreign jurisdictions is unnecessary and confuses the issue further. Existing Arkansas law is determinative of the issue. Also, although as stated in the majority opinion, the wording of the federal rule and the rule in other States may be identical, that alone is not sufficient to resort to consideration of interpretation of those rules in their jurisdictions. The statutes and law at issue in this case are Arkansas law, while the precedent cited from the federal courts and foreign jurisdictions is based on wholly different law. Even where the statute in Georgia is similar, the precedent is not helpful because we have our own that controls. This court has already spoken on this issue:

> The order stated that LaFerney had met all the terms and conditions of the earlier order and had in fact been a model citizen. The order provided that all charges were dismissed.
>
> . . . .
>
> Therefore, we hold that the trial court correctly ruled that the expungement of the prior proceedings, whether it was a conviction or not, rendered such record inadmissible. The trial court found that he had been rehabilitated prior to the entry of the order of expungement. Rule 609(c) requires the court to refuse to allow a conviction which has been expunged, to be used for testing the credibility of a witness.

Steele, supra, 280 at 52-53. Wal-Mart wished to use the evidence to impeach Mrs. Burkeen. This court has declared an expunged conviction may not be used for that purpose. *Steele, supra.*

The majority also cites the United States House-Senate Conference Committee Report on Fed. R. Evid. 609(a) for the proposition that Fed. R. Evid. 609 was intended especially to provide for admission of prior crimes involving dishonesty and false statements because these are particularly probative of credibility. That should come as no great surprise to anyone, but discussion of paragraph (a) is not helpful. It simply further confuses the issue. Paragraph (a) of Rule 609 is not at issue. Paragraph (c) of Rule 609 is at issue, and this court's holding is directly contrary to our holding in *Steele, supra.*

We are struggling with the use of specific words. As a general proposition, this court has declined to require "magic words." *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980) (reversed on other grounds in *Willett v. State*, 335 Ark. 427, 983 S.W.2d 409 (1998)). *Curtis v. Patrick*, 237 Ark. 124, 371 S.W.2d 622 (1963). Neither the order in *Steele*, nor the order in the present case even mentions rehabilitation. Both indicate that the conditions set out by the sentencing court were met, and the party was entitled to expungement. Under the holding of this court, expungement obtained under the same statute may or may not be effective. It depends on whether the order was worded just so to meet the new requirements of Rule 609(c), a rule of evidence, not a rule or statute affording expungement. The trial judge called it right — "expungement is expungement." To find otherwise is to judicially nullify expungement provided for by statute in holding that although the legislature intended that the conduct is to be deemed to have never occurred, this court may declare that the conviction is revived by an evidentiary rule.

The majority also holds that because the conviction of Mrs. Burkeen was excluded in error, the trial court abused its discretion in excluding the audiotape of Mr. Burkeen. This was based on the premise that if the conviction was admissible, then so was the audiotape. The audiotape was of an interview of Mr. Burkeen where he was being asked about Mrs. Burkeen's involvement in the activities that led to her conviction. Because I believe that the conviction was properly excluded, I would not find the trial court abused its discretion in excluding the audiotape. I would affirm on the trial court's exclusion of Mrs. Burkeen's conviction and the exclusion of the audiotape as well.

I would affirm.

Anthony LAMAR *v.* STATE of Arkansas

CR 01-909 68 S.W.3d 294

Supreme Court of Arkansas
Opinion delivered March 7, 2002

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

Mark Pryor, Att'y Gen., by: *Katherine Adams*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. Following a jury trial, Appellant Anthony Lamar was convicted of rape and sentenced to thirty years in the Arkansas Department of Correction. The State alleged that Mr. Lamar engaged in deviate sexual activity with A.B., who was four years old at the time. Mr. Lamar's counsel argued that the State had failed to prove penetration, an essential element of the offense. Mr. Lamar's only point on appeal is that the trial court erred in denying him the opportunity to make an opening statement at the conclusion of the State's evidence. We disagree and hold that a criminal defendant must be afforded the opportunity to delay his opening statement until the close of the State's evidence only when the defendant makes such a request at the proper time, the trial court assents, the State fails to object, and the defendant expects to put on some evidence following the opening statement. The judgment of the trial court is affirmed.

At the beginning of Mr. Lamar's trial on April 24, 2001, defense counsel, Don Thompson, informed the court that he wished to reserve his opening argument until after the State presented its case. The court responded: "Fine." There was no objection by the State. Following the State's opening argument, the court said: "All right, I think you want to withhold your opening statement, Mr. Thompson, is that correct?" Again, the State failed to object. The State proceeded to call its witnesses. After the State completed its presentation of evidence, defense counsel attempted to make an opening statement. The State then argued that, since the purpose of an opening argument is to show what the facts will prove and what the case will show, any statement by defense counsel would be more like a closing argument if he was not going to present any testimony or witnesses.

The trial court agreed with the State and concluded that defense counsel could only make an opening statement "if [he expected] to put on some evidence and [expected] to tell the jury what [he wanted] this evidence to prove." The court added that defense counsel could not rely on the evidence put on by the State or his cross-examination of that evidence. As defense counsel expected to present no evidence on behalf of Mr. Lamar, he was not allowed to make an opening statement. Both the State and the defense made closing arguments.

On appeal, Mr. Lamar contends that, under the circumstances of this case, the trial court's refusal to allow him to make his opening statement at the conclusion of the State's evidence was prejudicial and reversible error. The principal object of the opening statement is to give the jury "an outline of the evidence to be introduced by both sides and the nature of the issues to be tried." *Karr v. State*, 227 Ark. 777, 781, 301 S.W.2d 442, 445 (1957). The statutory provision on opening statements made by parties at trial is found at Ark. Code Ann. § 16-89-110 (1987):

> (a) The prosecuting attorney may then read to the jury the indictment, and state the defendant's plea thereto and the punishment prescribed by law for the offense, and may make a brief statement of the evidence on which the state relies.
>
> (b) The defendant, or his counsel, may then make a brief statement of the defense and the evidence upon which the defendant relies.

Section 16-89-111 (1987) further illuminates the required progression of a trial:

> (a) The state must then offer the evidence in support of the indictment.
>
> (b) The defendant, or his counsel, must then offer his evidence in support of his defense. . . .

The proper procedure calls for the defendant to make his opening statement immediately following that made by the prosecuting attorney. *Jackson v. State*, 249 Ark. 653, 460 S.W.2d 319 (1970) (citing *Perryman v. State*, 242 Ark. 461, 414 S.W.2d 91 (1967); *McDaniels v. State*, 167 Ark. 1163, 63 S.W.2d 335 (1933)). A defendant's refusal to make his statement at that time constitutes a waiver. *Id.*

Mr. Lamar argues, however, that based on our holding in *Jackson v. State,* 249 Ark. 653, 460 S.W.2d 319, we must conclude that the trial court erred in failing to grant him the opportunity to present his opening statement. There, the jury was selected, impaneled, and sworn, following which the prosecuting attorney made the opening statement for the State. The appellant's attorney then stated that the defense would like to reserve its opening statement until the closing of the State's case. There was no objection by the State, and the trial judge assented. Later, after the State rested its case, the appellant's attorney attempted to make his opening statement. At that point, the trial judge ruled that the appellant had waived his right to make an opening statement when he did not make it immediately following the opening statement by the prosecution.

This court held that the appellant in *Jackson* could not have knowingly waived his right to make his opening statement "after having been assured by the trial court, without objection by the prosecution, that he could reserve the statement until after presentation of the State's evidence in chief." *Id.* We pointed out that the State was in no position to complain of an error it permitted the court to make without objection. *Id.* at 655-56, 460 S.W.2d at 320-21. We held that the failure of the State to object when the appellant's request was made was at the least a silent acquiescence and that the trial court's failure to permit the appellant to make his belated opening statement deprived him of a fair trial and constituted prejudicial error. *Id.*

While this court in *Jackson* suggested in dicta that the right to make an opening statement is a "fundamental right," no Arkansas case has ever directly held that an opening statement is a part of the appellant's right to a fair trial. In fact, the Arkansas Court of Appeals has held that opening statements are permissible and not mandatory. *Richards v. State*, 266 Ark. App. 733, 585 S.W.2d 375 (1979).

The State argues that *Jackson*'s holding should be limited to situations in which the defendant intends to present evidence. Though there is no clear language in *Jackson* limiting the rule of that case to situations in which the defendant intends to present evidence, we so limit *Jackson* today.[1] Following our decision in *Jackson*, the United States Supreme Court decided the case of *Herring v. New York*, 422 U.S. 853 (1974). The *Herring* Court held that "there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all." *Id.* at 863. The Court made it clear that its holding should not be understood as implying the existence of a constitutional right to oral argument at any stage of the trial or appellate process other than final argument or summation. *Id. See also United States v. Salovitz*, 701 F.2d 17 (2d Cir. 1983) (holding that a criminal defendant's right to make an opening statement, unlike his right to a closing argument, is not one of the traditions of the adversary fact-finding process under the Sixth and Fourteenth Amendments).

The right to make an opening statement is a statutory right. Again, our statute on opening statements provides in part:

> (b) The defendant, or his counsel, may then make a brief statement of the defense and the evidence upon which the defendant relies.

Ark. Code Ann. § 16-89-110(b). This court has previously interpreted the language of that statute. In *Karr v. State*, this court said that the object of the opening statement is to present to the jury "an outline of the evidence *to be* introduced" and the nature of the issues "*to be* tried." 227 Ark. at 781, 301 S.W.2d at 445 (emphasis added). The *Karr* case was decided in 1957 under Ark. Stat. Ann. §§ 43-2110, 43-2111 (1947). The language of those two statutes is identical to the language now combined at Ark. Code Ann. § 16-

[1] We note that the defendant in *Jackson* called at least one witness. *Jackson v. State*, 249 Ark. at 660, 460 S.W.2d at 322-23.

89-110(a), (b) (1987). The *Karr* decision necessitates that some evidence must be introduced following an opening statement.[2] We recognized as much in *Jackson* when we noted that an opening statement "may alert the jury for critical points to be expected to be covered in the testimony to be adduced." 249 Ark. at 655, 460 S.W.2d at 320.

The defense may not use its "opening statement" to comment upon any evidence previously presented by the State, and cannot outline evidence it does not intend to present. Thus, where no evidence will be introduced following an opening statement, we hold that a defendant has no absolute right to make such a statement. Accordingly, if the trial court assents and the State fails to object, a defendant may be permitted to reserve his opening statement until the close of the State's case only when the defendant expects to present some evidence.[3]

Affirmed.

Henry PIFER *v.* SINGLE SOURCE TRANSPORTATION

01-807 69 S.W.3d 1

Supreme Court of Arkansas
Opinion delivered March 7, 2002

[2] *See also United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring) ("An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument.")

[3] Other jurisdictions have come to the same conclusion. *See, e.g., United States v. Salovitz*, 701 F.2d 17 (2d Cir. 1983); Iowa Code Ann. § 813.2, Rule 18 (1)(a)(3) (2001); N.C. Gen. Stat. § 15A-1221(a)(4), (6) (2001).

Dowd, Harrelson, Moore & Giles, by: *Greg Giles*, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Carol Lockard Worley* and *Julia L. Busfield*, for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant, Henry A. Pifer, was injured at work while returning to his truck from the restroom. The employer, Single Source Transportation, contested his claim for workers' compensation benefits. The Administrative Law Judge found that Mr. Pifer sustained an injury arising out of and in the course of his employment. In construing Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp. 2001), the Arkansas Workers' Compensation Commission reversed the ALJ's award and dismissed Mr. Pifer's claim. The Commission found that Mr. Pifer was not performing employment services at the time of the accidental injury. The Arkansas Court of Appeals, in a 4-2 unpublished opinion, reversed the Commission's decision and remanded for further consideration consistent with *Matlock v. Arkansas Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001). *See Pifer v. Single Source Transportation*, CA 01-86, slip op. (Ark. App. July 5, 2001). This court accepted Single Source's petition for review pursuant to Ark. Sup. Ct. R. 1-2(e) (2001). On appeal, Mr. Pifer contends that the Commission erred in its interpretation of Ark. Code Ann. § 11-9-102(4)(B)(iii). We agree, and reverse the Commission's decision.

Standard of Review

Upon a petition for review, we consider a case as though it had been originally filed in this court. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). We view the evidence in a light most favorable to the Commission's decision, and we uphold that decision if it is supported by substantial evidence. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Id.*

Facts

Henry A. Pifer worked as a truck driver for Single Source Transportation during a seven-year period prior to the accident. On June 7, 1999, Mr. Pifer returned to his employer's terminal after delivering a load around 11:15 a.m. At that point, according to Mr. Pifer's testimony, he was in need of a restroom break: "I had to go to the bathroom very bad and when I pulled around, I just locked the truck down — when I say locked down, I mean the brakes, and I run in to use the bathroom." The truck was left running. After using the restroom upstairs in the office, he spoke briefly with two co-workers and started to return to the truck to do his paperwork, complete his log book, secure the truck, and do a safety check. While returning to his truck, Mr. Pifer was hit on the left side of his back by a co-worker's pickup, knocking him five to six feet. Had he not been injured, Mr. Pifer testified that he would have done his paperwork, secured the truck, done a post check on the truck, turned in his paper work, and gone home after checking to see if there was another load for him that day.

Employment Services

The pivotal issue presented by this case is whether, pursuant to Act 796 of 1993, codified at Ark. Code. Ann. §§ 11-9-101, *et seq.* (Repl. 1996, Supp. 2001), Mr. Pifer was performing employment services when he sustained an injury while on a restroom break at an employer-provided restroom located on the employer's premises.[1] To evaluate Mr. Pifer's claim and the full Commission's

[1] Because the issue to be resolved in this appeal is whether Mr. Pifer was performing employment services at the time of the accident, we need not address the nature and extent

decision, we are called upon to interpret the phrase "in the course of employment" and the term "employment services" as used in Ark. Code Ann. §§ 11-9-102(4)(A)(i) and 11-9-102(4)(B)(iii) (Supp. 2001). When interpreting a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001); *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998).

Act 796 of 1993 made significant changes in the workers' compensation statutes and in the way workers' compensation claims are to be resolved. *White v. Georgia-Pacific Corp., supra.* Claims arising from injuries occurring before the effective date of Act 796 (July 1, 1993) were evaluated under a liberal approach. *Eddington v. City Electric Co.*, 237 Ark. 804, 376 S.W.2d 550 (1964); Ark. Stat. Ann. § 81-1325(b)(4) (Supp.1979). However, Act 796 requires us to strictly construe the workers' compensation statutes. Ark. Code. Ann. § 11-9-704(c)(3); *White v. Georgia-Pacific Corp., supra.* The doctrine of strict construction directs us to use the plain meaning of the statutory language. *Edens v. Superior Marble & Glass, supra*, and *Lawhon Farm Servs. v. Brown, supra.*

Act 796 defines a compensable injury as "[a]n accidental injury . . . arising out of and in the course of employment. . . ." Ark. Code Ann. § 11-9-102(4)(A)(i). A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when *employment services* were not being performed. . . ." Ark. Code Ann. § 11-9-102(4)(B)(iii) (emphasis added). However, Act 796 does not define the phrase "in the course of employment" or the term "employment services," *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). It, therefore, falls to this court to define these terms in a manner that neither broadens nor narrows the scope Act 796 of 1993. Ark. Code Ann. § 11-9-1001 (Repl. 1996). When the meaning of a statutory term is ambiguous, 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. *Stephens v. Arkansas Sch. for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000).

Since 1993, we have twice been called upon to construe the statutory language found in sections 11-9-102(4)(A)(i) and 11-

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of his injuries.

9-102(4)(B)(iii). *See White v. Georgia-Pacific Corp., supra,* and *Olsten Kimberly Quality Care, supra.* We have held that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer. . . ." *White v. Georgia-Pacific Corp.,* 339 Ark. at 478, 6 S.W.3d at 100. We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." *White v. Georgia-Pacific Corp., supra; Olsten Kimberley, supra.* The test is whether the injury occurred "within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly." *White v. Georgia-Pacific Corp.,* 339 Ark. at 478, 6 S.W.3d at 100 and *Olsten Kimberly, supra.*

It is well-settled that any interpretation of a statute by this court subsequently becomes a part of the statute itself. *Night Clubs, Inc. v. Fort Smith Planning Comm'n,* 336 Ark. 130, 984 S.W.2d 418 (1999); *Burns v. Burns,* 312 Ark. 61, 847 S.W.2d 23 (1993). The General Assembly is presumed to be familiar with this court's interpretations of its statutes, and if it disagrees with those interpretations, it can amend the statutes. Without such amendments, however, our interpretations of the statutes remain the law. *Lawhon Farm Servs. v. Brown, supra; Sawyer v. State,* 327 Ark. 421, 938 S.W.2d 843 (1997). Although aware of our interpretation of the term "employment services" in *White v. Georgia-Pacific Corp.* and *Olsten Kimberley,* the General Assembly has not changed section 11-9-102(4)(A)(i) or section 11-9-102(4)(B)(iii), other than to renumber those sections. *See* 2001 Ark. Acts 1757 and 1999 Ark. Acts 20. Accordingly, this court's interpretation of the pertinent statutory language remains the law.

Mr. Pifer would have this court either reaffirm the personal-comfort doctrine[2] or hold that a restroom break is a necessary

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[2] The personal-comfort doctrine states that:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

Arthur Larson, *The Law of Workmen's Compensation* § 21 (2001). Prior to Act 796 of 1993, this court adopted the personal-comfort doctrine in workers' compensation cases. *Coleman's Bar-B-Que v. Fuller,* 262 Ark. 645, 559 S.W.2d 714 (1978).

function and directly or indirectly advances the interests of the employer. Conversely, Single Source contends that an employee is not performing employment services during a restroom break, or any personal break, because the personal-comfort doctrine is not consistent with a strict construction of Act 796. Since the enactment of Act 796, we have not directly addressed the personal-comfort doctrine.[3] To automatically accept a personal-comfort activity as providing employment services would impermissibly broaden the requirements of Act 796. On the other hand, to automatically reject a personal-comfort activity as not providing employment services would impermissibly narrow the requirements of Act 796. Instead of following either extreme position, the critical issue is whether the employer's interests are being advanced either directly or indirectly by the claimant at the time of the injury. In addressing this issue, we decline to adopt the factors identified by the court of appeals in *Matlock v. Blue Cross Blue Shield, supra.*

We note that the activity of seeking toilet facilities, although personal in nature, has been generally recognized as a necessity such that accidents occurring while an employee is on the way to or from toilet facilities, or while he or she is engaged in relieving himself or herself, arise within the course of employment.[4] As the court of appeals reasoned in *Matlock v. Blue Cross, supra*:

> Restroom facilities are provided in work settings because eliminating bodily toxins and wastes are natural and ordinary biological processes. Employers provide restroom facilities for the benefit of their customers, to be sure. But they also provide those facilities to accommodate their workers so as to avoid the work interruptions and delays that would certainly occur if workers were forced to leave the employment premises in order to find a public restroom at some distance from the work, their supervisors, and customers.

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[3] We disagree with the statement by the court of appeals in *Beavers v. Benton County*, 66 Ark. App. 153, 991 S.W.2d 618 (1999), that "the personal-comfort doctrine is no longer the law." *Id.* at 155. This court agreed in *White v. Georgia-Pacific Corp.* that the claimant's injury was not compensable under the personal-comfort doctrine. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). However, we reversed the Commission's decision in that case on the ground that substantial evidence did not support the Commission's determination that the claimant was not performing employment services at the time of his injury. *Id.*

[4] "[T]he wants ministered to are so obviously in the category of necessities that no question arises about their being basically in the course of employment. The only issue on which compensation is sometimes denied is that of seeking these facilities in an unreasonable manner." Arthur Larson, *The Law of Workmen's Compensation* § 21.05 (2001).

Matlock v. Blue Cross Blue Shield, 74 Ark. App. at 341-42, 49 S.W.3d at 139. Like the appellant in *Matlock*, Mr. Pifer had gone to a restroom provided by his employer and was returning to resume the employer's work when the accident occurred that resulted in his injuries. His conduct in returning to his truck was entirely consistent with the employer's interest in advancing the work. Everything in the record before us indicates that Mr. Pifer was engaged in conduct permitted by the employer, if not specifically authorized by the employer, and that the employer provided restroom facilities on its premises.

Based on the record in this case, we hold that Mr. Pifer's restroom break was a necessary function and directly or indirectly advanced the interests of his employer. Consequently, his injury is not excluded from the definition of "compensable injury" under section 11-9-102(4)(B)(iii) because the injury did not occur at a time when he was not performing employment services. The Commission's decision based on an incorrect interpretation of the law must, therefore, be reversed. In so holding, we overrule all prior decisions by the Arkansas Court of Appeals to the extent that they are inconsistent with this opinion.

Finally, Single Source contends that substantial evidence supports the Commission's decision because Mr. Pifer stopped momentarily to speak with co-workers before returning to his truck. In support of that argument, Single Source cites a recent decision by court of appeals, *Clardy v. Medi-Homes LTC Serv. LLC*, 75 Ark. App. 156, 55 S.W.3d 791 (2001). The instant case is clearly distinguishable. Unlike Ms. Clardy, Mr. Pifer was not injured while talking with his co-workers.

Reversed and remanded for a determination of benefits.

Ronnie Dean GARRETT *v.* STATE of Arkansas

CR 01-923 69 S.W.3d 844

Supreme Court of Arkansas
Opinion delivered March 7, 2002

[redacted]

Ed Webb & Associates, by: *Lynn D. Lisk*, for appellant.

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

RAY THORNTON, Justice. On June 7, 1995, appellant, Ronnie Dean Garrett, was arrested and charged with driving while intoxicated ("DWI"). On August 1, 1995, appellant entered a guilty plea to the offense as charged. At that time, the DWI Omnibus Act provided that, in the event of a second DWI conviction during a period of three years from the date of the first conviction, the charge and punishment for any subsequent DWI offense occurring within that three-year period would be enhanced. *See* Ark. Code Ann. § 5-65-111(b)(1) (Repl. 1997). In 1999, the legislature amended the statute by substituting a five-year look-back period for the earlier three-year look-back period. *See* Ark. Code Ann. § 5-65-111 (Supp. 1999). On February 26, 2000, appellant was arrested and charged with second-offense DWI.

On March 6, 2001, a hearing on the matter was held in Lonoke County Circuit Court. At trial, appellant conceded that he was operating a motor vehicle while intoxicated at the time of his February 26, 2000, arrest, and does not raise a sufficiency of the evidence argument. Appellant was convicted of second-offense DWI, fined $400.00, and ordered to serve seven days in jail.

On appeal, appellant raises three allegations of error. First, he alleges that the five-year look-back period of the 1999 Omnibus Act is an unconstitutional *ex post facto* statute. Secondly, he argues that the five-year look back period of the statute violates the double-jeopardy clause. Finally, he contends that the 1999 Omnibus Act does not permit a revival of appellant's first DWI conviction. Finding no merit in these arguments, we affirm.

For his first point on appeal, appellant argues that Act 1077 of 1999, codified at Ark. Code Ann. § 5-65-111, violates the *ex post facto* clauses of the state and federal constitutions. Specifically, he argues that convicting him under a 1999 statute, which contained an enhanced sentence for a second offense occurring within a five-year period from an earlier conviction, constitutes an *ex post facto* punishment for his earlier crime.

This argument presents an issue of statutory interpretation. If the language of a statute is clear and unambiguous and conveys a clear meaning, it is unnecessary to resort to the rules of statutory interpretation. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001). In reviewing the act in its entirety, this court will reconcile provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part. *Id.* We also look to the legislative history, the language, and the subject matter involved. *Id.*

At the time of his first offense, Ark. Code Ann. § 5-65-111(b)(1) (Repl. 1997) was in effect. That statute provides in pertinent part:

> (b) Any person who pleads guilty, nolo contendere, or is found guilty of violating § 5-65-103 or any other equivalent penal law of another state or foreign jurisdiction shall be imprisoned:
>
> > (1) For no less that seven (7) days and no more than one (1) year for the second offense occurring within three (3) years of the first offense; . . . [.]

Id. At the time of appellant's first DWI conviction, no enhancement was applicable because no second DWI offense had occurred.

In July, 1999, the legislature amended the DWI Omnibus Act, specifically Ark. Code Ann. § 5-65-111, which provides as follows:

> (b) Any person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 or any other equivalent penal law of another state or foreign jurisdiction shall be imprisoned or shall be ordered to perform public service in lieu of jail as follows:
>
> > (1) For no fewer than seven (7) days but no more than one (1) year for the second offense occurring within five (5) years of the first offense or no fewer than thirty (30) days of community service; . . . [.]

Id. Appellant was given an enhanced punishment for his conviction under the statute in effect at the time of his February 26, 2000, conviction. From the date of passage of Act 1077 of 1999, a conviction of a DWI offense would be enhanced by the showing of a prior DWI conviction within five years of the date of the occurrence of the new offense.

In general, "An *ex post facto* law declares an offense to be punishable in a manner that it was not punishable at the time it was committed, and relates exclusively to criminal proceedings." *Taylor v. The Governor*, 1 Ark. 21 (1837). *See also Burns v. State*, 303 Ark. 64, 793 S.W.2d 779 (1990). An *ex post facto* law is one that makes an action done before the passing of the law, and which was innocent when done, criminal or one that aggravates a crime, or makes it greater than it was, when committed. *Herman, et al v. State*, 256 Ark. 840, 512 S.W.2d 923 (1974). For *ex post facto* to apply, there must be a change in the law that either criminalizes a previously innocent act or that increases the punishment received for an already criminalized act. *Jones v. State*, 347 Ark. 455, ___ S.W.3d ___ (2002).

In *Sims v. State*, 262 Ark. 288, 556 S.W.2d 141 (1977), where the defendant had been convicted twice for DWI before the legislature in 1975 passed an act increasing the penalty for a third DWI offense. Sims committed such a third offense in 1976, after the new law was effective. We upheld the law, reasoning that the enhanced penalty "is not for the first or second offense, but is for the third offense, which is considered as aggravated by reason of the preceding offenses." *Id.*

In the present case, the conviction in February 2000 was predicated upon the passage of Act 1077 of 1999. The crime was punishable in accordance with the law in effect at the time of the criminal act. Appellant was convicted on either June 7 or June 8, 1995, for his first-offense DWI. On August 1, 1995, he entered a plea of guilty. His sentence at the time was not enhanced because he had no prior DWI convictions. At that time, the 1997 statute, which included a three-year look-back period, was in effect. On August 1, 1999, the legislature enacted a five-year look-back period. On February 26, 2000, appellant was arrested for a second-offense DWI, which was enhanced by his earlier conviction.

Under *Sims, supra*, appellant had notice of the 1999 legislative amendment that any future DWI offense would subject him to an increased penalty. He repeated the DWI offense on February 26, 2000, thereby subjecting himself to an enhanced sentence under the 1999 amendment, which was in effect at the time of his second offense. We note the well-established rule that a sentence must be in accordance with the statutes in effect on the date of the crime. *State v. Ross*, 344 Ark. 364, 39 S.W.3d 789 (2001). The 1999 amendment was in effect on the date of his February 2000 second offense when he was sentenced accordingly. Thus, appellant's sentence under the provisions of Ark. Code Ann. § 5-65-111 (Supp. 1999) was not violative of *ex post facto* laws.

Appellant's reliance upon *Carmell v. Texas*, 529 U.S. 513 (2000), is misplaced. Here, there was no retroactive application of legislation that effected a change in evidentiary law. *Id.* Here, the only change made in Ark. Code Ann. § 5-65-111 was that the five-year look-back period widened the period of time during which appellant's status as a DWI offender could be used as an element of a second DWI offense. We have held that prior DWI convictions are elements of subsequent DWI offenses. *E.g., Hagar v. City of Fort Smith*, 317 Ark. 209, 877 S.W.2d 908 (1994).

The State urges that our holding in *Ross, supra*, where we addressed Act 595, passed in 1995, concerning a felon in possession of a firearm, is not controlling in this case. We agree. In *Ross, supra*, the key issue was an expungement of the record once Ross fulfilled the terms of his probation. In the present case, however, appellant had no expectation of having his record expunged under the statute. *See also* Ark. Code Ann. § 5-65-108(c) (Repl. 1997). Here, the question does not go to expungement but rather to the enhancement of the sentence, and it is within the legislature's power to

amend the statute to include an enhanced sentence for a second DWI offense during a five-year look-back period.

For his second point on appeal, appellant argues that double jeopardy attached to him on August 1, 1995 when he was convicted of his first DWI offense. The trial court's order, dated May 10, 2001, states:

> On March 6, 2001 a hearing was held in this case. At that hearing the Defendant argued that it violated the constitutional prohibitions against ex-post facto applications of law *and the double jeopardy clause of the constitution* for the state to use a four and one-half year old conviction for DWI to enhance the charge in this case from a DWI one to a DWI two charge.

The United States Supreme Court has recognized that Double Jeopardy consists of several protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments of the same offense.

Schiro v. Farley, 510 U.S. 222 (1994) (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)).

The United States Supreme Court has also upheld "the use of prior convictions to enhance sentences for subsequent convictions, even though this means a defendant must, in a certain sense, relitigate in a sentencing proceeding conduct for which he was previously tried." *Schiro, supra* (citing *Spencer v. Texas*, 385 U.S. 554 (1967)). As the Court points out, the double-jeopardy clause "is written in terms of potential or risk of trial and conviction, not punishment." *Id.* (citing *Price v. Georgia*, 398 U.S. 323 (1970)).

The trial court did not rule on the double jeopardy issue. We have held that a constitutional issue will not be addressed if it was not brought to the trial court's attention for a ruling during trial or at some point prior to the entry of final judgment. *Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999).

For his third point on appeal, appellant argues that nowhere in Act 1077 of 1999, codified at Ark. Code Ann. § 5-65-111, does it state that prior offenses, whose three-year look-back period has

expired, are to be "revived" for the purposes of prosecution. Specifically, appellant argues that there is no indication of legislative intent as to "reviving" prior convictions.

At the March 6, 2001, hearing, appellant stated,

> His [appellant's] three years were up a year and a half before this stop and it is our contention this violates *ex post facto* and double jeopardy. This is a *retroactive application of substantive, non-procedural law* when a three year period has completely expired and then you suddenly change the law and pick it back up again. This should be a DWI First Offense is our contention.

We disagree with appellant's argument. The first DWI offense was not revived. It was and remains on appellant's criminal record. The 1999 DWI statute in effect at the time of appellant's second conviction simply enhanced the sentence for that conviction based upon his earlier conviction. Moreover, it is unclear as to whether he obtained a specific ruling on the "revival" argument that he now raises on appeal. When appellant committed his second-offense DWI in February 2000, the 1999 amendment, codified at Ark. Code Ann. § 5-65-111, was already in effect, and consequently, appellant suffered no retroactive application of that statute.

Finally, appellant's discussion of Ark. Code Ann. § 5-65-111(c) (Supp. 1999) is inapposite. This statutory provision concerns offenses "occurring before July 30, 1999, which have not reached a final disposition." *Id.* Appellant's second offense occurred in February 2000, and his prior offense was disposed of in 1995. Under the 1999 amended statute, he remains a DWI-second offender.

Accordingly, we affirm appellant's sentence and conviction.

Affirmed.

WEIGH SYSTEMS SOUTH, INC.,
and Weigh Systems South II, Inc.
v. MARK'S SCALES & EQUIPMENT, INC.,
Mark Moody, and Timoth Young

01-959 68 S.W.3d 299

Supreme Court of Arkansas
Opinion delivered March 7, 2002

[redacted]

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *John E. Pruniski, III*, for appellants.

Tatum, Tatum & Riedel, by: *John Thomas Tatum, II*, for appellees.

RAY THORNTON, Justice. Appellants, Weigh Systems South, Inc., and Weigh Systems South II, Inc. [WSS], are engaged in the business of assembling, fabricating, installing and servicing scales, control and indicating systems that separate and weigh items of food.[1] Appellee, Mark Moody, was employed by WSS from 1992 until 1999. Moody was involved in the management of WSS. Appellee, Timoth Young, was employed by WSS from January 1997 until 1999. Young worked as a service technician at WSS.

After terminating his employment with WSS, Moody formed a new business called Mark's Scales & Equipment, Inc. Young also left WSS and began working for Mark's Scales & Equipment, Inc. The company engaged in the same type of business as WSS.

On November 22, 1999, WSS filed a complaint in the Chancery Court of Yell County seeking damages and injunctive relief against Moody, Young, and Mark's Scales & Equipment, Inc. [appellees]. The complaint alleged that the appellees violated the Arkansas Trade Secrets Act. A temporary restraining order was entered on the date the complaint was filed. The temporary

[1] Weigh Systems South II, Inc., and Weigh Systems South, Inc., are the same corporation. Weigh Systems South II, Inc., was established to transform Weigh Systems South, Inc., from a "C corporation" to a "S corporation."

restraining order enjoined the appellees from using WSS computer software and from violating the Arkansas Trade Secrets Act.

On October 23 and 24, 2000, a trial was held on WSS's complaint. On February 12, 2001, the chancellor entered an order dismissing WSS's complaint and vacating the temporary restraining order previously entered. The chancellor found that WSS failed to establish by sufficient evidence that the items claimed to be trade secrets constituted trade secrets pursuant to the Arkansas Trade Secrets Act.

It is from this order that WSS appeals, raising five points on appeal. We affirm the chancellor.

Our standard of review in chancery cases is *de novo*. *Conagra, Inc. v. Tyson Foods, Inc.*, 342 Ark. 672, 30 S.W.3d 725 (2000). We explained in *Conagra* that:

> Equity cases are tried *de novo* on appeal upon the record made in the chancery court, and the rule that this court disposes of them and resolves the issues on that record is well established; the fact that the chancellor based his decision upon an erroneous conclusion does not preclude this court's reviewing the entire case *de novo*. An appeal in a chancery case opens the whole case for review. All of the issues raised in the court below are before the appellate court for decision and trial *de novo* on appeal in equity cases involves determination of fact questions as well as legal issues. The appellate court reviews both law and fact and, acting as judges of both law and fact as if no decision had been made in the trial court, sifts the evidence to determine what the finding of the chancellor should have been and renders a decree upon the record made in the trial court. The appellate court may always enter such judgment as the chancery court should have entered upon the undisputed facts in the record.

Id. (citing *Ferguson v. Green*, 266 Ark. 556, 587 S.W.2d 18 (1979)). We have also noted that we do not reverse a finding of fact of the chancery court unless we conclude that the chancery court has clearly erred. *Saforo & Assoc., Inc. v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999). A finding is clearly erroneous when, even though there is evidence to support it, the appellate court is left with the definite and firm conviction that a mistake has been made. *Id.*

In its first point on appeal, WSS argues that the chancellor erred when he determined that WSS failed to take adequate steps to protect its proprietary information. In its second point on appeal, WSS argues that appellees misappropriated certain proprietary information which constituted trade secrets. In support of its arguments, WSS asserts that its customer lists, vendor list, pricing information, computer software, service agreement inventory checklist, and marketing plans constitute trade secrets.

[redacted] We first address the threshold issue of whether WSS had trade secrets which appellees misappropriated. The Arkansas Trade Secrets Act, Ark. Code Ann. § 4-75-601 to -607 (Repl. 2001), defines a "trade secret" as:

> (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (B) *Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*

Ark. Code Ann. § 4-75-601 (Repl. 2001) (emphasis added).

[redacted] We have identified several factors which we find material to our determination of whether information is a trade secret. These factors include: (1) the extent to which the information is known outside the business; (2) the extent to which the information is known by employees and others involved in the business; (3) the extent of measures taken by the company to guard the secrecy of the information; (4) the value of the information to the company and to its competitors; (5) the amount of effort or money expended by the company in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See Saforo, supra.*

WSS contends that its customer lists, vendor list, pricing information, service agreement inventory checklist, marketing plans, and computer software constitute trade secrets under the six criteria outlined in *Saforo, supra,* and therefore this information is a trade secret pursuant to the Arkansas Trade Secrets Act. To determine

whether WSS had trade secrets that appellees misappropriated, it is necessary to consider the six factors articulated in *Saforo* to the facts surrounding this case.

First, we determine the extent to which WSS's customer lists, vendor list, pricing information, service agreement inventory checklist, marketing plans, and computer software were known outside the business. WSS concedes that some or all of its customer lists appear in directories or are available on the internet. WSS also concedes that the vendors on its vendor list may be located using the internet.

The testimony at trial established that the service agreement checklist prepared by WSS merely contained a list of the equipment owned by each customer. The testimony further established that WSS's marketing plan was established by visiting trade shows and talking with customers about upcoming projects. Finally, the trial testimony established that the computer software installed by WSS was routinely but not always password protected. We conclude that the finding of the chancellor relating to this factor was not clearly erroneous.

Second, we consider the extent to which WSS's customer lists, vendor list, pricing information, service agreement inventory checklist, marketing plans, and computer software were known by employees and others involved in the business. Primarily, WSS's customer lists, vendor list and pricing information were maintained on password protected computers. However, at trial, Wade Jones, one of the owners of WSS, explained that in the summer of 1999, he, Timoth Young, Mark Moody, and people who worked in the parts room had access to WSS's vendor list. He also testified that the accounts payable department had access to WSS's customer lists, and that there were printed copies of the customer lists. Jones further testified that hard copies of the pricing information are maintained by WSS's "service people." He additionally noted that the service agreement inventory checklist is kept by the service manager and the service technicians. Finally, Jones explained that the information in the marketing plan was available to the individuals who managed WSS. The finding by the chancellor that WSS failed to take adequate steps to protect its proprietary information was not clearly erroneous.

The chancellor also considered the extent of measures taken by WSS to guard the secrecy of its customer lists, vendor list,

pricing information, service agreement inventory checklist, marketing plans, and computer software. Although this factor is only one of the factors we look to in determining the status of a trade secret, we consider it to be a prominent factor. *Conagra, supra.* In *Conagra,* we refused to recognize information as a trade secret when the company made no effort to restrain disclosure of the information post-employment. *Id.* Specifically, we explained:

> [T]he failure of a business to protect against the disclosure of information it considers to be secret following employment is critical to our analysis and ultimate decision regarding whether the information is in fact a trade secret.

Id.

We now review the facts surrounding WSS's efforts to protect its information. As we have previously noted, the information contained in WSS's customer lists and vendor list was available on the internet. Additionally, as noted by the chancellor, WSS's pricing information, customer lists, and vendor list were readily available in hard copy format. Finally, it is apparent that WSS's marketing plans and service agreement inventory checklist were readily available to individuals employed by WSS.

The chancellor's findings that the secrecy of WSS's computer software was compromised was not clearly erroneous. Specifically, WSS did not require its customers to sign licensing agreements or confidentiality agreements at the time the software was purchased. WSS also sold customers computer programs which allowed the customer to transfer WSS's software from one machine to another. Additionally, the trial testimony established that although WSS technicians were supposed to change the default password to a password known only by WSS when software was installed, this procedure was not always followed. The testimony further established that it was not uncommon for employees of WSS to provide the customer with the WSS password. There was also testimony that a computer "bug" existed in WSS's software that allowed the customer to gain access to the program without using a WSS password and that WSS did not swiftly act to correct the "bug."

[redacted] Additionally, the information WSS claims to be proprietary in nature was not protected from post-employment disclosure.

Specifically, WSS did not require its employees to sign confidentiality agreements nor did WSS require its employees to enter into covenants not to compete.[2] WSS took no significant or effective steps to protect the disclosure of its customer lists, vendor list, pricing information, service agreement inventory checklist, marketing plans, or computer software. We conclude that the finding of the chancellor with respect to the failure to protect from post-employment disclosure was not clearly erroneous.

Next, we consider the value of WSS's customer lists, vendor list, pricing information, service agreement inventory checklist, marketing plans, and computer software to WSS and its competitors. Wade Jones testified that when he started WSS he initially purchased a customer list for $25,000. Jones further testified that WSS invests approximately $100,000 to $150,000 annually in software development. WSS did not provide evidence as to the value of its vendor list, pricing information, service agreement inventory checklist, or marketing plan; instead WSS contends that this information has been developed over time and is essential to WSS when it is making quotes on jobs or fabricating or installing equipment.

With regard to the value of WSS's customer lists, vendor list, pricing information, service agreement inventory checklist, marketing plans, and computer software to its competitors, WSS argues that appellees benefitted greatly from the information. Specifically, WSS contends that because appellees provided services for customers on WSS's customer lists, and because appellees used vendors that were on WSS's vendor list, WSS's lists were very valuable to appellees. However, WSS did not provide any evidence as to the value of this information to appellees. Additionally, as found by the chancellor, because the information contained in WSS's customer lists and vendor list was readily available from other sources, appellees did not have to rely on WSS's customer lists or vendor list to ascertain this information.

Fifth, we consider the amount of effort or money expended by WSS in developing its customer lists, vendor list, pricing information, service agreement inventory checklist, marketing plans, and computer software. As noted above, Wade Jones purchased a customer list for WSS at a cost of $25,000. Further, as

[2] We note that WSS argues that it required it employees to sign a "non-compete agreement." However, appellees Moody and Young both testified that they did not sign an agreement.

noted above, there was testimony that WSS invested approximately $100,000 to $150,000 annually in software development. WSS argues that it also updates its vendor and pricing information continuously. We conclude that expenditures on information which was not protected as a trade secret is not accorded the status of a trade secret.

Finally, we consider the ease or difficulty with which WSS's customer lists, vendor list, pricing information, service agreement inventory checklist, marketing plans, and computer software could be properly acquired or duplicated by others. Once again, we note that the information available in WSS's customer lists and vendor list was available on the internet. Thus, this information was easily acquired or duplicated by others. Next, we note that the information contained in WSS's service agreement inventory checklist, pricing lists, and marketing plan was readily available to numerous WSS employees. These employees were not required to sign confidentially agreements or non-compete agreements. Therefore, this information was easily duplicated by others. Finally, the trial testimony established that WSS's computer software could be easily duplicated by anyone with the computer's service manual.

After reviewing the facts in the case now before us, we conclude that the chancellor did not err in finding that the information WSS seeks to protect is not a trade secret. Specifically, we conclude that the information contained in WSS's customer lists, vendor list, pricing list, service agreement inventory checklist, marketing plans, and computer software is information which is generally known or readily ascertainable. We further hold that WSS did not take adequate steps to protect the information from being acquired or duplicated by others. Because the information is not a trade secret, we conclude that appellees did not misappropriate the information from WSS. Accordingly, the chancellor is affirmed.

Because we have determined that WSS did not have proprietary information which would qualify as a trade secret under either the Arkansas Trade Secrets Act or the factors articulated in *Saforo*, we need not address the remaining points raised on appeal concerning injunctive relief, monetary damages, or attorney's fees. *See Wal-Mart Stores, Inc. v. The P.O. Market, Inc.*, 347 Ark. 651, ___ S.W.3d ___ (February 14, 2002).

Affirmed.

FIRST UNITED BANK, *Trustee v.* PHASE II, EDGEWATER ADDITION RESIDENTIAL PROPERTY OWNERS IMPROVEMENTS DISTRICT NO. 1 of Maumelle, Arkansas, *et al.*, *Appellees*, and DeHaven, Todd & Co., *et al.*, *Appellees/Cross-Appellants*

01-252 69 S.W.3d 33

Supreme Court of Arkansas
Opinion delivered March 7, 2002
[Petition for rehearing denied April 11, 2002.]

Friday, Eldredge & Clark, by: *Elizabeth R. Murray*, *Larry W. Burks*, and *Harry A. Light*, for appellant.

Richard L. Lawrence, for appellees.

Pike & Bliss, P.A., by: *George Pike*, for appellees/cross appellants.

JIM HANNAH, Justice. This case involves two appeals. First, Appellant First United Bank, Trustee ("the Trustee"), appeals the chancery court's decision to award attorney's fees to Appellees Phase II Edgewater Addition Residential Property Owners Improvement District No. 1 ("Edgewater"), Maumelle Heights Planned Residential Property Owners Improvement District No. 1 ("Maumelle Heights"), Waterside Addition Municipal Property Owners Multi-Purpose Improvement District No. 6 ("Waterside"), and West Pointe Addition Municipal Property Owners Multi-Purpose Improvement District No. 7 ("West Pointe") (collectively referred to as the "Districts"). Second, Cross-appellant DeHaven, Todd & Co., DeHaven Todd Limited Partnership, John W. "Jay" DeHaven, and Michael J. Todd (collectively referred to as "DeHaven") appeals the chancellor's decision dismissing them from the case in their counterclaim against the Trustee.

This action stems from three lawsuits, two of which resulted in these appeals. First, there was the initial underlying lawsuit filed by the Trustee against the Districts, DeHaven, and other defendants, which was dismissed by the Trustee during the pendency of that action after the trial court decided a threshold issue in the Districts' favor. Second, the Districts and DeHaven each filed counterclaims in that underlying lawsuit, which are the subject of this appeal.

In June 1995 and May 1996, Citizens Bank & Trust of Carlisle, Arkansas, the original Trustee, and the four development Districts

in Maumelle, Arkansas, entered into an agreement for the reissuance and sale of bonds to the public to help finance the Districts' improvements. Each District executed a Pledge and Mortgage and pledged to the Trustee certain income from the sale and operation of the lots in order to finance the repayment of the bonds. These Pledge and Mortgage agreements, which were nearly identical for each District, pledged several sources of funding including:

1. The assessment of benefits on property within each District;
2. Special taxes levied against the property within each District;
3. Other revenues, including:
   A. Revenues derived from certain escrow agreements;
   B. Proceeds from the sale of District-owned lots;
   C. Prepayment of all special taxes and redemption premiums (the "Lot Purchase Price") associated with each purchaser's acquisition of a lot within a District.

The revenues from certain escrow agreements stem from five separate escrow agreements, which covered several promissory notes executed by lot purchasers in favor of DeHaven, the original developer of the property. Payments made by purchasers under these escrow agreements were credited to the escrow accounts, and some of this money was used as a source of income for the bond accounts to pay the Special Taxes. Citizens Bank & Trust was succeeded by First United Bank as the indenture trustee following the creation of these agreements.

The impetus for these actions arose in late 1996 when DeHaven asked the Trustee to sign a certificate relating to the Edgewater and Maumelle Heights bond issues to facilitate financing being obtained by one of DeHaven's entities. This action apparently caused the Trustee some concern because the Trustee then consulted with its attorneys, the Friday, Eldredge & Clark Law Firm, regarding this certificate and other concerns about the financial condition of the Districts' bond obligations. The Trustee's main concerns were its belief of an apparent under-funding of the Debt Service Reserve funds, which did not total the required $250,000 for each District when the agreements were signed, the periodic use of Debt Service Reserve funds to meet debt service payments, the unpredictable inflows of money into the Districts' bond accounts, and the smaller payments received than those projected in the Official Statements of the bond issues.

Due to its concerns, the Trustee refused to sign DeHaven's certificate and informed the Districts about these possible problems.

In early 1997, the Trustee requested a "cash flow analysis" showing how the bonds would be repaid and the Debt Services Funds would be fully funded. In January 1997, David Paes, an accountant for DeHaven, acknowledged by letter that without the payments for lot releases, Edgewater, for example, would be in default, and that the lot release money from the sale of certain lots had been used to pay the debt service rather than reduce the principal on the bonds. Based on this information and its failure to receive any additional "cash flow" information of funds, the Trustee notified the Districts by letter on February 19, 1997, that it was preparing a notice to bondholders about the shortages in the Debt Service Reserve funds, foreclosure suits, and the need to increase the special taxes to cover the debt service.

On March 21, 1997, the Trustee and its counsel and the Districts' counsel, John Thurman, met and agreed to defer taking action until an independent accountant retained by the Trustee and the Districts could review the financial status of each of the four bond issues. In the meantime, Thurman wrote a letter to DeHaven requesting immediate action because DeHaven was in default under its contracts to purchase lots, and DeHaven had not paid the general taxes or special improvement assessments.

The Trustee and the Districts hired Gary Burris, a certified public accountant with Rasco, Burris & Winter (RBW), in September 1997, and Burris presented his preliminary findings and reports on October 17, 1997, to the Trustee and the Districts. According to Burris's initial findings, while Maumelle Heights's bonds were estimated to be fully paid by 2003, the three other Districts were underfunded. Burris continued to evaluate the bond funds with supplemental information, but the Trustee threatened not to call the bonds if the Districts did not indemnify the Trustee. The Districts, through counsel, responded that the Trustee was required to call bonds from excess funds. Furthermore, DeHaven indicated that it was willing to buy the District lots and pay some of the taxes, but that it wanted the Trustee's and Districts' respective counsels to resign, in part because of DeHaven's belief that the two were siding only with the Trustee's position.

During this time, lots within the districts were being sold. In order to be relieved of liability of the special taxes, property owners could prepay the Lot Release Price, as defined in paragraph 9 of the Pledge and Mortgage agreements, to the Trustee, and the Trustee would then release the lot from the obligation of the special taxation. The Trustee's release of the lot was mandatory, as indicated by

the use of the word "shall" in the Pledge and Mortgage agreements. However, in early April 1998, the Trustee received several requests to release lots that had delinquent special taxes, but the Trustee refused to release those lots even though the Lot Release Price had been paid. Many of these lots were purchased by builders or individual homeowners who wished to own the lots free of the lien imposed by the bond issues. Bond counsel, Heartsill Ragon, had earlier opined to the Trustee that delinquent special taxes need not be paid if the Lot Release Price was paid. However, the Trustee would not release the deeds despite the fact that substantial money had been paid, and the Trustee deposited the payments into the various bond funds.

On April 29, 1998, Burris presented his revised cash-flow projections based on information received as of August 31, 1997. These revised projections indicated that Edgewater, Maumelle Heights, and West Pointe would not be underfunded, but that Waterside would be. The projections indicated that Edgewater would retire its bonds in early 2009, Maumelle Heights in early 2002, and West Pointe in early 2007. Waterside, however, would be underfunded in 2017. Burris indicated that these projections were based on some unmet assumptions. Soon thereafter, DeHaven notified the Trustee on May 7, 1998, that it would sue if the Trustee did not release the deeds on the lots for which the Trustee had received the Lot Release Price. DeHaven then wrote a letter on May 29, 1998, to the Trustee enclosing Paes's cash-flow projections (which Paes later admitted were incorrect), and DeHaven followed with a letter to RBW accusing Burris of violating his fiduciary duties to the Districts and the commissioners and distributing false data. The Trustee responded that it wanted to meet with the parties to attempt to reach an agreement about resolving the situation.

In early June 1998, the Trustee directed its employee Tammy Bracewell to prepare financial schedules for each of the four districts. Bracewell prepared two schedules, "Bracewell 1" and "Bracewell 2." The Trustee directed Bracewell to include in "Bracewell 1" only the Special District Taxes and to omit all other sources of revenue that had been pledged in the Pledge and Mortgage agreements. This schedule also failed to include funds that the Trustee had actually received prior to the preparation of the report. Understandably, "Bracewell 1" concluded that all the bonds would soon default. The "Bracewell 2" schedule, however, included all sources of income, including the monies that had been received, and predicted that Edgewater and Waterside would retire their

bonds early, West Pointe would retire its bonds as scheduled, but Maumelle Heights would default in 2010.

On June 4, 1998, the Districts' counsel wrote the Trustee demanding that it immediately release the deeds on the lots for which the Lot Release Price had been paid, or the Districts would file suit against the Trustee. However, the Trustee, on its own behalf and on behalf of the bondholders without their consent and knowledge, responded by filing its initial lawsuit on June 12, 1998, against the Districts for declaratory judgment and instructions to the Trustee. Basically, the Trustee's basis in filing this suit was that it claimed that Ark. Code Ann. § 14-94-118 required more money to be paid to release a lot than was required in the Pledge and Mortgage agreements' Lot Release Price calculations contained in those documents. The Trustee asserted in its complaint that the Lot Release Price in the Pledge and Mortgage documents should be revised to comply with the statute.

On June 26, 1998, the Trustee amended its complaint and added as defendants the DeHaven group and the law firms and underwriters who were involved in the bond issue. The Trustee revised its complaint against the Districts and requested a declaratory judgment on the Lot Release Price issue, for reformation of the trust documents, for imposition of a constructive trust of all escrow agreements, for rescission of the bonds, for an affirmative injunction to require a levy of additional taxes, and included allegations of constructive fraud, negligence, malpractice, and violations of the Arkansas Securities Act against DeHaven, the law firms, and the underwriters of the bonds. As noted by the trial court in its final order, the Trustee filed this complaint and amended complaint despite the fact that it had Burris's and Bracewell's projections indicating that none of the four bond issues were in default, that some of the bonds had already been retired, that all required principal and interest payments had been made as scheduled, and that bond counsel had advised the trustee that the Lot Release Price contained in the Pledge and Mortgage agreements were correct and adequate, and that it was not necessary to collect delinquent special taxes in addition to the Lot Release Price. Despite this, the Trustee filed suit without the bondholders's consent or knowledge.

The Districts answered and counterclaimed on July 1, 1998, asking that the Trustee be enjoined from breaching its fiduciary duty to the Districts, that the Trustee be ordered to release and continue to release lots for which the Lot Release Price had been and would be paid under the formula in the Pledge and Mortgage

agreements, and that the Districts be awarded damages and attorney's fees. The Districts asserted that the Trustee had a duty and an obligation to release the lots for which the Lot Release Price had been paid under the Pledge and Mortgage agreements, and failure to do so was a breach of its fiduciary duty. DeHaven also filed a timely answer and counterclaim of similar character. On July 30, 1998, the Trustee filed its answers to the counterclaims.

The chancery court determined that the initial determination to be made in the case involved whether the Lot Release Price was adequate. Trial on this preliminary issue was held in November and December of 1998. Prior to trial, Burris indicated that his service to both the Trustee and the Districts had become adversarial and that he would have to resign due to this conflict; therefore, the trial court made Burris a court-appointed expert with a duty to neither party. At trial, the Trustee contended that the Lot Release Price in Paragraph 9 of the Pledge and Mortgage did not comply with Arkansas law and other portions of the Pledge and Mortgage agreements and asked for a revision of this price. The Trustee also contended that the "Bracewell 1" report accurately projected the payment or nonpayment of the bonds. However, on February 12, 1999, the trial court entered its final order on these issues finding, among other things, that the Lot Release Price was valid and that the delinquent Special Taxes did not have to be paid if the Lot Release Price was met, and instructed the Trustee to release the lots in accordance with the bond documents. Furthermore, the court dismissed Edgewater and Maumelle Heights from the litigation because the projections at trial indicated that they would retire their bonds. Finally, the trial court determined that although the projections at trial indicated that Waterside and West Pointe might be underfunded, default was not predicted until at least 2010, giving those Districts' commissioners time to take appropriate action. The Trustee filed its notice of appeal on March 12, 1999. The Trustee notified the bondholders regarding the litigation and filed its report of such with the trial court on April 1, 1999. Then, upon the Trustee's request, the Arkansas Supreme Court dismissed the Trustee's appeal on May 3, 1999.

After dismissing the appeal, First United Bank resigned as Trustee, and a successor Trustee was appointed. A hearing was held on this matter on June 1, 1999, and the trial court entered an order later that day approving First United Bank's withdrawal as Trustee, and ordering that no disbursement should be made from the bond funds until a successor Trustee was appointed or unless the trial court approved a disbursement. However, despite the agreement

reached on the morning of June 1, 1999, and as ordered that afternoon, the Trustee, prior to making the scheduled bond payments, paid its attorney's fees to Friday, Eldredge & Clark Law Firm from the respective bond funds: $33,946.28 from Maumelle Heights; $74,838.97 from Waterside; and $78,297.55 from Edgewater, for a total payment of $187,082.90. It also paid the Districts' attorney's fees in the amount of $5,128.51. As a result of these disbursements, the bond funds were transferred to the successor trustee with a zero balance. While funds were transferred from the Debt Service Reserve funds into the bond accounts, this left the Debt Service Reserve Funds below the required levels, which was one of the complaints and concerns First United Bank, as Trustee, had against the Districts.

Ultimately, the trial court dismissed the Trustee's and bondholders's other claims without prejudice on August 3, 1999. The litigation was not over, however, as the counterclaims were still pending. In addition, due to the Trustee's release of attorney's fees to Friday, Eldredge & Clark Law Firm despite the court's order restricting such a release, the Districts filed a motion to recover funds paid to that law firm and for sanctions on August 20, 1999.

Trial on the Districts' and DeHaven's counterclaims commenced on April 18, 2000, through April 28, 2000. After the Districts and DeHaven presented their cases, the trial court granted the Trustee's motion to dismiss DeHaven's counterclaim finding that there was no evidence of a breach of a contractual or fiduciary relationship between DeHaven and the Trustee, and that DeHaven failed to establish any damages caused by the Trustee. However, the trial court determined in its order dated July 19, 2000, that the Trustee breached a contract with the Districts by refusing to release the lots for which the Trustee had received the Lot Purchase Price detailed in the Pledge and Mortgage agreements. The trial court found that the Pledge and Mortgage agreements created a contractual duty in the Trustee where the Districts pledged the revenue as collateral for the issuance of the bonds, and the Trustee was obligated to release the lots when the Lot Release Price was paid as one form of revenue to retire the bonds. The court found that the Trustee had no discretion to release the lots, but instead was required to release the lots upon payment of the Lot Release Price, and that this agreement between the Trustee and the Districts was a contractual obligation.

While the court acknowledged that it was proper for the Trustee to ask for guidance regarding its requirements under the

trust through a declaratory-judgment action or mandamus under Paragraph 5 in the Pledge and Mortgage agreements, the court determined that the Trustee here actually asked the court to modify the agreements, including the Lot Release Price, which resulted in a breach of the agreement with the Districts. The court determined that when the Trustee pursued the litigation against the Districts and others against bond counsel's advice and without the approval of the bondholders, as required in the trust agreement, it acted on its own behalf and not for the bondholders. As such, the actions of the Trustee "were so contrary to the provisions of the Pledge and Mortgage, they constituted a breach of its contractual duty to the Districts." The court found that the Trustee only had authority to pursue litigation to require the Districts to act under the terms of the agreements, but here there was never an allegation that the Districts had not acted in compliance with those agreements. Any contention that the Districts were not meeting their obligations stemmed from the "Bracewell 1" schedules, but the court determined that reliance on that schedule was not reasonable because that schedule clearly ignored other sources of revenue in the bond documents. Therefore, the court concluded that not only was the Trustee wrong in its assertions, it proceeded without any reasonable basis for its assertions. The court also found that the breach of contract occurred when the Trustee relied only on the "Bracewell 1" projections rather than relying on Burris's projections, the "Bracewell 2" projections, advice of bond counsel, the terms of the Pledge and Mortgage agreements, and its duty to get bondholder approval before pursuing litigation.

Finally, the court determined that the Trustee's assertion that the only entity that could be harmed by its actions and that could file suit for its actions is the bondholders was contrary to the fact that reduction in the bond accounts directly harms the Districts that have to then provide additional funds to retire the bonds. Therefore, the damages to the Districts under the contractual agreement in the Pledge and Mortgage documents were the legal expenses expended from the bond funds as a result of the litigation, since the loss of those funds reduced the Districts' ability to retire the bonds. The court denied the Districts' claim for payment by the Trustee of Burris's expert fees because the Districts agreed to his appointment as the court-expert. In addition, the trial court did not award as damages any fees prior to April 1998, because the Districts failed to establish that any legal fees prior to the Trustee's refusal to release lots under the Lot Release Price were unreasonable or unnecessary. The court did note, however, that it was "very troubled" over the payments made by the Trustee to Friday, Eldredge & Clark Law

Firm from the bond funds on June 1, 1999, when the court ordered and the parties agreed that no funds would be released. However, the court determined that because it ordered the Trustee to repay the fees as damages, any violation of that order is irrelevant, but mention of it was necessary to again show that the Trustee continued to completely disregard its duties and responsibilities.

Following this decision, the Districts filed a motion on August 2, 2000, for additional attorney's fees to be paid to the Districts' attorney, Richard Lawrence, in pursuing the counterclaim against the Trustee. The court granted this motion on September 1, 2000, and awarded $128,726.25 in attorney's fees to Lawrence based on the Trustee's breach of contract with the Districts. The Trustee filed its notice of appeal on September 5, 2000, from the trial court's initial order, and an amended notice of appeal on September 11, 2000, from the trial court's subsequent fee award. The DeHaven group filed its notice of appeal on September 6, 2000, from the trial court's dismissal of its counterclaim against the Trustee.

We review chancery cases de novo on the record, but we do not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001); *Harris v. City of Little Rock*, 344 Ark. 95, 40 S.W.3d 214 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.*

As noted, there are two appeals from the trial court's decision in this case: the Trustee's appeal from the award of damages in favor of the Districts for breach of contract, and DeHaven's appeal from the trial court's dismissal of DeHaven's claim for damages against the Trustee.

I. The Trustee's Appeal

The Trustee raises three issues on appeal. First, the Trustee argues that the Districts lacked standing to assert a cause of action against the Trustee because the trust agreement is not a contract, and the Districts, which are not direct beneficiaries of the trust, cannot pursue a claim against the Trustee. Second, the Trustee argues that the chancery court erred in finding that there was a breach of contract because the Pledge and Mortgage agreements were not contracts but trusts, the chancery court disregarded gross

negligence as the standard of care, and the Trustee's conduct was not a breach of contract. Finally, the Trustee argues that the chancellor erred in determining the existence and amount of damages in that the Districts failed to prove any recoverable damages, the damage calculation was in error, and the trial court erred in the amount of attorney's fees awarded to the Districts.

A. Standing of the Districts to Assert a Cause of Action

The Trustee argues that the Districts did not have standing to assert a cause of action against it in a counterclaim because the Pledge and Mortgage agreements were trust agreements between the Trustee and the bondholders, thus permitting only the bondholders to bring a cause of action against the Trustee should there be a breach of the trust. The Districts respond in three parts: first, they argue that even if the Pledge and Mortgage agreements are treated only as trusts, the Districts have standing as beneficiaries; second, they argue that Arkansas law allows a settlor to maintain an action against a Trustee; and third, they argue that the Pledge and Mortgage agreements have features of both trusts and contracts to allow claims for breaches of fiduciary and contractual duties.

Generally, Arkansas law on "standing" states that a person or party who has a pecuniary interest in the outcome of the action has standing to assert a claim on his or its behalf. *See, e.g., In re $3,166,199*, 337 Ark. 74, 987 S.W.2d 663 (1999); *McCoy v. Moore*, 338 Ark. 740, 1 S.W.3d 11 (1999); *Stilley v. James*, 345 Ark. 362, 48 S.W.3d 521 (2001). In these cases, this court noted that the appellants had standing to pursue an action where they would be pecuniarily affected by the outcome of the case. Under this general rule, the Districts have standing to pursue a counterclaim against the Trustee based on the fact that a decrease in the amount of funds in the bond accounts adversely and directly affects the Districts' pecuniary interests. This is even more prevalent here where the Districts' counterclaim was based on the fact that their asserted damages were due to the Trustee's pursuit of causes of action outside of the authority granted it under the trust indenture, such as revision or rescission of the trust indenture documents.

The deeper issue here, however, and what the Trustee is apparently trying to argue in this point, is whether the agreement reached among the Districts, the Trustee, and the bondholders is a trust in the "donative" sense of the word or actually a contractual

trust indenture requiring performance of different duties by these parties to that agreement. The Trustee is correct in its assertion that under general trust law, a party has no standing to raise an issue regarding property in which it has no interest. *See McCollum v. McCollum*, 328 Ark. 607, 946 S.W.2d 181 (1997). Furthermore, once a settlor, the person creating the trust, releases his interest to the property to the trust, he loses any standing to challenge the administration of that property unless such power is reserved in him as a beneficiary or trustee, or unless the person has an interest in the subject matter of the trust. *Restatement (Second) of Trusts* § 200(d) (1959). In *McCollum*, this court determined that beneficiaries under a family trust had no standing to contest the sale of property by the trustee of a marital trust, where the marital trust permitted the trustee, who was also the beneficiary in that trust, to dispose of the property as she wished. The court determined that the beneficiaries in the family trust never gained an interest in the property because the family trust was a residual trust which only went into effect if the marital trust did not dispose of the property. The *Restatement (Second) of Trusts* § 200(b), however, notes that if a settlor makes a contract with the trustee, he can maintain an action against the trustee on that contract.

Here, however, the Pledge and Mortgage agreements, while termed by the parties as a "trust," are actually more akin to indenture agreements in the form of corporate or trust indentures, or to a deed of trust. *Black's Law Dictionary* defines an indenture as "1. A formal written instrument made by two or more parties with different interests . . .; 2. A deed or elaborate contract signed by two or more parties." *Black's Law Dictionary* 773 (7th ed. 1999). Types of indentures can include a corporate indenture, defined as "a document containing the terms and conditions governing the issuance of debt securities, such as bonds or debentures," or a trust indenture, defined as "a document containing the terms and conditions governing a trustee's conduct and the trust beneficiaries' rights." *Id.* A deed of trust is "a deed conveying title to real property to a trustee as security until the grantor repays a loan. This type of deed resembles a mortgage." *Id.* Furthermore, the statutes authorizing the creation of municipal property owners' districts indicate that such districts may issue bonds to fund improvements, and may "provide for the execution and delivery of a trust indenture or like instrument by the board securing the bonds and for the execution and delivery of other writings pertaining thereto." Ark. Code Ann. § 14-94-123(b)(2).

The importance in understanding the terminology here is that while the parties call this a "trust," it is not a trust in the classic "donative" sense of the word, and this court has determined on several occasions that an indenture trust is actually a contractual relationship among several parties. In *Stilley v. Makris*, 343 Ark. 673, 38 S.W.2d 889 (2001), for example, this court determined that a proposed initiative was invalid where the initiative, which proposed to require Jefferson County to sell its county hospital, impaired the contractual relations between the hospital and the county as contained in lease agreements and in a "trust indenture contract." This "trust indenture contract" involved the County's issuance of revenue bonds, secured by a mortgage lien on the hospital property and the rental payments made under a lease, and the court indicated that this was a contract between the County and the bank, which would be impaired if the proposed initiative was approved. Selling the property under the proposed initiative would make it impossible for the County, the bank, and the bondholders who relied on the lease revenues and hospital income to pay satisfy the bonds. In *City of Barling v. Fort Chaffee Redevelopment Authority*, 347 Ark. 105, 60 S.W.3d 443 (2001), this court determined that public trusts formed under Ark. Code Ann. §§ 28-72-201 to -202 (1987) involve a trust indenture, and that trust agreement becomes a binding contract between the state, the designated beneficiary, and the trustee of the trust. While that contractual right is provided by statute, the fact that the terms of the indenture trust are similar to that here is persuasive authority that such a trust indenture is, in reality, more akin to a contract.

Such is the case here in that obligations continue among the different parties regardless of who has the ability to control the holding and disbursement of income. Here, the Districts are under the duty to make bond payments in a timely manner, and must sell District-owned lots to help meet that requirement. The Trustee is under the duty to hold, protect, and appropriate the income, release deeds to property owners upon payment of the Lot Release Price, and retire the bonds upon payment by the Districts. The bondholders are required to finance the bonds and refund the bonds only at required times over the course of the agreement. Failure by any one of these entities to perform its duties under the trust indenture contract could result in a breach of the agreement actionable by any party harmed by that breach. Therefore, a breach of a contractual duty by the Trustee that harms the Districts is actionable in contract by the Districts as parties to the mortgage-style trust indenture.

B. Breach of Contract

First, the Trustee argues that the Pledge and Mortgage agreements were not contracts that could be breached, and cites the granting clause of the Pledge and Mortgage noting that the Districts "pledge, mortgage, assign, transfer and set over" the income and rights to income to retire the bonds. The Trustee argues that this is evidence of the creation of a trust rather than a contract under the *Restatement (Second) of Trusts*. However, as discussed in the previous section, the Pledge and Mortgage agreements between the Trustee and the Districts evidence certain obligations on the part of each entity to the other in the performance of the trust indenture agreement. This agreement between the Trustee and the Districts is in the nature of a contract, and is actionable under contractual causes of action. Furthermore, the Trustee may by contract undertake other duties than those which he undertakes as trustee, and if that is done the trustee will be liable in an action at law for failure to perform such duties. *Restatement (Second) of Trusts* § 197(b). The Trustee's agreement to release the lots upon the payment of the Lot Release Price is an evident duty on the Trustee, and one which the Trustee admittedly failed to perform.

Second, the Trustee argues that the chancery court erroneously disregarded the "gross negligence" standard of care required under the trust indenture contract in ruling that the "gross negligence" standard did not apply to this case. Paragraph 19 of the Pledge and Mortgage agreements states in part:

> 19. *Trustee Standard of Care*: By its acceptance of the offices of Trustee and paying agent hereunder, the Trustee agrees to discharge its duties as a reasonably prudent Trustee. The Trustee shall be responsible only for gross negligence in the execution of its trust. . . .

The trial court found that the gross-negligence standard of care only applies in tort cases, and because this is not a tort claim by the beneficiary bondholders, but rather a breach-of-contract claim by the Districts, the gross-negligence standard of care does not apply. The trial court was correct. Clearly, by the terms of the trust indenture agreement, the Trustee agreed to be bound to a "gross negligence" standard of care in its execution of the "trust" and in its duties as a trustee. The Trustee's actions in refusing to release the lots, however, was an action taken in violation of its contractual duties to the Districts and not within the confines of the trust

agreement with the bondholders. Therefore, the Trustee was liable for a contractual breach, which carries no consideration of a duty of care.

As its third point here, the Trustee argues that its conduct was not a breach of contract because the Trustee was duty bound to solve the problems of the trust to protect the bondholders. The Trustee argues that it was fully empowered to ask for guidance from the trial court regarding the declaration of rights under the documents, and that payment of its attorney's fees for this action cannot in hindsight justify an award of damages after an unsuccessful litigation on the Trustee's part.

As the chancery court noted below, and as is apparent on appeal, the Trustee continues to miss the point that the breach of contract did not occur when it filed suit or pursued a declaratory judgment action, but rather the breach occurred when the Trustee refused to release the lots to purchasers who had paid the Lot Release Price under the guise that the Pledge and Mortgage documents had to be revised or rescinded. It was this refusal to release these lots that spurred the litigation in this action.

[redacted] Under a contractual theory, the Trustee's actions were unwarranted. Contractually, the Trustee entered into an agreement with the Districts under Paragraph 9 of the Pledge and Mortgage agreement that once the Lot Release Price has been paid, the Trustee would release the deed to the lot owner, who would then be excused from paying any additional Special Taxes or Assessment of Benefits. Here, however, the Trustee does not deny that it did not release the lot pursuant to the provisions in Paragraph 9 — rather, it argues that it had the right to do this. However, the contractual language of the Pledge and Mortgage agreement provides the Trustee no discretion in the release of these lots. Instead, Paragraph 9 indicates that the Trustee "shall" release the lots upon payment of the Lot Release Price. As noted above, breach of the Pledge and Mortgage agreements, as mortgage-type contracts, becomes actionable. Therefore, failure to release the lots pursuant to Paragraph 9 resulted in a breach of contract.

[redacted] Under the terms of the Pledge and Mortgage agreements, the Trustee was empowered under Paragraph 5 to proceed by mandamus or other proper remedy, in the name of the bondholders, to compel the Districts' performance of the terms of the agreement. Furthermore, Paragraph 16 lays out the Trustee's obligations if the Districts default. Under Paragraph 16, the Trustee and its

counsel may be paid a reasonable amount to litigate and solve a default situation. However, both Paragraph 5 and Paragraph 16 anticipate that action by the Trustee will only be taken if the Districts fail to meet their obligations or if they default. In this case, however, the Districts did not fail to meet their obligations, nor did they default in their payments of the bonds. While the Trustee certainly retained the power to ask the chancery court for a declaratory judgment regarding its obligations under the Pledge and Mortgage agreements, it did not have authority to ask for reformation or rescission of the agreements. Because the Trustee stepped outside its permitted boundaries under the terms of the trust, the Districts, as parties to a contract, were compelled to bring this counterclaim against the Trustee to recover the funds expended for fees which were improperly paid from the bond funds to pursue litigation that was largely unwarranted.

C. Damages

In its third point on appeal, the Trustee argues that the trial court erred in determining the existence and amount of damages, and in awarding attorney's fees to the Districts.

1. Existence of Damages

First, the Trustee argues that the Districts failed to prove any recoverable damages. The Trustee argues that "if the prosecution of the litigation was considered a breach, the districts certainly suffered no out-of-pocket loss. The districts did not pay the attorney's fees. The fees were paid out of the respective bond funds." The Trustee further asserts that the trial court indicated that the breach occurred when the Trustee refused to release the lots and based the fee award from that date forward, but then also concluded that no damages resulted from that breach. As such, the damages awarded do not bear any relationship to any damages proved.

Damages recoverable from breach of contract are those damages that would place the injured party in the same position as if the contract had not been breached. *Dawson v. Temps Plus Inc.*, 337 Ark. 247, 987 S.W.2d 723 (1999); *Carroll v. Jones*, 237 Ark. 361, 373 S.W.2d 132 (1963). Here, the question is whether the Trustee's breach of contract in its failure to release lots upon payment of the Lot Release Price resulted in any damages. Certainly, this failure at that time did not, in and of itself, cause

"damage" to the amount of money in the bond funds. However, the trial court found that it was this act that triggered the resulting litigation that drained the bond funds the Trustee claimed to be protecting. The Trustee attempts to argue that the court's finding that this alone was the "breach" on which damages were based; however, in reading the court's order, it is apparent that the court found that upon that initial breach, all actions by the Trustee thereafter seemed to be one continuing breach for the reason that the entire litigation was not warranted. For example, the court also found that the Trustee breached the contract when it requested a reformation of the Lot Release Price through litigation rather than following the requirements in the Pledge and Mortgage agreements requiring approval by two-thirds of the bondholders. The Trustee, in fact, did not even attempt to get that approval. The court also found that the breach related to the Trustee's reliance on the "Bracewell 1" schedule indicating that default was imminent, rather than on the other information, including the "Bracewell 2" schedule, indicating that at least three of the four Districts would retire the bonds. Therefore, while the initial breach of contract related to the Trustee's failure to release the lots, the trial court also indicated that the Trustee continued breaching the contract with the Districts by pursuing actions that, under the trust indenture contract, it did not have authority to pursue. Certainly, while the Trustee retains authority to ask for guidance under or a declaratory judgment about the terms of the agreements, the Trustee's actions in this case extended beyond those powers, resulting in unnecessary litigation that drained the bond funds, resulting in damage to the Districts.

[redacted] Ultimately, the trial court found that the only damages proved by the Districts were those relating to the payment of litigation expenses, namely attorney's fees, for pursuing an action contrary to the contract and trust language. In other words, to place the Districts in the same position as before the initial breach, payment of all litigation expenses after April 1, 1998, when the Trustee refused to release the lots, constituted the required damages. The trial court did not err in this decision.

2. Calculation of Damages

Second, the Trustee argues that if the trial court is affirmed on the award of damages, the court wrongly calculated the damages because it relied on a law firm exhibit showing when invoices were paid to Friday, Eldredge & Clark Law Firm rather than when the work was done. As such, the award of fees after April 1, 1998, could

take into account fees paid for work done before April 1, 1998. The Districts respond that the trial court based its decision, in part, on the Trustee's own exhibit, and that the Trustee's own witness testified to the accuracy of those charges, but that the final order offers no specific document on which the trial court relied.

Notably, the Districts are correct that the trial court did not base its conclusion on any particular document as no such document is indicated in the final order. Two documents, DX 49, a report completed by Paes detailing the payout of attorney's fees during this case, and PX 305, a summary detailing the amount of $315,528.97 for fees paid to Friday, Eldredge & Clark Law Firm for activities from April 1, 1998, to February 25, 1999, offer evidence on which the trial court apparently relied. It appears that the trial court took these and other documents into account when it reached its final award total of $381,436.96 for the amount paid to the Trustee's attorneys in the litigation. In order to return the Districts to the position in which they would have been had the contract not been breached, the trial court was correct in assessing damages for the attorney's fees paid from the bond funds during the pendency of the litigation by the Trustee and the time during which the Districts pursued the Trustee for repayment of those funds into the bond accounts. These fees were based in large part on the Trustee's own records and exhibits. As such, we can not find that the trial court erred in assessing these damages.

3. Attorney's Fees Awarded to the Districts

Finally, the Trustee argues that the trial court erred in awarding fees to the Districts. The Trustee argues that the fee reports submitted by the Districts included unrelated expenses, and, therefore, those fees should have been reduced by approximately $35,000. The Districts respond that the trial court made an initial adjustment downward of attorney's fees authorized by statute, but thereafter the Trustee failed to show that the award of fees was an abuse of discretion. Therefore, the fees should stand.

A trial court is not required to award attorney's fees and, because of the trial judge's intimate acquaintance with the trial proceedings and the quality of service rendered by the prevailing party's counsel, we usually recognize the superior perspective of the trial judge in determining whether to award attorney's fees. *Marcum v. Wengert*, 344 Ark. 153, 40 S.W.3d 230 (2001); *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000); *Chrisco v. Sun Industries Inc.*,

304 Ark. 227, 800 S.W.2d 717 (1990). The decision to award attorney's fees and the amount to award are discretionary determinations that will be reversed only if the appellant can demonstrate that the trial court abused its discretion. *Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998); *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993). A grant of attorney's fees is an issue within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Id.* The decision of whether to award attorneys' fees in a contract case is governed by Ark. Code Ann. § 16-22-308, which provides in pertinent part:

> In any civil action to recover on . . . breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney fee to be assessed by the court and collected as costs.

In awarding fees under Ark. Code Ann. § 16-22-308, the trial court has broad discretion on whether to award fees, and his decision will not be reversed absent an abuse of discretion. The operative word in this statute is "may." The word "may" is usually employed as implying permissive or discretional, rather than mandatory, action or conduct and is construed in a permissive sense unless necessary to give effect to an intent to which it is used. *Jones, supra; Chrisco, supra.*

Here, the trial court entered a subsequent order on September 1, 2000, granting fees to the four Districts in the amount of $128,726.25 to be divided out among the Districts according to the attorney's allocation of percentages of contribution to the lawsuit. According to the order, the trial court reviewed the submission of fees by Attorney Lawrence with some care, adjusting the fees downward and correcting a typographical error in order to reach the correct amount of fees. The Districts were clearly the prevailing parties as they succeeded in proving a breach-of-contract claim resulting in reimbursement to the bond funds of the damages from the breach, *i.e.*, the attorney's fees expended in unwarranted litigation. While the Trustee argues that the fee schedules submitted by the Districts' attorneys listed unnecessary expenses, the Trustee fails to specifically state why certain expenses are not warranted, other than to indicate that these expenses are "Non-litigation" expenses. However, a review of the listed expenses indicates that these expenses are for the time period included within the award of damages and involve various matters involved in this litigation. As such, we cannot say that the trial court abused its discretion in awarding these fees.

II. DeHaven's Appeal

As the second appeal involved in this case, DeHaven filed an appeal from the trial court's dismissal of it from the litigation at the close of the Trustee's case upon a directed-verdict motion. On appeal, DeHaven argues that it only appeals from the portion of the chancellor's order denying its request for attorney's fees, and asserts three points in support of this argument. First, DeHaven argues that the trial court was correct in requiring the Trustee to reimburse the bond accounts. Second, DeHaven argues that the trial court erred in failing to recognize that its escrow agreements were incorporated into the Districts' Pledges and Mortgages signed by the Bank that same day. Finally, DeHaven argues that the trial court erred in failing to realize that DeHaven suffered the same damages as the Districts, and that DeHaven's help in recovering those damages also entitles it to attorney's fees.

First, the trial court dismissed DeHaven from the litigation upon a motion by the Trustee to dismiss both DeHaven's and the Districts' claims. At trial, the court indicated that the dismissal was due to "lack of proof," and in its final order the court indicated that DeHaven was dismissed "for failure to prove any breach of a duty, either fiduciary or contractual . . . and for failure to establish any damages sustained by the DeHaven Group. . . ." A chancery court is to evaluate the motion for directed verdict by deciding whether, if the proceeding were a jury trial, the evidence would be sufficient for the case to go to the jury. *See Swink v. Giffin*, 333 Ark. 400, 970 S.W.2d 207 (1998). In its evaluation of the plaintiff's case, the chancery court is not to assess the credibility of the testimony presented by the plaintiff's witnesses. *Id.* To determine whether the plaintiff has presented a *prima facie* case, the trial court must view the evidence in the light most favorable to the nonmoving party, and give the evidence its highest probative value, taking into account all reasonable inferences deducible from the evidence. *Bradford v. Verkler*, 273 Ark. 317, 619 S.W.2d 636 (1981); *Suzuki of Russellville, Inc. v. Mid-Century Ins. Co.*, 14 Ark. App. 304, 688 S.W.2d 305 (1985). If the evidence, viewed in the light most favorable to the nonmoving party is insubstantial, the trial court should grant the defendant's motion for directed verdict. *City of Little Rock v. Cameron*, 320 Ark. 444, 897 S.W.2d 562 (1995). Evidence is insubstantial when it is not of sufficient force or character to compel a conclusion one way or the other or if it does not force a conclusion to pass beyond suspicion or conjecture. *Id.*; *Burns v. Boot Scooters, Inc.*, 61 Ark. App. 124, 965 S.W.2d 798 (1998).

A. Lack of Proof of a Breach of Duty

DeHaven first argues that the trial court erred in finding lack of proof of a breach of duty due to the fact that DeHaven did not sign the Pledge and Mortgage Agreements upon which the court relied to find a breach of contract. DeHaven argues that the escrow agreements it signed with the Trustee were incorporated into the Pledge and Mortgage agreements, thus making it a party to those documents through incorporation by reference.

As the Trustee suggests, we cannot find where DeHaven argued during the discussion on the directed-verdict motion that these contracts were incorporated by reference so that it was included in the Pledge and Mortgage agreements as a party to those agreements. During the discussion regarding the motion for directed verdict the court discussed DeHaven's lack of proof as to damages sustained, but did not discuss how DeHaven planned to dovetail its participation into the Pledge and Mortgage agreements. As such, this argument is raised for the first time on appeal, and we, therefore, will not consider it. *Hurst v. Holland*, 347 Ark. 235, 61 S.W.3d 180 (2001); *Ghegan & Ghegan, Inc. v. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001).

2. Lack of Proof of Damages

DeHaven next argues that the trial court erred in finding that DeHaven did not prove that it was damaged by the money paid for attorney's fees to the Trustee's attorneys. DeHaven argued below that because the money was taken out of the bond accounts to pay for fees, this delayed the retirement of the bonds, which delayed the release of the escrow agreements as security for the bonds. DeHaven notes that its "Collateral Assignment and Security Agreement" lays out the procedure for the Trustee's ability to collect DeHaven's proceeds from the escrow accounts to pay a portion of the bond amounts. As part of that procedure, as soon as the bonds are retired and nothing is left owing under the Pledge and Mortgage agreements, DeHaven's and the Trustee's agreement becomes void, and DeHaven then resumes the right to collect all income due under the escrow accounts. Therefore, the sooner the bonds are paid, the sooner DeHaven begins to receive money from the escrow accounts. However, as noted above, the Trustee did not breach an agreement with DeHaven and, therefore, DeHaven has no cause of action on which it was the prevailing party to recover

fees under Ark. Code Ann. § 16-22-308. Therefore, fees are not warranted.

Affirmed.

Michael Glenn PICKENS *v.* STATE of Arkansas

CR 01-992 69 S.W.3d 10

Supreme Court of Arkansas
Opinion delivered March 7, 2002

[redacted]

Phyllis J. Lemons, for appellant.

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

JIM HANNAH, Justice. Michael Glenn Pickens appeals his conviction of rape and sentence of life in prison. Pickens was convicted under Ark. Code Ann. § 5-14-103 (Supp. 2001) of engaging in sexual intercourse or deviate sexual activity with another person who was less than fourteen (14) years of age. Pickens asserts two issues on appeal. He first asserts that his motion for a directed verdict was denied in error because there was a lack of substantial evidence of rape. He also asserts that the trial court erred in failing to exclude evidence of a prior conviction for rape. We find no merit in either claim and affirm.

Facts

Pickens was living with his girlfriend at the time of the alleged rapes in this case. She had a twelve-year-old daughter living with her who is the victim in this case. The victim testified that Pickens first came into her bedroom at night and made sexual advances to her. She further testified that he later came into her room and had sexual intercourse with her despite her protests.

The victim testified that this occurred late at night while the others in the house were asleep and that she was raped in the bed where she slept. She also testified that she and her two brothers slept together in the same room in a bunk bed. In fact, according to her testimony, a brother who was then five slept with her in the lower bunk. A brother who was then eleven years old slept on the top bunk. She testified that although there were multiple rapes, neither brother ever woke up.

The victim testified that Pickens engaged in sexual intercourse with her on between ten and twenty or more occasions and later testified that he had sex with her on a daily basis for two years. When the victim told her mother of the sexual abuse, she threw Pickens out of her house. The victim was then taken for medical care and tested positive for a sexually transmitted disease.

Because the victim tested positive for a sexually transmitted disease, the State had Pickens tested. His test was negative. However, when he was asked to submit to the test, he told Arkansas State Police Officer Brenda Hale that he had indeed been infected with a venereal disease. However, he further told her that while he was in jail on another charge, but after this alleged sexual abuse, he was given an antibiotic by injection that cleared up the infection.

During a polygraph test, Pickens was asked if he had raped the victim. He denied it verbally while shaking his head "yes." After the test, Pickens tried to get the testing officer to shake hands, and when she refused, he stated, "I know you won't shake my hand, because I was smarter than you and I wouldn't tell you that I had sex with that girl, but I am not going to tell you that."

Sufficiency of the Evidence

Pickens argues that the trial court erred in denying his motion for a directed verdict. A motion for a directed verdict challenges the sufficiency of the evidence. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001); *Britt v. State*, 344 Ark. 13, 38 S.W.3d 363 (2001). The test for determining sufficiency of the evidence is whether substantial evidence, direct or circumstantial, supports the verdict. *Ross, supra.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict. *Id.*

Pickens argues that there was "absolutely no evidence from which the jury could have found Appellant guilty of Rape without resorting to suspicion and conjecture." The victim in this case was under the age of fourteen. Criminal liability is based simply upon having sexual intercourse with a person under the age of fourteen. Ark. Code Ann. § 5-14-103(a)(1)(C)(i). The victim testified that Pickens came into her room at night and had sexual intercourse with her. She also testified that the contact was always penile-vaginal intercourse and that it occurred on at least ten to twenty occasions. Elsewhere in her testimony, she testified that it occurred every day for two years.

The victim testified Pickens had sexual intercourse with her. There is no question that in the prosecution of a defendant for the rape of someone below the age of consent, the testimony of the victim alone is sufficient to support the conviction. *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999); *Nowlin v. State*, 253 Ark. 57, 484 S.W.2d 339 (1972); *Goodnaugh v. State*, 191 Ark. 279, 85 S.W.2d 1019 (1935); *Ragsdale v. State*, 132 Ark. 210, 200 S.W. 802 (1918); *Bond v. State*, 63 Ark. 504, 39 S.W. 554 (1897). Thus, this testimony alone is sufficient to allow the jury to decide this case. There was no error in denying Pickens's motion for a directed verdict.

Evidence of Prior Sexual Offenses

Pickens was convicted of the rape of his nine-year-old stepsister in 1988 and sentenced to ten years in the Arkansas Department of Correction. He objects to admission of this prior conviction in the present case based on the prohibition in Ark. R. Evid. 404(b) against the use of character evidence to prove conformity therewith. Rule 404(b) provides:

> (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.

The evidence is not admissible simply to show a prior bad act. *Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000). However, the State argued below that the evidence was admissible under Rule 404(b)

as evidence of a "common motive, plan, design or scheme." Such evidence is allowed under Rule 404(b).

However, the assertion of a plan or scheme was not explained further at trial, nor on appeal, and there is no evidence offered to show Pickens engaged in a plan such as "luring children into his lair" where he could gain the opportunity to abuse them. *See Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994). If a plan is asserted, there must be evidence the offenses were planned. *Clay v. State*, 318 Ark. 550, 886 S.W.2d 608 (1994). To be admissible, the evidence must be independently relevant, which means it must have a tendency to make the existence of a fact of consequence to the determination of the case more or less probable. *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997) (citing *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994)). *See also* Ark. R. Evid. 401. Evidence of a plan is lacking, but the evidence does show motive.

The evidence was properly offered to show motive. This court first characterized the admission of evidence of prior sexual offenses under Rule 404(b) as the "pedophile exception" in *Greenlee, supra*. However, this court has long held that other sexual offenses may be admissible to show motive. *Greenlee, supra; Cope v. State*, 292 Ark. 391, 730 S.W.2d 242 (1987); *Ward v. State*, 236 Ark. 878, 370 S.W.2d 425 (1963); *Hummel v. State*, 210 Ark. 471, 196 S.W.2d 594 (1946).

In *Berger v. State*, 343 Ark. 413, 36 S.W.3d 286 (2001), we clarified the requirements for admission of such evidence under Rule 404(b). Evidence of other sexual offenses is allowed where the other sexual offenses involve a similar act of sexual abuse of children, and where such evidence shows a proclivity toward a specific act with a person or class of persons with whom the accused has had an "intimate relationship." As we noted in *Berger*, this requirement of an "intimate relationship" has been met in a number of cases in the past where the victim either lives with the criminal defendant in the same home or where the offenses were committed in the criminal defendant's home. *Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998); *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998); *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996); *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987). As noted in *Berger*, Rule 404(b) does not require that the child live in the criminal defendant's home or that the crime have been committed there, but such evidence does tend to show an intimate relationship.

The trial court, in analyzing the admissibility of the evidence in this case, found:

> Based upon the disparity of the ages, the fact that the child was nine, this child was only 12 or 13, he was substantially older in each instance and they both stood in a close relation to him, one being a step sister and the other being essentially a step daughter, he was living in with this present child's mother, puts them in to the same similar circumstances where he was a household member in some control and some leadership and some ability to be in their life, to gain their confidence.

The act in the prior sexual offense was sexual intercourse. It was precisely the same act as was committed against the present victim, and that satisfies the first requirement of similarity. We now move to the second requirement. Both victims were underage girls of approximately the same age. This satisfies the second requirement of the acts being directed at a specific person or class of persons. Finally, as to the third element, both instances of sexual offenses were committed against someone who was substantially younger than Pickens, someone who stood in a family or quasi-family relationship to him as stepsibling and stepdaughter, and someone who Pickens gained access to by using the household that they or he lived in. In fact, in a statement to the police, Pickens stated that he had not been in a father-daughter relationship with the victim, but that he had been in authority over her. Thus, the third requirement of an intimate relationship is met. *Berger, supra.*

The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Hernandez, supra.* We find no abuse of discretion.

Arkansas Supreme Court Rule 4-3(h)

The transcript of the record in this case has been reviewed pursuant to Rule 4-3(h). Rule 4-3(h) requires, that in cases of sentences of life imprisonment or death, we review all prejudicial errors in accordance with Ark. Code Ann. § 16-91-113(a) (1987). None has been found.

Affirmed.

Buckie Allan MILLS *v.* STATE of Arkansas

CR 02-67 68 S.W.3d 294

Supreme Court of Arkansas
Opinion delivered March 7, 2002

Ben Beland, for appellant.

No response.

PER CURIAM. Ben Beland, a state-salaried, full-time public defender for the Twelfth Judicial District, was appointed by the trial court to represent appellant Buckie Mills, an indigent defendant, in this rape and kidnapping case. Mills was convicted and sentenced to life imprisonment without parole. Mr. Beland timely filed a notice of appeal from the judgment of conviction and lodged the appellate record with the Supreme Court Clerk.

Mr. Beland now asks this court to relieve him as appellant's counsel and to appoint new counsel. Mr. Beland is a full-time public defender and is provided a state-funded secretary and pursuant to Act 1370 of 2001 he can not receive compensation for appellate work. Accordingly, we grant Mr. Beland's motion to be relieved for good cause shown. Mr. Mark M. Henry will be substituted as appellant's attorney in this matter.

CORBIN, J., not participating.

David NUEHRING *v.* STATE of Arkansas

CR 01-1341 68 S.W.3d 298

Supreme Court of Arkansas
Opinion delivered March 7, 2002

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

No response.

PER CURIAM. On December 4, 2001, petitioner, David Nuehring, by and through his attorney, Deborah R. Sallings, filed a motion for a belated appeal and for determination of appellate counsel on appeal. On January 17, 2002, this court issued a *per curiam* remanding this case to the trial court to settle the record in order to determine whether attorney Michael Sherwood was relieved of his responsibility to represent appellant on appeal, and whether appellant requested that Mr. Sherwood file a notice of appeal on appellant's behalf. We declined to rule on the issue of who was to represent him during his appeal until the record was settled.

On February 19, 2002, the record was settled in compliance with our mandate, and the motion for belated appeal and for determination of appellate counsel was resubmitted to the court. At this hearing, Mr. Sherwood did not dispute that he took no action

on appellant's requests to proceed with an appeal. 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 curium*).

The trial court also found that the attorney appointed from the Public Defender's office, Deborah R. Sallings, was relieved as counsel and that Mr. Sherwood, who never requested to be relieved as counsel, continued to be appellant's counsel.

Now that the record has been settled, we can rule on the motion to file a belated appeal, and therefore it is granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Cartrell Lewan McCOY *v.* STATE of Arkansas

CR 01-762 69 S.W.3d 430

Supreme Court of Arkansas
Opinion delivered March 14, 2002
[Supplemental opinion on denial of rehearing
delivered April 18, 2002.*]

* *Reporter's note*: See 348 Ark. 239, 74 S.W.3d 599 (2002).

William R. Simpson, Jr., Public Defender; *Brett Qualls* and *Steve Abed*, Deputy Public Defenders, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

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

DONALD L. CORBIN, Justice. Appellant Cartrell Lewan McCoy was convicted of attempted first-degree murder and burglary in the Pulaski County Circuit Court. He was sentenced to thirty years' and five years' imprisonment, respectively, and ordered to pay a fine of $5,000. Additionally, the trial court revoked his probation for a prior conviction of possession of cocaine with intent to deliver and sentenced him to a concurrent term of fifteen years' imprisonment. Appellant appealed to the Arkansas Court of Appeals, arguing that the trial court erred in denying his motion to instruct the jury on the crime of attempted second-degree murder.[1] The court of appeals agreed with Appellant and reversed. *See McCoy v. State*, 74 Ark. App. 414, 49 S.W.3d 154 (2001). The State filed a petition for review of that decision, and we granted it, pursuant to Ark. Sup. Ct. R. 1-2(e). When we grant review following a decision by the court of appeals, we review the case as though it had been originally filed with this court. *See Kennedy v. State*, 344 Ark. 433, 42 S.W.3d 407 (2001); *Miller v. State*, 342 Ark. 213, 27 S.W.3d 427 (2000). We reverse the trial court and affirm the court of appeals.

The facts of this case are not in dispute. On August 11, 1999, Appellant entered the apartment of Rodney Wilson and began firing a gun toward his ex-girlfriend, Sarah Battung. Battung was

[1] Appellant's attorney filed a no-merit brief on the revocation. The court of appeals initially declined to reach the issue because counsel had not provided the entire record for review. On rehearing, however, the court of appeals reversed itself and affirmed the trial court's ruling revoking Appellant's probation. *See McCoy v. State*, 74 Ark. App. 423-A, 52 S.W.3d 510 (2001) (*supplemental opinion on grant of reh'g*). Neither party seeks review of that part of the decision; hence, we do not review it.

hit by two bullets, one in her chest and one in her back. As a result of the incident, Appellant was charged with attempted first-degree murder under Ark. Code Ann. §§ 5-3-201 and 5-10-102(a)(2) (Repl. 1997). In addition, Appellant was charged with residential burglary, in violation of Ark. Code Ann. § 5-39-201(a)(1) (Repl. 1997), for having entered or remained unlawfully on Wilson's premises.

At the conclusion of all the evidence, Appellant requested an instruction on attempted second-degree murder, under Ark. Code Ann. § 5-10-103(a)(1) (Repl. 1997). The State objected on the ground that the attempt statute, section 5-3-201, requires that a person act purposely, while second-degree murder under section 5-10-103(a)(1) requires that a person act knowingly. The State contended that it was not possible to purposely attempt a knowing offense. The trial court agreed and refused to instruct on second-degree murder. The jury convicted Appellant of attempted first-degree murder and burglary.

Appellant challenged the attempted-murder conviction in the court of appeals. He argued that the trial court had erred in refusing to instruct on attempted second-degree murder, because it is a lesser-included offense of attempted first-degree murder. In response, the State abandoned its trial argument and submitted three alternative reasons to affirm the trial court's ruling. First, the State argued that attempted second-degree knowing murder is not a lesser-included offense of attempted first-degree purposeful murder, because second-degree murder requires the additional proof that the crime was committed "under circumstances manifesting extreme indifference to the value of human life." *See* section 5-10-103(a)(1). Second, the State argued that the trial court's refusal to give the instruction is correct because the instruction proffered by Appellant, a standard AMCI 2d instruction, did not accurately state the law. Third, the State argued that there was no rational basis for instructing the jury on attempted second-degree murder. The court of appeals was not persuaded by any of these arguments, and it reversed Appellant's conviction and remanded for new trial. The State petitioned for review of this decision, and we granted it for the purpose of clarifying the law on this issue.

Before we reach the merits of this issue, we must address a preliminary issue concerning the appropriate test for determining when an offense is included in another offense. In *Goodwin v. State*, 342 Ark. 161, 27 S.W.3d 397 (2000), this court observed in a footnote that there were possible inconsistencies between our case

law and Ark. Code Ann. § 5-1-110 (Repl. 1997), regarding the requirements for a lesser-included offense. *See also Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001). Our case law has generally required that three criteria be met before an offense will be considered a lesser-included offense. Section 5-1-110(b), on the other hand, provides three alternative ways in which an offense may be included in another offense. This inconsistency was not directly addressed in *Goodwin* because both parties had relied solely on this court's case law and had not otherwise briefed the issue. This court made it clear, however, that it would be inclined to address this issue in the future, once it was properly before us.

In the present case, the State relies on this court's case law, while Appellant relies on one of the alternative tests set out in section 5-1-110(b). Particularly, he relies on subsection (b)(3), which provides, in part, that an offense is a lesser-included offense if it differs from the offense charged only in the respect that a lesser kind of culpable mental state suffices to establish its commission. Thus, because Appellant relies on section 5-1-110, we will address the inconsistencies between our cases and that statute.

Section 5-1-110 was originally enacted in Act 280 of 1975 and became effective January 1, 1976. Prior to the passage of Act 280, the requirements for determining when an offense was included in another offense were established at common law, beginning with *McBride v. State*, 7 Ark. 374 (1847). There, this court held: "A party indicted of one offence may be convicted of a lesser, provided it be of the same class with that which he is charged." *Id.* at 375. This holding was expanded on in *Cameron v. State*, 13 Ark. 712, 714 (1852), wherein this court held:

> [U]pon an indictment for a felony, the accused may be convicted of a misdemeanor, where both offences belong to the same generic class, where the commission of the higher may involve the commission of the lower offence, and where the indictment for the higher offence contains all the substantive allegations necessary to let in proof of the misdemeanor.

This court adhered to this three-part test for over one hundred years. *See, e.g., Sharpensteen v. State*, 220 Ark. 839, 250 S.W.2d 334 (1952); *Bailey v. State*, 215 Ark. 53, 219 S.W.2d 424 (1949); *Moreland v. State*, 125 Ark. 24, 188 S.W. 1 (1916); *Monk v. State*, 105 Ark. 12, 150 S.W. 133 (1912); *State v. Nichols*, 38 Ark. 550 (1882); *Guest v. State*, 19 Ark. 405 (1858); *Strawn v. State*, 14 Ark. 549 (1854).

In *Gaskin v. State*, 244 Ark. 541, 426 S.W.2d 407 (1968), this court altered its prior decisions and opted for a more succinct test: "To be an included offense, all the elements of the lesser offense must be contained in the greater offense — the greater containing certain elements not contained in the lesser." *Id.* at 543, 426 S.W.2d at 409 (quoting *Beck v. State*, 238 Ind. 210, 213, 149 N.E.2d 695, 697 (1958)). However, in *Caton v. State*, 252 Ark. 420, 479 S.W.2d 537 (1972), this court retreated from the one-dimensional test adopted in *Gaskin* and reaffirmed the prior three-prong test established in *Cameron*. This remained the test for lesser-included offenses until the General Assembly passed Act 280 of 1975.

Act 280 created our current comprehensive Criminal Code. The Act's purpose is reflected in its title: "AN ACT to Reform, Revise, and Codify the Substantive Criminal Law of the State of Arkansas[.]" Section 105 of the Act was originally codified as Ark. Stat. Ann. § 41-105 and is now found at section 5-1-110. That section provides in pertinent part:

> (b) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> > (1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or
> >
> > (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or
> >
> > (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

This statute is clearly written in the disjunctive, connected with the term "or," and provides three distinct ways in which an offense may qualify as a lesser-included offense. As if the statute itself was not clear enough, the Official Commentary to this provision plainly reflects the legislature's intent in establishing multiple ways to determine whether an offense is included in another:

> By defining an included offense, subsection (b) serves two functions. Its primary purpose is to authorize conviction of

> offenses not expressly named in the indictment or information, but it also delineates the exact scope of subsection (a)(1)'s prohibition on multiple convictions. Application in either context turns on the meaning of included offense, which the Code defines by establishing *three alternative* tests. [Citation omitted.] [Emphasis added.]

This court initially recognized that three separate tests were established by the foregoing statute. For example, in *Lowe v. State*, 264 Ark. 205, 570 S.W.2d 253 (1978), the appellant argued that the trial court erred in instructing the jury on negligent homicide at his trial for manslaughter. This court held that under the third test in section 41-105(2)(c), now section 5-1-110(b)(3), negligent homicide was a lesser-included offense of manslaughter because the only difference between the two offenses was that negligent homicide required a lesser kind of culpable mental state than manslaughter. *See also King v. State*, 262 Ark. 342, 557 S.W.2d 386 (1977); *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

Until 1985, but for a few exceptions, this court continued to view the statute as providing three separate and alternative ways of defining a lesser-included offense. *See, e.g., Thomas v. State*, 280 Ark. 593, 660 S.W.2d 169 (1983); *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983) (*per curiam*); *Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983); *Wilson v. State*, 277 Ark. 219, 640 S.W.2d 440 (1982) (*per curiam*); *Martin v. State*, 277 Ark. 175, 639 S.W.2d 738 (1982) (*per curiam*); *Brewer v. State*, 277 Ark. 40, 639 S.W.2d 54 (1982); *Barnum v. State*, 276 Ark. 477, 637 S.W.2d 534 (1982) (*per curiam*); *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982) (*per curiam*); *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981); and *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981) (collectively holding that an offense is a lesser-included offense if it is established by proof of the same or fewer elements required to establish the greater offense). *See also James v. State*, 280 Ark. 359, 658 S.W.2d 382 (1983) (holding that, under the third statutory test, an offense is included in another if they are of the same generic class and differ only in the degree of seriousness of injury). *But see Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983), *cert. denied*, 472 U.S. 1019 (1985); and *Foster v. State*, 275 Ark. 427, 631 S.W.2d 7 (1982) (disregarding two of the three statutory tests and holding that an offense was not a lesser-included offense because it required proof beyond those elements required to commit the greater offense).

In *Thompson v. State*, 284 Ark. 403, 682 S.W.2d 742 (1985), that all changed. There, the appellant contended that it was error for the trial court to refuse to instruct the jury that theft is a lesser-

included offense of robbery. This court rejected her argument, but not on the basis of the statutory tests. Rather, without explanation, this court reverted to pre-code decisions, requiring three criteria to establish lesser-included offenses, holding:

> [A]n offense is not a lesser included offense solely because a greater offense includes all of the elements of an underlying offense. The lesser included offense doctrine *additionally* requires that the two crimes be of the same generic class and that the differences between the offenses be based upon the degree of risk or risk of injury to person or property or else upon grades of intent or degrees of culpability.

Id. at 407-08, 682 S.W.2d at 745. Since *Thompson*, this court has repeatedly applied those three criteria with little or no mention of the statutory law. *See, e.g., Hill*, 344 Ark. 216, 40 S.W.3d 751; *Goodwin*, 342 Ark. 161, 27 S.W.3d 397; *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999); *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997); *Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996); *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989); *Henderson v. State*, 286 Ark. 4, 688 S.W.2d 734 (1985). *But see Sullivan v. State*, 289 Ark. 323, 711 S.W.2d 469 (1986) (relying on the earlier test established in *Gaskin*, 244 Ark. 541, 426 S.W.2d 407, that to constitute an included offense, all the elements of the lesser offense must be contained in the greater offense which contains certain elements not in the lesser offense).

The holding in *Thompson* and its successors is in direct conflict with the plain language of section 5-1-110. Accordingly, we retreat from those holdings to the extent that they conflict with the statutory law. We wish to make clear from our decision today that the determination of when an offense is included in another offense depends on whether it meets one of the three tests set out in section 5-1-110(b)(3). With this holding in mind, we review the merits of the issue in this case.

I. Lesser-Included Offense

Although Appellant was actually charged with *attempted* first-degree murder and sought an instruction on *attempted* second-degree murder, our resolution of this appeal requires us to initially determine whether second-degree murder is a lesser-included offense of first-degree murder. Appellant was charged with attempted first-degree murder under section 5-10-102(a)(2), which

provides that 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." He sought an instruction under section 5-10-103(a)(1), which provides that a person commits second-degree murder if "[h]e knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life." He asserts that the requirement of "extreme indifference" is part of the culpable mental state of the perpetrator. Thus, he asserts that this version of second-degree murder differs from purposeful first-degree murder only to the extent that it requires a lesser culpable mental state, as provided in section 5-1-110(b)(3).

The State, on the other hand, argues that the phrase "under circumstances manifesting extreme indifference to the value of human life" is an additional element of the crime of second-degree murder, not merely a part of the mental state. It contends that the holding in *Byrd*, 337 Ark. 413, 992 S.W.2d 759, is directly on point. We disagree.

The phrase "under circumstances manifesting extreme indifference to the value of human life" is found in numerous criminal offenses involving injury or death to persons. Regardless of the offense in which it appears, however, this court has consistently viewed that phrase as part of the proof of the actor's mental state. *See, e.g., Branstetter v. State*, 346 Ark. 62, 57 S.W.3d 105 (2001); *Flowers v. State*, 342 Ark. 45, 25 S.W.3d 422 (2000); *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996); *Hill v. State*, 325 Ark. 419, 931 S.W.2d 64 (1996); *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994); *Weger v. State*, 315 Ark. 555, 869 S.W.2d 688 (1994); *Burnett v. State*, 295 Ark. 401, 749 S.W.2d 308 (1988); *Nolen v. State*, 278 Ark. 17, 643 S.W.2d 257 (1982); *State v. Vowell*, 276 Ark. 258, 634 S.W.2d 118 (1982); *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977).

In the first of those cases, *Martin*, this court held that "the phrase 'circumstances manifesting extreme indifference to the value of human life' indicates that the attendant circumstances themselves must be such as to demonstrate the culpable mental state of the accused." *Id.* at 84, 547 S.W.2d at 83. Extreme indifference is thus "in the nature of a culpable mental state . . . and therefore is akin to 'intent.' " *Vowell*, 276 Ark. at 260, 634 S.W.2d at 119 (citing *Martin*, 261 Ark. 80, 547 S.W.2d 81). Offenses requiring extreme indifference involve actions that "evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim." *Tigue*, 319 Ark. at 152, 889 S.W.2d at 762. In the case of

capital murder under Ark. Code Ann. § 5-10-101(a)(9) (Repl. 1997), which requires proof that the defendant knowingly caused the death of a person fourteen years old or younger under circumstances manifesting extreme indifference, this court has held that the requirement of extreme indifference goes to the perpetrator's intent, such that he must act with deliberate conduct that culminates in the death of a person. *See Branstetter*, 346 Ark. 62, 57 S.W.3d 105. But for the required age of the victim, the capital-murder statute at issue in *Branstetter* mirrors the version of second-degree murder at issue here.

The State's reliance on this court's holding in *Byrd*, 337 Ark. 413, 992 S.W.2d 759, is misplaced. There, the defendant was charged with first-degree murder under section 5-10-102(a)(3), which requires proof that the defendant "knowingly caus[es] the death of a person fourteen (14) years of age or younger" at the time of the crime. *Id.* at 425-26, 992 S.W.2d at 766. At trial, Byrd sought an instruction for second-degree murder, that he knowingly caused the death of another person under circumstances manifesting extreme indifference to the value of human life. The trial court refused the instruction, and this court affirmed. This court held that second-degree murder was not a lesser-included offense of the type of first-degree murder charged in that case, because "the element of causing a death under circumstances manifesting extreme indifference to the value of human life is not an element of the charge for first-degree murder of a person aged fourteen years or younger." *Id.* at 426, 992 S.W.2d at 766. By using the word "element," the State contends that this court effectively concluded that the "extreme indifference" language was an attendant circumstance that must be proven separate and apart from the required mental state. We disagree.

The holding in *Byrd* is clearly limited to the situation where the perpetrator is charged with first-degree murder by knowingly causing the death of a person fourteen years old or younger. Second-degree murder is not a lesser-included offense of that type of first-degree murder, because it requires that the accused act knowingly with extreme indifference, as opposed to just knowingly. This is as far as the holding in *Byrd* extends. It does not extend to the type of first-degree murder at issue here, requiring that the accused purposely cause the death of another. Thus, *Byrd* does not control the issue in this case.

Here, Appellant was charged with attempted first-degree murder, in that, with the purpose of causing the death of another

person, he attempted to cause the death of his ex-girlfriend. The requisite mental state to commit first-degree murder is "purposely." Arkansas Code Annotated § 5-2-202(1) (Repl. 1997) provides: "A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result." The mental state of "purposely" includes that of "knowingly." *See* Ark. Code Ann. § 5-2-203(c) (Repl. 1997). "Knowingly" is defined as follows:

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

Section 5-2-202(2). We agree with the court of appeals that the definition of "purposely" encompasses the culpable mental state of acting knowingly with extreme indifference, which requires deliberate conduct with a knowledge or awareness that one's actions are practically certain to bring about the prohibited result. The combination of knowledge and extreme indifference requires proof that the defendant acted with more than mere knowledge, but less than purposeful intent. Thus, second-degree murder under section 5-10-103(a)(1) is a lesser-included offense of first-degree murder under section 5-10-102(a)(2), as it differs from the greater offense only to the extent that it requires a lesser kind of culpable mental state. *See* section 5-1-110(b)(3). Accordingly, it was error for the trial court to refuse to instruct the jury on attempted second-degree murder.

II. Proffered Jury Instruction

Alternatively, the State urges that we may affirm the conviction in this case on the ground that the instruction proffered by Appellant did not accurately state the law. The State admits that the proffered instruction was taken directly from AMCI 2d 501. The State also admits that it did not make any objection to the form of the instruction in the trial court. Notwithstanding, the State asks us to affirm because the trial court reached the right result, only for a different reason. We agree that this court may affirm the trial court's ruling if it was the right result, even though the trial court announced the wrong reason. *See, e.g., Williams v. State*, 343 Ark. 591, 36 S.W.3d 324 (2001); *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998); *Hagen v. State*, 315 Ark. 20, 864 S.W.2d 856 (1993).

However, this affirmance rule presupposes that a ruling on the issue was made by the trial court.

Here, the record reflects that Appellant asked the trial court to instruct the jury on the lesser-included offense of attempted second-degree murder. The prosecution objected on the ground that criminal attempt is a purposeful act, while second-degree murder is a knowing act, and that one cannot purposely commit a knowing offense. The trial court agreed and refused to instruct the jury on the lesser-included offense. The issue of the sufficiency of the proffered instruction was not part of the trial court's ruling. Indeed, there is nothing to indicate that the trial court was even remotely concerned with the language of the instruction itself. Thus, the affirmance rule is not applicable. This is not a case where the trial court found the instruction insufficient because it misstated the first required element and the State asked us to affirm the ruling on the ground that the instruction misstated the second element. The affirmance rule could be applied in that situation. Here, there was no ruling whatsoever on the language of the instruction. Without a ruling on this issue, there is nothing for us to review.

Moreover, we cannot review this particular issue because the trial court did not make any findings regarding the sufficiency of the proffered instruction. The instruction proffered in this case is a model instruction, taken directly from AMCI 2d 501. When this court promulgated the second edition of the model jury instructions for criminal cases, it entered an order on their proper usage. *See In Re: Arkansas Model Criminal Instructions*, 264 Ark. Appx. 967 (1979) (*per curiam*). This order directed that "the AMCI instruction shall be used unless the trial judge finds that it does not accurately state the law. In that event he will state his reasons for refusing the AMCI instruction." *Id. See also Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999); *Smith v. State*, 334 Ark. 190, 974 S.W.2d 427 (1998); *Calloway v. State*, 330 Ark. 143, 953 S.W.2d 571 (1997); *Webb v. State*, 326 Ark. 878, 935 S.W.2d 250 (1996); *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943, *cert. denied*, 519 U.S. 982 (1996); *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994); *Moore v. State*, 317 Ark. 630, 882 S.W.2d 667 (1994); *Campbell v. State*, 294 Ark. 639, 746 S.W.2d 37 (1988) (collectively holding that the trial court should not give a non-model instruction unless it finds or concludes that the model instruction does not accurately state the law). Thus, our cases require a ruling by the trial court regarding the correctness of the model instruction before this court will find error. This was not done here.

Additionally, were we to entertain the State's argument in this case, we would be placing Appellant in a particularly unfair position. Had this argument been raised below, defense counsel undoubtedly would have been given the opportunity to alter the language of the instruction to satisfy the State's disagreement. It would be unduly harsh to affirm the conviction, knowing that Appellant was not given an opportunity to revise any alleged inaccuracies in the instruction. Accordingly, we will not reach the merits of the State's argument on this point.

III. Rational Basis

Lastly, the State argues that we may affirm the trial court's refusal to instruct on the lesser-included offense of attempted second-degree murder because there was no rational basis for giving the instruction. We recently set out the standard for instructing the jury on lesser-included offenses:

> No right has been more zealously protected by this court than the right of an accused to have the jury instructed on lesser-included offenses. *Rainey v. State*, 310 Ark. 419, 837 S.W.2d 453 (1992); *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980). It is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by even the slightest evidence. *See Ellis v. State*, 345 Ark. 415, 47 S.W.3d 259 (2001); *Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001). Thus, we will affirm the trial court's decision to exclude an instruction on a lesser-included offense only if there is no rational basis for giving the instruction. *Id. See also* Ark. Code Ann. § 5-1-110(c) (Repl. 1997).

Brown v. State, 347 Ark. 44, 47, 60 S.W.3d 422, 424 (2001). Accordingly, if there was at least the slightest evidence to warrant the instruction, we must reverse and remand for a new trial.

The evidence at trial revealed that Appellant had been dating Sarah Battung for two and one-half years before she broke off the relationship on June 30, 1999. After the break-up, Appellant tried repeatedly to get back together with her and continued to call her. Battung resisted his efforts. At some point, Battung obtained a no-contact order against Appellant. On the evening of August 11, 1999, Battung was staying at Rodney Wilson's apartment. Appellant had made repeated telephone calls to Wilson's apartment that evening trying to apologize to Battung. Battung refused to talk to

Appellant and hung up on him several times. Around midnight, Appellant called again. This time, Battung yelled and cursed at him. While she was on the telephone, one of the men present in Wilson's apartment walked over to Battung and gave her a kiss. Appellant could tell what had happened, and he became angry. He then told Battung that he was going to kill her. Battung did not believe Appellant's threats, but she told him that she was going to call the police in the morning. She then hung up the phone. Appellant called right back and told Battung that he was sorry and that he had said what he said because he was mad.

Thereafter, Appellant's sister, Trineka McCoy, who was one of five or six persons present in Wilson's apartment, went out onto the balcony and discovered Appellant sitting there in a chair. Trineka described Appellant as looking pretty upset. She warned him not to go inside the apartment. Disregarding his sister's instruction, Appellant entered the apartment and began arguing and fighting with two men. He also accused Battung of sleeping with one of the men. Battung was walking from the kitchen to the couch when she saw Appellant enter the apartment. She then sat down on the couch and began to dial 911. Appellant asked her if she was calling the police, and she stated that she was. Appellant then began shooting at her.

We view this proof as providing at least the slightest evidence that Appellant acted knowingly with extreme indifference to the value of human life. We disagree with the dissent that the proof unquestionably shows that Appellant acted with the purpose to kill Battung. Although Appellant did threaten to kill Battung just before the shooting, he also apologized to her immediately thereafter and told her that he had made the threat because he was mad. Moreover, there was evidence showing that Appellant shot at Battung in an attempt to stop her from calling the police, not for the purpose of killing her. The testimony demonstrates that Appellant only fired his gun after Battung told him that she was calling the police. Based on this evidence, the jury could have found that Appellant fired at Battung knowing that his conduct was practically certain to cause her death, but being extremely indifferent to the value of human life. Accordingly, it was error for the trial court to refuse to instruct the jury on the lesser-included offense of attempted second-degree murder. We thus reverse the judgment of conviction and remand for a new trial.

Circuit Court reversed and remanded; Court of Appeals affirmed.

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

TOM GLAZE, Justice, dissenting. I respectfully dissent on the basis that no rational basis existed on which to instruct the jury as to second-degree murder. To explain, I turn to the statutory history leading to our law defining first-degree and second-degree murder.

In 1975, the General Assembly enacted Act 280, which reformed, revised, and codified Arkansas's substantive criminal law. Section 1502 of Act 280, pp. 549-560, defined murder in the first degree as follows:

> (1) A person commits murder in the first degree if:
>
> (a) acting alone or with one or more other persons, he commits or attempts to commit a felony, and in the course of and in the furtherance of the felony, or in the immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life, or
>
> (b) with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person.
>
> . . . .

Section 1503 of Act 280, pp. 600-601, defined second-degree murder as follows:

> (1) A person commits murder in the second degree if:
>
> (a) with the purpose of causing the death of another person, he causes the death of any person; or
>
> (b) he knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or
>
> (c) with the purpose of causing serious physical injury to another person, he causes the death of any person.
>
> . . . .

In the First Extraordinary Session of 1987, the General Assembly enacted Act 52, which revised the above definitions of first-degree murder by adding a new subsection (c) to read as follows:

> (c) under circumstances manifesting cruel or malicious indifference to the value of human life, he knowingly causes the death of a person fourteen years of age or younger.

This new subsection was the General Assembly's response, reflecting dissatisfaction with this court's split decision in *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987), where the court found no evidence of premeditation and deliberation to prove first-degree murder where a child's death was caused from a beating at the hands of his drunken father; in *Midgett* this court reduced the father's conviction to second-degree murder.

And finally, the General Assembly in 1989 enacted Act 856, which basically revised the homicide statutes as follows:

> (1) It moved the first-degree murder provision, "with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person," to be included as an element of the offense of capital murder. *See* Ark. Code Ann. § 5-10-101(a)(4).
>
> (2) It revised the second-degree murder offense, removing the provision, "with a purpose of causing the death of another person, he causes the death of another person," and placing that provision in the statute defining first-degree murder. *See* Ark. Code Ann. § 5-10-102(a)(2).
>
> (3) And as pointed out in (2), Act 856 reduced the second-degree statute to two elements only: One, a person commits murder in the second degree if he knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or, two, with the purpose of causing serious physical injury to another person, he causes the death of any person.

After noting the changes made as a result of Acts 52 and 856 set out above, the two following changes are especially pertinent to the case before us: (1) the first-degree murder statute, section 5-10-102(a), now embodies the offense element, "with a purpose of causing the death of another person, he causes the death of another

person," and (2) the second-degree murder statute, section 5-10-103(a), no longer includes that offense element.

These foregoing changes in elements are particularly significant in light of the evidence offered at Mr. McCoy's trial. Here, his victim, Sarah Battung, testified that, by telephone, McCoy told her that he was going to kill her. McCoy subsequently went to Sarah's apartment, where some of her friends were present. McCoy looked like he was trying to fight Sarah's friends, and Sarah started to dial 911 on the phone. McCoy asked, "What are you doing? Are you calling the police?" Sarah said, "Yes." McCoy then pointed a gun directly at Sarah and started shooting in rapid succession, hitting her once in her side and another time in her back. She testified that there was no one between her and him.

In the foregoing evidence, McCoy unquestionably attempted to purposely cause Sarah's death as provided in section 5-10-102(c)(2), as amended by Act 856 of 1989.[1] Prior to 1989, section 5-10-103, the second-degree murder statute and its "purposely" element, would have applied to the offense before us; however, since 1989, that is no longer true. McCoy argues the second-degree murder statute still applies, because under section 5-10-103(a)(1), he knowingly attempted to cause Sarah's death *under circumstances manifesting extreme indifference* to the value of human life. However, to read section 5-10-103(a)(1) in this way suggests there is no difference between the language used in the first-degree murder provisions 5-10-102(a)(2) and -103(a). In other words, the General Assembly did a meaningless act when it revised those two statutes so the "purposely" provision was removed from section 5-10-103(a) to 5-10-102(a)(2). I cannot agree.

This court has distinguished the phrase "circumstances manifesting extreme indifference to the value of human life" to mean that the attendant circumstances themselves must be such as to demonstrate the culpable mental state of the accused. *Martin v. State*, 262 Ark. 80, 547 S.W.2d 81 (1977); *see also Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994). To act "purposely," on the other hand, is when a person acts with the conscious object to engage in conduct to cause such a result — in this case, when McCoy acted with the purpose to cause Sarah's death. McCoy told Sarah he was going to kill her, and he acted on that by going to her apartment,

[1] Purposely is defined by the criminal code as when a person acts purposely with respect to his conduct as a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Code Ann. § 5-2-202(1) (Repl. 1997).

pointing his gun directly at her, and firing and unloading it at her, hitting her two times in vital parts of her body.

This case is not a situation in which the State had to demonstrate McCoy's mental state by an additional showing of extreme indifference to human life by attendant circumstances. Here, his conscious object was evident by his telling Sarah he intended to kill her, and he immediately proceeded to act on that objective. McCoy's mental state was made obvious by his sole actions. For McCoy's acts to fall within the second-degree murder statute, the evidence must have shown that the *attendant circumstances manifested extreme indifference* to the value of human life. For example, this court has found such attendant circumstances when a defendant fires his gun into a crowd, *see Johnson v. State*, 270 Ark. 992; 606 S.W.2d 752 (1980); when a father repeatedly beat his frail son who died as a result, *see Branstetter v. State*, 346 Ark. 62, 57 S.W.3d 105 (2001); or when, although denying any knowledge of his accomplices' plans to kill the victim, the defendant joined accomplices in a robbery which resulted in the victim's death, *see Hutts v. State*, 342 Ark. 278, 28 S.W.3d 265 (2000).

In the present case, the facts simply do not support a finding of such attendant circumstances. Had the facts been different — for example, had McCoy fired randomly into the room where the party was taking place — then perhaps I could agree with the majority that there was the slightest evidence to support the giving of the lesser instruction. However, McCoy aimed and fired directly at Sarah, shortly after he said he was going to kill her. This is evidence of a *purposeful* mental state, not evidence of an awareness of attendant circumstances.

In conclusion, the majority opinion correctly states that it is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by the slightest evidence. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). However, the trial court may refuse to offer a jury instruction on an included offense when there is no rational basis for a verdict acquitting the defendant of the charged offense and convicting him of the included offense. *Id.* As already alluded to above, because McCoy acted purposely in his attempt to kill Sarah, but failed to present evidence showing there were attendant circumstances that resulted in causing her to be shot, I would affirm McCoy's conviction.

ARNOLD, C.J., joins this dissent.

Robert SPEARS and Barbara Spears *v.*
John MILLS and Carol Mills

01-887 69 S.W.3d 407

Supreme Court of Arkansas
Opinion delivered March 14, 2002

Benson, Robinson & Wood, by: *Joe Benson* and *Brian D. Wood*, for appellants.

Greenhaw & Greenhaw, by: *John Greenhaw*, for appellees.

DONALD L. CORBIN, Justice. This appeal presents an issue of first impression: Whether a trial court has authority to reconvene a jury to be polled and to deliberate further on its verdict once the jury has been discharged and has left the courtroom. Appellants Robert and Barbara Spears argue that the Washington County Circuit Court exceeded its authority in this case by allowing the jury to reconvene and produce a verdict that contradicted its initial verdict. They argue further that the trial court erred in granting a mistrial on the issue of damages and ordering a new trial on that issue. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We agree with Appellants, and we reverse the trial court's judgment and remand for entry of the first jury verdict.

The record reflects that Appellees John and Carol Mills filed a complaint in the circuit court against Appellants, alleging that Appellants violated a warranty of habitability in the initial construction and subsequent repairs to the house that Appellees purchased from Appellants. Appellants responded by asserting that the suit was barred by the five-year statute of limitation, as they contended that the house was substantially completed on September 13, 1995, but the complaint was not filed until September 20, 2000. Appellants also asserted that the repairs completed in May 1996, remedied the situation.

The case was tried to a jury in February 2001. At the conclusion of the evidence, the jury was initially instructed to complete four interrogatories on liability. The first two asked the jury whether Appellants had breached a warranty of habitability in the sale of the house and in the roof repairs done in 1996. Both interrogatories were answered affirmatively. The third interrogatory asked whether Appellees were at fault in causing the damage to their house. The jury answered "No." The fourth interrogatory asked the jury to determine the date that the house was substantially completed. The jury answered "9/13/95." Based on the jury's answer to the fourth interrogatory, the trial court concluded that any claim regarding the initial construction was barred by the statute of limitations. Accordingly, the jury was only submitted one damage interrogatory, asking the amount of damages sustained as a result of the repairs done in 1996. The jury answered "0."

Once the jury's verdict had been read, the trial court asked the parties if they had any questions and if they wished to have the jury polled. Both parties indicated that they had no questions and that they had no desire to have the jurors polled. Thereafter, the jury was discharged, and the individual jurors left the courtroom. Minutes later, while the trial court was discussing the issue of attorney's fees, the bailiff notified the court that the jury was back in the jury room. The jury foreman had informed the bailiff that the jurors felt that they may have misunderstood the interrogatory pertaining to damages. Based on this information, the trial court had the jurors brought back into the jury box. Appellants' attorney objected to any reconvening of the jury because a final verdict had been rendered and the jury had been discharged. Over Appellants' objection, the following discussion occurred between the court and the jury foreman:

THE COURT: Welcome back. Mr. Foreman?

MR. TRIPP: Yes, Your Honor.

THE COURT: I'm going to ask a couple of questions and I'm going to do what I think that the lawyers have agreed and I want to talk to them about this in a minute. This is kind of unusual to say goodbye to a jury and have them start down the stairs and then have you get about half way down and then decide that you want to come back. So, we're on water that I'm not sure is easily charted for me, but we're going to try to, in the end, do what's fair to everybody. In order to start that I think I need to ask you, Mr. Foreman, why don't you stand up please? I have been given notification by my bailiff that you, on behalf of the jury, and for the jury informed him that there may have been some question about the last interrogatory that you answered.

MR. TRIPP: Yes, Your Honor.

THE COURT: Okay. And so I've held you in the courthouse. Have any of you left the courthouse?

MR. TRIPP: No, Your Honor.

THE COURT: Okay. Have any of you talked to anybody else in the world, other than the members of the jury?

MR. TRIPP: Just among ourselves.

THE COURT: Okay. The law allows me to ask each one of you if this verdict, which we just signed, is your verdict and I can't, at this time, explain all the reasons why there are rules why we do certain things certain ways in the law but the only verdict that seems to be in question is this last one, Interrogatory Number Seven, "State the amount of damages you find Plaintiff sustained as a result of repairs done in 1996" and the answer on this one is "Zero," signed by Charles Tripp, foreman. At this time, I'm going to do what's called poll the jury and this is a procedure that's prescribed by law. And I'm going to have each one of you, starting at the back left-hand corner stand, state your name and then tell me if this is your verdict.

Thereafter, each juror was polled. Ten of the twelve jurors stated that the verdict that was read earlier in open court was not their verdict.

At that point, the trial court sent the jury out of the room and sought guidance from the attorneys as to how to proceed. Again, Appellants' attorney objected to any further action by the jury. He contended that once the verdict had been read and the jury had been discharged, the case was over and the verdict was final. He asserted that Appellees had waived their right to poll the individual jurors by failing to request a poll before the jury was discharged.

Appellees' attorney argued that although the jury had technically been discharged, the jurors had almost immediately reconvened themselves into the jury room and had not discussed the matter with anyone else. He argued that it was a matter of fundamental fairness to permit the jury to deliberate further, given that ten of the twelve jurors had just indicated that the verdict read in court was not theirs.

The trial court initially took a recess to allow both counsel the opportunity to research the issue. Thereafter, the trial court went back on the record and announced its intention to allow the jury to deliberate on a new verdict. The trial court reassured the parties that they would have an opportunity to argue the law at a later time. The jury returned a new verdict, awarding Appellees damages in the amount of $5,900. The trial court accepted the verdict, but instructed counsel for both sides to submit briefs on the issue.

The trial court entered a final order on March 26, 2001. In that order, the trial court concluded that it had the authority to recall the jury for the purpose of polling the jurors and, if appropriate, to allow them to deliberate further. The trial court acknowledged the general rule that once a jury has been discharged, the verdict is final and the case has ended. However, the court concluded that Arkansas law would recognize an exception in this case, where the error was made known within minutes after discharge and the jurors had not mingled with bystanders or discussed the case with anyone else. Notwithstanding these conclusions, the trial court refused to enter the second verdict on the ground that it was different in substance, not just form, and, in fact, impeached the first verdict. The trial court reasoned that it would be inappropriate to impose the second verdict under the circumstances. Accordingly, the court declared a mistrial and granted a new trial on the issue of damages sustained from the 1996 repairs.

Appellants raise two points for reversal. For their first point, they argue that it was error to allow the jury to reconvene and deliberate after it had rendered a verdict and had been discharged

from the case and dispersed from the courtroom. They rely on Ark. Code Ann. § 16-64-119 (1987), which provides in pertinent part:

> (b) When the verdict is announced either party may require the jury to be polled, which is done by the clerk or court asking each juror if it is his verdict. If any one answers in the negative, the jury must again be sent out for further deliberation.
>
> (c) The verdict shall be written, signed by the foreman, and read by the court or clerk to the jury, and the inquiry made whether it is their verdict.
>
> (d)(1) If any juror disagrees, the jury must be sent out again.
>
> (2) *If no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case.* [Emphasis added.]

Appellants also rely on this court's cases holding that the time to object to an irregularity or inconsistency in a verdict is prior to the discharge of the jury. *See, e.g., P.A.M. Transp., Inc. v. Ark. Blue Cross & Blue Shield*, 315 Ark. 234, 868 S.W.2d 33 (1993); *Wal-Mart Stores, Inc. v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991). Similarly, the time to correct or clarify a verdict based on the jury's misunderstanding of the instructions is before the jury is discharged. *Center v. Johnson*, 295 Ark. 522, 750 S.W.2d 396 (1988). The failure to object to a verdict irregularity prior to the discharge of the jury constitutes a waiver of that irregularity. *Id.*; *Coran v. Keller*, 295 Ark. 308, 748 S.W.2d 349 (1988).

Appellees, on the other hand, urge this court to uphold the trial court's determination that the decisions in *Levells v. State*, 32 Ark. 585 (1877), and *Barnum v. State*, 268 Ark. 141, 594 S.W.2d 229 (1980), would allow the trial court some leeway to reconvene the jury following discharge when an issue arises concerning the validity of the verdict. We disagree. While there is language in those holdings that conceivably could be construed to grant the trial court some discretion in correcting a verdict after the jury has been discharged, the reality is that in both of those cases, the irregularities in the verdict were noticed before the jury had even stepped out of the jury box.

In *Levells*, 32 Ark. 585, the jury had returned a verdict of guilty for only one of two criminal charges. The trial court read the verdict and then discharged the jury. As the jurors were exiting the

jury box, the trial court called them back and told them that the verdict was defective. Thereafter, the trial court sent the jurors out to deliberate further. This court affirmed the trial court's action, concluding that the jury had not been truly discharged. This court pointed to the fact that the jurors remained in the presence of the court and had not "mingled with the by-standers." *Id.* at 591. This court reasoned:

> The authorities say, that after the verdict has been received and the jury discharged, their control over the verdict is at an end, and they cannot be recalled to alter or amend it.
>
> But what is a discharge? Clearly, it would seem to us that, *if they have not separated, and as a body, are still in the presence of the court,* the order discharging is *in fieri,* and yet in the breast of the court, and may be recalled. To correct a mistake when no prejudice can result from it, is not only proper, but the duty of the court.

Id. (citations omitted) (emphasis added).

In *Barnum*, 268 Ark. 141, 594 S.W.2d 229, the jury had not been discharged at all. There, the trial court was handed the jury's verdict and promptly stated that the verdict seemed ambiguous and unclear. The court then sent the jury to deliberate further. This court upheld the trial court's action, on the ground that "the jury have full power over their verdict, and may amend it, or recede from it, at any time before it has been received and recorded, and themselves have been discharged from the case." *Id.* at 144, 594 S.W.2d at 231 (quoting *Gilchrist v. State*, 100 Ark. 330, 340, 140 S.W. 260, 264 (1911)). This court explained further:

> Over 75 years ago, we said that it was no longer questioned that a jury may amend its verdict to conform to its finding and to put it in proper form at any time before they have separated and before the verdict has been entered of record and the jury discharged. *Hamer v. State*, 104 Ark. 606, 150 S.W. 142 [(1912)]. Even after a jury had been discharged, but before the jurors had dispersed, or mingled with bystanders at the trial, a recall of the jurors and a direction to them to retire and amend a defective verdict, over the objection of the accused, was held to be proper performance of the duty of the trial judge. *Levells v. State*, 32 Ark. 585 [(1877)].

Id. at 144-45, 594 S.W.2d at 231. This holding does not support the trial court's conclusion that a trial court has discretion to reconvene the jury for further deliberation once the jury has been discharged

and dispersed from the courtroom. *Barnum* merely holds that the jury may amend its verdict to reflect its true intention so long as the jury has not been discharged and the verdict has not been received and recorded.

Contrary to Appellees' argument, a review of this court's cases on the subject demonstrates that it has only permitted the jury to correct or amend its verdict prior to the time it is discharged. *Levells* is the sole exception. Even there, however, the jurors were still in the presence of the court as a body. The *Levells* court emphasized the fact that at the time the error was discovered, the jury, as a body, had not left the presence of the trial court and mingled with bystanders. We do not read *Levells* so literally to hold that mingling with bystanders only occurs if the jurors have actually discussed the case with other persons. Rather, mingling occurs once the individual jurors have been discharged from their oath and duties as jurors and have left the presence, control, and supervision of the court. Thus, the only exception carved out by this court is where the jury has not yet split up as a body and is still in the presence and control of the court.

The holding in *Clift v. Jordan*, 207 Ark. 66, 178 S.W.2d 1009 (1944), upon which Appellants rely, is instructive. There, the jury rendered a verdict that appeared to be inconsistent with the damages sought by the plaintiffs. While the jury was still impaneled, the trial court asked if the jury had misunderstood the instructions. One juror answered "Yes." *Id.* at 69, 178 S.W.2d at 1010. The trial court then sent the jury out to deliberate further. This court affirmed the trial court's actions, holding:

> The verdicts of a jury should in any and all cases reflect the true and correct and final conclusions of the jury, and *if before discharging the jury* it was made known to the court that the jury had misunderstood the instructions, no error is committed in permitting the jury to further consider their verdict, after the instructions have been explained.

Id. at 69-70, 178 S.W.2d at 1011 (citation omitted) (emphasis added). This holding demonstrates this court's awareness of the conflicting interests at stake when a verdict does not reflect the true intention of the jury. On the one hand, there is the interest of the parties, as well as society in general, in having a verdict that is a true reflection of the jury's intention. On the other hand, there is the need for finality and for measures that ensure the sanctity of the jury

and its deliberations. By requiring that any corrections or amendments be completed prior to the jury's discharge, this court made it clear that the paramount consideration is that the jury be free from even the appearance of taint or outside influences.

Similarly, in *Center*, 295 Ark. 522, 750 S.W.2d 396, this court held that "[t]he time to correct or clarify a verdict is before the jury is discharged." *Id.* at 525, 750 S.W.2d at 398 (citing *Barham v. Rupert Crafton Comm'n Co.*, 290 Ark. 211, 718 S.W.2d 432 (1986)). Citing to the prior decision in *Clift*, this court reinforced the notion that while a jury verdict should in all cases reflect the actual final conclusion of the jury on the matter being tried before them, any error resulting from the verdict because the jury misunderstood the instructions may only be corrected if done before the jury is discharged. "However, *if before the jury is discharged* it is made known to the court that the jury misunderstood the instructions, it is not error for the court to permit the jury to further consider their verdict, after the instructions are again read to them." *Id.* (emphasis added).

Here, the jurors were presented with an interrogatory asking them to state the amount of damages sustained by Appellees as a result of the repairs done in 1996. After deliberating, the jury returned with a verdict of zero damages. Both parties indicated that they had no questions about the verdict and that they did not wish to have the jury polled. The jury was then discharged, and the jurors left the courtroom. Thereafter, the jury foreman informed the court that the jury may have misunderstood the instruction on damages. Based on this information, the trial court recalled the jury, polled each juror, and then sent them to deliberate further based on the result of the poll. This was error.

The foregoing cases demonstrate that the time to correct a verdict based upon a claim that the jury misunderstood the instructions is prior to the jury's discharge. The jury has full power over its verdict and may amend it or recede from it at any time before the verdict has been received and recorded and before the jury has been discharged. Once the jury has been discharged and has left the presence of the court, it is without power to correct or amend its verdict. Here, the verdict was received and recorded, and the jury was discharged from the case before the claim was made that the jurors may have misunderstood the instruction. Accordingly, it was error for the trial court to reconvene the jury for the purpose of correcting any mistake in the verdict.

To date, this court has not strayed from its earlier holdings, which only permit a verdict to be corrected *prior* to the jury's discharge. The reason for this strict or absolute rule is to avoid even the appearance of any possible taint to the jury's verdict. Thus, even though the trial court here found that the individual jurors had not discussed the matter with anyone other than fellow jurors, the fact that the jurors had been discharged and had left the presence and control of the court gives at least the appearance that they may have been influenced by outside pressures. Indeed, the trial court acknowledged this appearance of impropriety when it refused to impose the jury's second verdict.

In sum, neither section 16-64-119 nor this court's long-standing precedent permit the trial court to recall the jury after discharge and poll the individual jurors based on a claim that the jury misunderstood the instructions. Nor does Arkansas law allow the jury to correct or amend its verdict once it has been discharged from the case and left the presence and control of the court. Accordingly, we reverse the trial court's judgment, and we remand with instruction to reinstate the jury's first verdict, which awarded zero damages to Appellees. Because we reverse and remand on this issue, it is not necessary to address the second point on appeal.

Sherry C. FAULKNER *v.*
ARKANSAS CHILDREN'S HOSPITAL;
Bonnie Taylor, M.D.; Michelle Moss, M.D.;
Lorrie Baker, R.N.; and
Carl Chipman, R.N., C.C.P.

01-860 69 S.W.3d 393

Supreme Court of Arkansas
Opinion delivered March 14, 2002
[Petition for rehearing denied April 11, 2002.]

[redacted]

Mark Alan Peoples, PLC, for appellant.

Friday, Eldredge & Clark, by: *Elizabeth R. Murray*, *Michael S. Moore*, and *Daniel L. Herrington*, for appellees.

ROBERT L. BROWN, Justice. Appellant Sherry C. Faulkner appeals from an order granting the motion to dismiss filed by appellees Arkansas Children's Hospital (ACH) and four medical professionals who worked at ACH: Dr. Bonnie Taylor, Dr. Michelle Moss, registered nurse Lorrie Baker, and registered nurse Carl Chipman. We hold that the circuit court did not err in granting the Rule 12(b)(6) motion, and we affirm.

The facts are taken from the allegations in Faulkner's complaint. Because we are reviewing an order granting a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we accept the facts alleged as true. *King v. Whitfield*, 339 Ark. 176, 5 S.W.3d 21 (1999). Faulkner was employed at ACH as the Extra Corporeal Membrane Oxygenation (ECMO) Technical and Educational Coordinator in 1989. ECMO is a medical process which provides support to patients with respiratory or cardiopulmonary failure. ECMO is used when patients are not benefitted by other supportive therapies such as conventional ventilation.

Faulkner held the position of ECMO Coordinator from June 1, 1989, to February 10, 1999. When she was first hired to open ACH's ECMO facilities in 1989, she purchased the necessary equipment and otherwise prepared ACH for the beginning of its ECMO program. Faulkner selected the program's original staff, including nurse Lorrie Baker, whom she selected to fill the position of ECMO nurse Coordinator. Faulkner also established a mobile ECMO unit. While in the position of ECMO Coordinator, Faulkner was a member of and an active participant in several national ECMO organizations. In her capacity as a cardiovascular perfusionist, she won the 1999 Perfusionist of the Year award from the American Society of Cardiovascular Perfusion. Faulkner is also the author of scientific articles concerning ECMO.

In the summer of 1990, after the ECMO program had been in operation for roughly a year, ACH hired Dr. Mark Heulitt to be the pediatric ECMO physician. Heulitt represented that his experience with ECMO was extensive. Faulkner, however, reported to her superiors that when Heulitt worked on his first ECMO patient in October 1990, he "did not know what he was doing" and was "totally lost." Additionally, Heulitt's former employer provided information that contrary to Heulitt's representations, his experience with neonatal ECMO was limited. Faulkner's superiors took no action following her report.

Heulitt later wrote a letter to one of Faulkner's superiors, ECMO Medical Director Dr. Jim Fasules, describing Faulkner as "emotionally unstable." The letter was written in response to a meeting between Faulkner and Heulitt that was called to discuss an incident in which a patient became endangered during a mobile ECMO procedure. While discussing the issue, "Faulkner was not allowed to carry out the orders of . . . Dr. Fasules." Faulkner wrote a memo to Fasules describing the meeting, and Fasules wrote a letter in response in which he too described Faulkner as emotionally unstable.

In December of 1991, Dr. Taylor and nurse Baker began conspiring together to usurp Faulkner's authority and responsibilities as ECMO coordinator. They circumvented communications with her and changed her call schedule and the standard of care for patients without consulting her. They also made personnel decisions without her consent.

In December of 1997, a patient was flown from Louisiana to ACH and was placed on the mobile ECMO. The patient was administered a larger quantity of drugs than should have been administered. The cause of the mistake was nurse Chipman's and nurse Baker's use of untested equipment and lack of attention to detail in the loading and securing of the ECMO equipment. Dr. Moss was the responsible physician, but she blamed Faulkner for the incident. Since that time she has been short and abrupt with Faulkner and has wrongly accused her of improper conduct.

In the fall of 1998, Dr. Moss made a decision to place a patient on ECMO. Faulkner was not consulted even though she was the ECMO coordinator on call that day. Nurse Baker did not report the patient's status to Faulkner. When Faulkner arrived on the scene, she noticed that the drug delivery apparatus was not properly arranged and that as a result, the patient was not being administered the necessary drugs. The patient had low blood pressure because of this mistake. Faulkner corrected the mistake and remained with the patient. The next day, Dr. Moss blamed Faulkner for changes in the patient's EKG in front of other ACH employees. She accused Faulkner of being "sloppy and/or incompetent," even though she knew that the accusation was not true.

At about this time, Faulkner requested an internal audit of the ECMO unit to identify areas needing improvement in patient care. She identified other ECMO staff members' mistakes to her superiors and reported that Dr. Taylor was not communicating properly with her. Faulkner also maintained that nurse Baker deliberately

concealed staff meetings from her to keep her from attending. Nurse Baker further deliberately gave false information to other ECMO centers regarding Faulkner and her duties. Additionally, Faulkner advised her superiors that nurse Baker did not follow protocols regarding ECMO patients during this time period. Despite Faulkner's revelation of specific patients and documented breaches in their care and paperwork, ACH took no disciplinary action towards nurse Baker.

In February 1999, ACH alleged that Faulkner mishandled three patients. The incidents occurred on February 5, 9, and 10 of that year. Two of the incidents resulted in blood or fluid spillage. Faulkner specifically disputed the mishandling allegations and maintained that she did the best job she could under the circumstances. She reviewed her actions with the attending physician in each incident. Her actions did not place patients in jeopardy. Also in February of that year, nurse Chipman told Dr. Taylor that Faulkner had made many mistakes when performing ECMO. He said that Faulkner "had been good for about 2 years but then had dropped off in her productivity." Nurse Chipman knew that his statement was untrue.

On February 12, 1999, Faulkner was called to a meeting with Dr. Taylor and registered nurse Mary McDaniel, a vice-president of ACH. At that time, Faulkner was asked to give a statement regarding one of the three patients whom Faulkner allegedly mishandled earlier that month. At the meeting, Dr. Taylor and nurse McDaniel had a copy of Faulkner's medical insurance program and ACH benefits plan. They had marked sections covering psychiatric conditions. Nurse McDaniel asked Faulkner to leave the hospital and not return until she was contacted to do so. Nurse McDaniel further cautioned Faulkner not to do any work from home that concerned ECMO. ACH placed Faulkner on an emergency administrative leave of absence, vaguely citing Faulkner's state of mind as the reason for the leave.

ACH and Dr. Taylor later insisted that Faulkner obtain a psychological evaluation for "extreme paranoia, stress, and possible psychomotor disorder." Dr. Taylor stated that she thought Faulkner was "stressed out" and cited the February 10, 1999 incident in which Dr. Taylor asserted that Faulkner dumped pressurized blood on the floor. No formal documentation of the reasons for the administrative leave was presented to Faulkner. Faulkner was not given notice of the cause for her suspension or reassignment, and she was not given a hearing or other similar opportunity to respond to the alleged deficiencies.

On February 18, 1999, Faulkner received a psychological examination from Dr. Cheralyn Powers. Dr. Powers's conclusions were that Faulkner suffered a paranoid reaction to being placed on leave. Dr. Powers could not conclude that any paranoia was present before the administrative action was taken by ACH, and she recommended that Faulkner return to her job. Dr. Powers's report was not issued until March 1, 1999.

In a letter dated March 17, 1999, ACH accused Faulkner of several improper acts and errors in her handling of ECMO patients during the month of February 1999. Faulkner was not given a chance to respond, despite the fact that "[t]he events described in the ACH letter [were] incorrect or grossly misinterpreted and mischaracterized."

ACH told Faulkner that the circumstances surrounding her leave would not be made public and would be disseminated only on a need-to-know basis. However, while on leave, Faulkner received a telephone call from a person who did not work at ACH and did not live in Little Rock. The person knew the circumstances surrounding her administrative leave. Faulkner believes that it was nurse Baker and Dr. Taylor who were responsible for any unauthorized disclosure of Faulkner's situation. Additionally, nurse Chipman and others knew of Faulkner's being placed on leave before she did and openly discussed it with staff members.

ACH did not follow its own internal procedures in placing Faulkner on administrative leave. ACH may place an individual on leave for three days to investigate alleged incidents, but Faulkner was placed on leave for approximately five weeks. Additionally, when Faulkner initiated a grievance procedure, as allowed by ACH procedures, ACH again did not follow its own procedures because it omitted steps in the grievance process. Specifically, ACH did not issue a written report on the grievance following investigation, as mandated by its procedures. ACH also prematurely terminated Faulkner's complaint process.

Faulkner was not allowed to return to work until April 1, 1999. She was returned to the position of cardiovascular perfusionist and was not allowed to return to her previous position of ECMO coordinator. ACH's position was that Faulkner could not handle the stress of the coordinator position. Faulkner contends that the position of perfusionist subjects her to much greater stress than did the coordinator position.

In the fall of 1999, nurse Chipman unilaterally contacted the ECMO coordinator at the University of Michigan. Nurse Chipman falsely told the ECMO coordinator there that Faulkner could have nothing to do with ECMO at ACH and was no longer allowed to write or present on the subject.

On August 22, 2000, Faulkner filed her complaint in Pulaski County Circuit Court against the appellees. Faulkner stated in her complaint that she filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission in 1999 and a subsequent complaint in federal district court in 2000, but on her motion, the federal complaint was dismissed without prejudice. She asserted in her state complaint six causes of action: violation of the Arkansas Civil Rights Act, defamation, outrage, interference with contractual relations, breach of contract, and civil conspiracy. She prayed for compensatory and punitive damages as well as for reinstatement to her former position as ECMO coordinator. On September 6, 2000, the appellees filed a motion to dismiss under Ark. R. Civ. P. 12(b)(6). Following a hearing for arguments of counsel, the circuit court granted the motion.

I. Standard of Review

Faulkner initially raises the issue of the standard this court should employ in its review of the trial court's order of dismissal. As already noted, this court reviews a trial court's decision on a motion to dismiss by treating the facts alleged in the complaint as true and by viewing them in the light most favorable to the plaintiff. *King v. Whitfield, supra*; *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994). In viewing the facts in the light most favorable to the plaintiff, the facts should be liberally construed in plaintiff's favor. *Rothbaum v. Arkansas Local Police & Fire Retirement Sys.*, 346 Ark. 171, 55 S.W.3d 760 (2001); *Martin v. Equitable Life Assurance Soc. of the U.S.*, 344 Ark. 177, 40 S.W.3d 733 (2001). Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. Ark. R. Civ. P. 8(a)(1); *Grine v. Board of Trustees*, 338 Ark. 791, 2 S.W.3d 54 (1999); *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997).

Faulkner asserts that the trial court failed to accept the facts alleged in her complaint as true. We will address this point with respect to each point of appeal.

II. The Arkansas Civil Rights Act

Faulkner's first point relating to a dismissed cause of action is that the trial court erred in dismissing her Arkansas Civil Rights Act claim. She asserts that though she is not disabled, she was regarded by her superiors at ACH as being disabled. The appellees respond that the Arkansas Civil Rights Act, unlike the federal Americans with Disabilities Act, does not contemplate a cause of action for those merely "regarded as" being disabled. The trial court, nevertheless, concluded that the Arkansas Civil Rights Act does contemplate a cause of action for a person regarded as having a disability. The trial court found, however, that Faulkner had not pled facts sufficient to show that she was regarded as having a disability within the meaning of the Act.

This issue presents the court with a matter of statutory interpretation. We review issues of statutory interpretation *de novo*, as it is for this court to decide what a statute means. *Fewell v. Pickens*, 346 Ark. 246, 57 S.W.3d 144 (2001); *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. *Harris v. City of Little Rock*, 344 Ark. 95, 40 S.W.3d 214 (2001); *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000). 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. *Raley v. Wagner*, 346 Ark. 234, 57 S.W.3d 683 (2001); *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. *Stephens v. Arkansas Sch. for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000); *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997). 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. *Stephens v. Arkansas Sch. for the Blind, supra* (citing *State v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994)). Finally, the ultimate 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); *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998).

The Arkansas Civil Rights Act of 1993 is codified at Ark. Code Ann. §§ 16-123-101 to -108 (Supp. 2001). Disability is defined as follows under that Act:

> (3) "Disability" means *a physical or mental impairment that substantially limits a major life function*, but "disability" does not include:
>
> (A) Compulsive gambling, kleptomania, or pyromania;
>
> (B) Current use of illegal drugs or psychoactive substance use disorders resulting from illegal use of drugs; or
>
> (C) Alcoholism;

Ark. Code Ann. § 16-123-102(3) (Supp. 2001) (emphasis added). A second relevant portion of the Act provides:

> (a) The right of an otherwise qualified person to be free from discrimination because of race, religion, national origin, gender, or *the presence of any sensory, mental, or physical disability* is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> (1) The right to obtain and hold employment without discrimination[.]

Ark. Code Ann. § 16-123-107(a)(1) (Supp. 2001) (emphasis added).

As the emphasized portions of these statutes illustrate, there is no express provision for a cause of action for one who is simply "regarded as" having a disability by others. In this respect, the Arkansas Civil Rights Act differs materially from the federal Americans with Disabilities Act. The federal legislation provides this definition of "disability:"

The term "disability" means, with respect to an individual:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) *being regarded as* having such an impairment.

42 U.S.C. § 12102(2) (1998) (emphasis added).

The plain language of these two legislative enactments differs significantly. It is true, as Faulkner points out, that the Arkansas Civil Rights Act specifically provides that our state courts may look to state and federal decisions which interpret the federal civil rights laws as persuasive authority for interpretive guidance. The relevant section provides:

> When construing this section, a court may look for guidance *to state and federal decisions* interpreting the federal *Civil Rights Act of 1871*, as amended and codified in 42 U.S.C. § 1983, as in effect on January 1, 1993, which decisions and act shall have persuasive authority only.

Ark. Code Ann. § 16-123-105(c) (Supp. 2001). The Arkansas statute, however, does not similarly point to decisions reached interpreting the Americans with Disabilities Act.

The Eighth Circuit Court of Appeals recently offered its view that our court would interpret the Arkansas Civil Rights Act's definition of "disability" in identical fashion to its federal corollary. *See Land v. Baptist Med. Center*, 164 F.3d 423 (8th Cir. 1999). In *Land*, the court stated:

> Additionally, Land contends the district court committed error in deciding Megan was not disabled within the meaning of the ACRA. The Arkansas Supreme Court has not yet decided whether a food allergy is a disability under the ACRA, and so we "must decide 'what the [Arkansas Supreme Court] would probably hold were it called upon to decide the issue.' " *Lenhardt v. Basic Inst. of Tech., Inc.,* 55 F.3d 377, 379 (8th Cir. 1995) (quoting *Hazen v. Pasley,* 768 F.2d 226, 228 (8th Cir. 1985)). The definition of disability in both the ACRA and the ADA are in all relevant respects the same, *compare* Ark. Code Ann. § 16-123-102(3) *with* 42 U.S.C. § 12102(2)(A), and we believe the Arkansas Supreme Court would consider analogous federal ADA decisions in deciding the issue confronting us in this case, *Lenhardt*, 55 F.3d at 380.

Land, 164 F.3d at 425-26. The Eighth Circuit Court's decision, of course, is not binding authority for this court. But, in addition, the definition of a *presently occurring* disability, which was at issue in *Land*, is virtually the same in both acts: substantial limitation in a major life activity. Hence, the situation in *Land* is dramatically different from what confronts us in the case at hand. Here, we are called upon to read a section of the federal act into the Arkansas act. Specifically, Faulkner asks this court to extend the plain language of

the Arkansas Civil Rights Act's definition of disability to include coverage for persons *regarded as* having a disability.

We decline to expand the statutory definition of disability in this manner as it would be akin to legislating. *See, e.g., Shoemaker v. State*, 343 Ark. 727, 38 S.W.3d 350 (2001) (refusing to judicially legislate a fighting-words exception into an otherwise constitutionally infirm statute); *Four County (NW) Regional Sold Waste Mgmt. Dist. Bd. v. Sunray Serv., Inc.*, 334 Ark. 118, 971 S.W.2d 255 (1998) (rejecting *de novo* review of legislative action as judicial legislation violative of the separation-of-powers doctrine). The plain language of the Arkansas Civil Rights Act makes clear that our state act only contemplates coverage for persons presently suffering a disability. In this case, Faulkner does not allege that she has a present disability. Quite to the contrary, she adamantly denies in her complaint that she has any sort of mental impairment. As such, she has not stated facts sufficient to allege a cause of action for discrimination under the Arkansas Civil Rights Act. The trial court's decision to dismiss the claim should be affirmed as the right result, though that result was reached for the wrong reason. *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001); *Ouachita Trek & Dev. Co. v. Rowe*, 341 Ark. 456, 17 S.W.3d 491 (2000); *Malone v. Malone*, 338 Ark. 20, 991 S.W.2d 546 (1999).

III. Defamation

Faulkner next contends that the trial court erred in dismissing her cause of action for defamation. The trial court correctly disposed of most of the instances of alleged defamation by noting that they were time-barred under the one-year statute of limitations set out in Ark. Code Ann. § 16-56-104(4) (1987). Faulkner concedes this point. However, she maintains that one incident, namely nurse Chipman's statement to the University of Michigan ECMO coordinator in the fall of 1999, was actionable as slander and should not have been dismissed.

A viable action for defamation turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *Southall v. Little Rock Newspapers, Inc.*, 332 Ark. 123, 964 S.W.2d 187 (1998); *Thomson Newspaper Publishing Inc. v. Coody*, 320 Ark. 455, 896 S.W.2d 897 (1995). The following elements must be proved 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. *Dodson v. Allstate Ins. Co., supra*; *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997); *Minor v. Failla*, 329 Ark. 274, 946 S.W.2d 954 (1997) (citing *Mitchell v. Globe Int'l Pub., Inc.*, 773 F. Supp. 1235 (W.D. Ark. 1991)).

The allegedly defamatory statement must also imply an assertion of an objective verifiable fact. *Dodson v. Allstate Ins. Co., supra*; *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97 (1991) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)). In order to determine whether a statement may be viewed as implying an assertion of fact, the following factors must be weighed: (1) whether the author used figurative or hyperbolic language that would negate the impression that he or she was seriously asserting or implying a fact; (2) whether the general tenor of the publication negates this impression; and (3) whether the published assertion is susceptible of being proved true or false. *Dodson v. Allstate Ins. Co., supra*; *Dodson v. Dicker, supra.*

We turn then to the pertinent allegations in Faulkner's complaint:

> Sometime in the fall of 1999, Defendant Chipman telephoned Ms. Robin Chapman, ECMO coordinator at the University of Michigan. Without legitimate purpose or reason, Chipman told Chapman that Faulkner was no longer ECMO coordinator at ACH. Chipman falsely told Chapman that Faulkner would be forced to leave the ECLS steering committee and that Faulkner could have nothing to do with ECMO and would no longer be allowed to present or write regarding ECMO. Chipman's statements to Chapman regarding Faulkner were not true. Chipman knew, at the time he made such statements, that they were untrue. Chipman made such statements with the intent to harm Faulkner in her profession.

Faulkner made three allegations in this paragraph of her complaint. The first, that Faulkner was no longer ECMO coordinator at ACH, was a true statement and thus cannot be defamatory. The second and third statements, that Faulkner "would be forced to leave the ECLS steering committee," and that she "could have nothing to do with the ECMO and would no longer be allowed to present or write regarding ECMO," could be read, as the trial court pointed out, as a prediction of what Chipman thought might happen in the future. Yet, we are mindful of the fact that it could also be read as what nurse Chipman considered Faulkner's current status to be

with respect to the ECLS steering committee and her ability to publicly comment on her ECMO work.

Given our standard of liberal construction of a plaintiff's complaint in favor of the plaintiff when considering a Rule 12(b)(6) motion to dismiss, we are reluctant to dismiss this cause of action on the basis of one interpretation of what was said. Nevertheless, we again hold that the trial court reached the right result, albeit for the wrong reason, because Faulkner has not pled specific facts demonstrating that she has suffered actual damage to her reputation, but has only pled a conclusion to that effect. That is not enough to withstand a Rule 12(b)(6) motion. *See* Ark. R. Civ. P. 8(a)(1); *Grine v. Board of Trustees, supra.* Actual damage, of course, is an element of defamation, *see Dodson v. Allstate Ins. Co., supra,* and Arkansas no longer recognizes the doctrine of defamation *per se* which, under the common law, presumed damage to reputation. *See United Ins. Co. of America v. Murphy,* 331 Ark. 364, 961 S.W.2d 752 (1998); *Dodson v. Allstate Ins. Co., supra.* Because of her failure to plead facts supporting actual damage to her reputation, her defamation claim was properly dismissed.

IV. Outrage

For her next point, Faulkner urges that the trial court erred in dismissing her cause of action for the tort of outrage. There are four elements that are necessary to establish liability for the tort of outrage: (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was "extreme and outrageous," was "beyond all possible bounds of decency," and was "utterly intolerable in a civilized community;" (3) the actions of the defendant were the cause of the plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. *Crockett v. Essex,* 341 Ark. 558, 19 S.W.3d 585 (2000); *Deitsch v. Tillery,* 309 Ark. 401, 833 S.W.2d 760 (1992). In sum, this court has taken a very narrow view of claims of outrage. *See, e.g., Croom v. Younts,* 323 Ark. 95, 913 S.W.2d 283 (1996); *Ross v. Patterson,* 307 Ark. 68, 817 S.W.2d 418 (1991). This court has recognized a cause of action for the tort of outrage in an employment setting. *See, e.g., Palmer v. Arkansas Council on Econ. Educ.,* 344 Ark. 461, 40 S.W.3d 784 (2001); *M.B.M. Co., Inc. v. Counce,* 268 Ark. 269, 596 S.W.2d 681 (1980).

The question before us today is whether, as a matter of law, the conduct of the appellees can reasonably be regarded as so outrageous as to permit recovery. *Palmer v. Arkansas Council on Econ. Educ., supra*; *Deitsch v. Tillery, supra.* Merely describing conduct as outrageous does not make it so. *Crockett v. Essex, supra*; *Fuqua v. Flowers*, 341 Ark. 901, 20 S.W.3d 388 (2000). Faulkner argues to this court that "if allowed to proceed, she can establish that the conduct [of the appellees] meets [the] high standard" required for claims of outrage. However, we must look only to the facts as alleged in her complaint. Under our standard of review, we will give those facts a liberal interpretation, but we cannot surmise what additional facts might be developed should this claim be allowed to proceed. Arkansas is a fact-pleading state. Ark. R. Civ. P. 8(a)(1). As such, a plaintiff must state facts in the complaint sufficient, if taken as true, to sustain her causes of action.

Two cases where the tort of outrage was alleged and which arose out of the workplace appear pertinent. In *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991), the plaintiff alleged that he had a dispute with his shift leader while at work, and after work, he tried to discuss the matter, but the shift leader hit him. He alleged that he was fired the next day because management asserted that he had provoked his shift leader into a fight. In that case, we affirmed dismissal of the outrage claim under Ark. R. Civ. P. 12(b)(6), even though the plaintiff's boss had actually been physically violent toward him. Likewise, in *Sterling v. Upjohn Healthcare Serv., Inc.*, 299 Ark. 278, 772 S.W.2d 329 (1989), this court upheld the trial court's grant of summary judgment to the defendant, despite the plaintiff's employer's unfounded assertions that plaintiff was drunk at work, the employer's attempts to undermine the plaintiff, and the employer's eventual violent rhetoric regarding the plaintiff.

In the case before us, Faulkner presents facts indicating strained working relationships, a deliberate attempt to undermine her authority, false accusations of shoddy work, false accusations and rumors of mental illness, and, eventually, her being placed on leave. This conduct on the part of ACH and its representatives and employees, however, appears to be no more egregious than that involved in the two cases discussed above. Viewing the facts alleged in the complaint as true, and giving Faulkner all reasonable inferences therefrom, we hold that she has not alleged conduct that is beyond all possible bounds of human decency and utterly intolerable in a civilized society so as to rise to the level of outrage.

V. Tortious Interference

Faulkner's fourth claim is that the trial court erred in dismissing her cause of action for tortious interference with a contractual relationship. The trial court did so on the basis of the lack of a third party who did not continue a contract with Faulkner because of the appellees' unauthorized conduct.

The elements of tortious interference are: (1) the existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship; and (4) resultant damage to the party whose relationship has been disrupted. *Dodson v. Allstate Ins. Co., supra.* (citing *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)). A fifth requirement has been added by this court: the conduct of the defendant must be "improper." *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 969 S.W.2d 160 (1998).

In addition to the above, another essential element of a tortious-interference-with-contractual-relations claim is that there must be some third party involved. *See Navorro-Monzo v. Hughes*, 297 Ark. 444, 763 S.W.2d 635 (1989). A party to a contract and its employees and agents, acting within the scope of their authority, cannot be held liable for interfering with the party's own contract. *See St. Joseph's Regional Health Center v. Munos,* 326 Ark. 605, 934 S.W.2d 192 (1996); *Fisher v. Jones,* 311 Ark. 450, 844 S.W.2d 954 (1993). Indeed, in *Navorro-Munzo v. Hughes, supra,* we held that a claim for tortious interference was defeated by the fact that there was no third party involved with whom a contract could be disparaged. *See also St. Joseph's Regional Health Center v. Munos, supra* (an agent of a doctor's employer could not have interfered with the doctor's contract because he stood in the shoes of one of the parties to the contract); *Palmer v. Arkansas Council on Econ. Educ., supra* (a party to a contract and its agents acting in the scope of their authority cannot be liable for interfering with the party's own contract).

In deciding this point, it is unnecessary to determine whether Faulkner, an at-will employee, indeed had any contract with ACH which was jeopardized by actions of the named appellees. This is because there was no third-party contract involved which was even alleged to have been interfered with by the named

appellees. The named appellees were all employees and agents of ACH. A third-party contract is essential to the cause of action. Hence, the only remaining issue is whether the employees were acting outside of the scope of their employment with ACH when they engaged in the alleged interference.

From the facts set out in Faulkner's complaint, even construing them in her favor and giving her all favorable inferences, it is clear that the appellees in this case were acting within the scope of their employment during the events described in the complaint. In every instance, the conduct described by ACH employees is directly related to ACH's reason for being, which is to provide care to its patients. Part of providing care to patients is the disciplining of employees who do not perform their jobs according to the standards prescribed by the employer hospital. Even if that discipline is administered unjustly, as alleged in Faulkner's complaint, it cannot be said that that activity is outside of the scope of employment. Likewise, even if Faulkner's co-workers and superiors severed all communication and attempted to "usurp her authority," as alleged, those actions still are within the scope of employment. In short, disciplinary actions and power struggles within a workplace setting, such as alleged here, do not exceed the scope of employment for purposes of agency or employment analysis.

We hold that Faulkner cannot maintain a cause of action for tortious interference because the named appellees were acting within the scope of their employment and because there was no interference with a third-party contract alleged. The trial court should be affirmed on this point as well.

VI. Breach of Contract

Faulkner further claims that she had a contractual obligation from ACH to follow that hospital's grievance procedure. She urges this court to reinstate her claim for breach of contract because she alleges that her status as an at-will employee was altered by the existence of the ACH employee-grievance procedures.

Generally, an employer may terminate the employment of an at-will employee without cause. *See Crain Indus., Inc. v. Cass,* 305 Ark. 566, 810 S.W.2d 910 (1991); *Gladden v. Arkansas Children's Hospital,* 292 Ark. 130, 728 S.W.2d 501 (1987). An exception to the at-will doctrine is where an employee relies upon *an express*

agreement, such as in an employment manual, which disallows termination except for cause. *Gladden v. Arkansas Children's Hospital, supra*; *Robinson v. Langdon*, 333 Ark. 662, 970 S.W.2d 292 (1998).

Faulkner asserts that she is not an at-will employee because ACH adopted a grievance process through which employees could dispute adverse employment actions. As such, she appears to assert that she not only had protection against wrongful discharge but that she also had protection against reassignment, which is what happened in this case.

We conclude that Faulkner's breach-of-contract claim is meritless. ACH's alleged grievance process is not the same as a for-cause provision in an employment manual. In fact, Faulkner has not pled that the grievance process had anything to do ACH's decision to reassign her, which, Faulkner claims, was a breach of contract. Moreover, it is certainly not apparent from her complaint, even construing the facts in her favor, that the grievance process shields her from reassignment in the same way that a for-cause provision in an employee handbook shields an employee from wrongful discharge.

Faulkner was an at-will employee and, as such, was subject to reassignment by her employer. She has not pled any facts indicating otherwise. The trial court should be affirmed on this point.

VII. Civil Conspiracy

Faulkner's final argument is that the trial court erred in dismissing her cause of action for civil conspiracy.

To prove a civil conspiracy, a plaintiff must show that two or more persons have combined to accomplish a purpose that is unlawful or oppressive or to accomplish some purpose, not in itself unlawful, oppressive or immoral, but by unlawful, oppressive or immoral means, to the injury of another. *Chambers v. Stern*, 347 Ark. 395, 64 S.W.3d 737, (2002); *Dodson v. Allstate Ins. Co.,* 345 Ark. 430, 47 S.W.3d 866, (2001); *Mason v. Funderburk,* 247 Ark. 521, 446 S.W.2d 543 (1969). A civil conspiracy is not actionable in and of itself, but a recovery may be had for damages caused by acts committed pursuant to the conspiracy. *Chambers v. Stern, supra*; *Dodson v. Allstate Ins. Co., supra.* A civil conspiracy is an intentional tort which requires a specific intent to accomplish the contemplated wrong. *Chambers v. Stern, supra*; *Dodson v. Allstate Ins. Co., supra.*

In *Dodson v. Allstate Ins.*, *supra*, we noted that a corporation cannot conspire with itself, since that defeats the requirement of a combination of two or more persons acting to accomplish some unlawful or oppressive purpose. Thus, in order to sustain a claim for a civil conspiracy where agents of a corporation are involved, it is necessary to show that one or more of the agents acted outside of the scope of their employment, to render them a separate "person" for purposes of the conspiracy. *Dodson*, 345 Ark. at 445, 47 S.W.3d at 876. In *Dodson* we said that corporate agents could "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." *Dodson*, 345 Ark. at 445, 47 S.W.3d at 876 (citations omitted).

As was the case with tortious interference, this point turns on whether the individual appellees were acting within the scope of their employment when they conspired as alleged in Faulkner's complaint. Again, we must look to the stated reasons for the actions taken by the individual appellees. No facts are alleged in the complaint to the effect that the named appellees were acting for their own personal benefit to the elimination of any benefit for ACH. Only the conclusory statement is made that the individual appellees were "acting in their own interests and not in the best interests of ACH." That is not sufficient to withstand a Rule 12(b)(6) motion. *See* Ark. R. Civ. P. 8(a)(1); *Grine v. Board of Trustees*, *supra*. All of the actions alleged to be part of the conspiracy claimed by Faulkner involve patient care and relate to the effective practice of ECMO. Accordingly, we hold that the individual appellees were acting within the scope of their employment when they engaged in the conduct described in the complaint. Thus, there can be no civil conspiracy.

Affirmed.

CADILLAC COWBOY, INC. *v.* Pamela Sue JACKSON

00-1243 69 S.W.3d 383

Supreme Court of Arkansas
Opinion delivered March 14, 2002

Mercy, Carter & Elliott, L.L.P., by: *W. David Carter*, for appellant.

Crisp, Boyd & Poff, L.L.P., by: *Bill Schubert*, for appellee.

ANNABELLE CLINTON IMBER, Justice. This is the second appeal in this case. *See Jackson v. Cadillac Cowboy, Inc.*, 337 Ark. 24, 986 S.W.2d 410 (1999) ("*Jackson I*"). The appellant, Cadillac Cowboy, Inc., appeals from a jury verdict in Howard County Circuit Court in favor of Pamela Sue Jackson, individually and as the administratrix of the estate of James C. Jackson, deceased. The jury found that both Cadillac Cowboy and Kevin Holliday were liable for the death of James C. Jackson, awarding total damages of $916,363.70. Cadillac Cowboy raises three points on appeal: (1) the trial court erred in refusing to apply the Arkansas Dramshop Act, Ark. Code Ann. § 16-126-101, *et seq.* (Supp. 2001), which was enacted after this court's decision in *Jackson I*; (2) the trial court erred in denying Cadillac Cowboy's motion for judgment notwithstanding the verdict; and (3) the trial court erred in instructing the jury to apportion fault between separate defendants Cadillac Cowboy and Kevin Holliday. We conclude that the points raised are without merit, and we affirm.

Mr. Jackson was killed after his automobile was struck by a pickup truck driven by separate defendant Kevin Holliday. Prior to the accident, Mr. Holliday had been drinking at a club owned by the appellant called the Sundowners Club. In her complaint, Mrs. Jackson alleged that on August 31 and September 1, 1994, Cadillac Cowboy, by and through its owners and employees, served alcoholic beverages to Mr. Holliday, who they knew or should have known was extremely intoxicated and intended to drive his vehicle while in an intoxicated state.

The trial court dismissed the complaint pursuant to Ark. R. Civ. P. 12(b)(6) based upon our holding in *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965), that the consumption of alcohol was the sole proximate cause in situations where vendors, licensed by

the state to sell alcoholic beverages, sell alcohol to intoxicated persons who later injure third parties. In the first appeal from the trial court's dismissal order, we examined the reasoning expressed in *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997), particularly with respect to our legislature's enactment of statutes imposing a high duty of care on vendors licensed to sell alcohol in Arkansas. *Jackson v. Cadillac Cowboy, Inc.*, 337 Ark. 24, 986 S.W.2d 410 (1999). We recognized that vendor liability extended not only to the sale of alcohol to minors, but also to the sale of alcohol to intoxicated persons. *Id.* Our respective holdings in *Shannon* and *Jackson I* relied upon the legislature's expression of state policy in effect at the time appeal was taken to this court.

In *Shannon*, we concluded that the General Assembly had assigned a high duty of care to licensed alcohol vendors as set forth in the affirmative requirements of statutory provisions. *Shannon v. Wilson, supra.* Similarly, in *Jackson I*, we turned again to Act 695 of 1989, which stated in pertinent part:

> (a) It is the specifically declared policy of the General Assembly of the State of Arkansas that all licenses issued to establishments for the sale or dispensing of alcoholic beverages are privilege licenses, and the holder of such privilege license is to be held to a high duty of care in the operation of the licensed establishment.
>
> (b) It is the duty of every holder of an alcoholic beverage permit issued by the State of Arkansas to operate the business wherein alcoholic beverages are sold or dispensed in a manner which is in the public interest, and does not endanger the public health, welfare, or safety. Failure to maintain this duty of care shall be a violation of this act and grounds for administrative sanctions being taken against the holder of such permit or permits.

1989 Ark. Acts 695 (codified at Ark. Code Ann. § 3-3-218(a) & (b) (Repl. 1996)). Noting further that the General Assembly had deemed the sale of alcohol "to a habitual drunkard or an intoxicated person" to be a misdemeanor, Ark. Code Ann. § 3-3-209 (Repl. 1996), we determined that the "weighty responsibility" placed by our state upon licensed vendors of alcohol established a duty of care which extended to civil liability. *Jackson v. Cadillac Cowboy,* 337 Ark. 24, 29, 986 S.W.2d 410, 413 (1999).

In reversing the dismissal order and remanding the case to the trial court, we reiterated the duty of care set forth in the statutes that existed at the time of our decision. Moreover, we held that

"evidence of the sale of alcohol by a licensed vendor to an intoxicated person is some evidence of negligence," and we overruled *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965). *Jackson I*, 337 Ark. at 33-34, 986 S.W.2d at 415. Upon remand, the trial court instructed the jury based upon the standard of care announced in our mandate in *Jackson I*.

After our decision in *Jackson I*, but prior to the trial on remand, the General Assembly passed Act 1596 of 1999, which stated in pertinent part:

> SECTION 1. The General Assembly finds and determines that it needs to clarify and establish its legislative intent regarding the sale of alcoholic beverages as addressed by the Supreme Court of Arkansas in "Shannon v. Wilson, et. al" (96-762: June 23, 1997) and "Jackson v. Cadillac Cowboy, et. al." (98-574: March 18, 1999).
>
> SECTION 2. The General Assembly finds and determines that the knowing sale of alcoholic beverages by a retailer to a minor is contrary to the public policy of the State of Arkansas.
>
> SECTION 3. In cases where it has been proven that an alcoholic beverage retailer knowingly sold alcoholic beverages to a minor, or sold under circumstances where such retailer reasonably should have known such purchaser was a minor, a civil jury may determine whether or not such knowing sale constituted the proximate cause of any injury to such minor, or to a third person, caused by such minor.
>
> SECTION 4. In cases where it has been proven that an alcoholic beverage retailer knowingly sold alcoholic beverages to a person who was clearly intoxicated at the time of such sale or sold under circumstances where such retailer reasonably should have known such person was clearly intoxicated at the time of such sale, a civil jury may determine whether or not such sale constitutes a proximate cause of any subsequent injury to other persons. For purposes of this Act, a person is considered clearly intoxicated when such person is so obviously intoxicated to the extent that, at the time of such sale, he presents a clear danger to others. It shall be an affirmative defense to civil liability under this section that an alcoholic beverage retailer had a reasonable belief that the person was not clearly intoxicated at the time of such sale or that the person would not be operating a motor vehicle while in the impaired state.

> SECTION 5. Except in the knowing sale of alcohol to a minor or to a clearly intoxicated person, the General Assembly hereby finds and declares that the consumption of any alcoholic beverage, rather than the furnishing of any alcoholic beverage, is the proximate cause of injuries or property damage inflicted upon persons or property by a legally intoxicated person.

1999 Ark. Acts 1596 (codified at Ark. Code Ann. § 16-126-101, *et seq.* (Supp. 2001) ("Dramshop Act"). In this appeal, Cadillac Cowboy contends that the Dramshop Act should have controlled the disposition of this case upon remand; that is, sections 16-126-101, *et seq.* should have been incorporated into the jury instructions given at trial. As previously stated, the trial court instructed the jury in accordance with the standard of care set forth in *Jackson I.*

Standard of Care

Cadillac Cowboy argues that the General Assembly clearly intended for the standard of care set forth in the Dramshop Act to apply to the instant case upon remand. As support for this proposition, Cadillac Cowboy points to the following language found in the Dramshop Act's proposed emergency clause: "[t]his act should go into effect as soon as possible in order that subsequent litigation be subject to this act." *See* 1999 Ark. Acts 1596, § 10. The emergency clause, however, was not adopted by the General Assembly and was erroneously included in the codification of Act 1596. *See* Ark. Code Ann. 16-126-101, *et seq.*[1] Thus, we need not address the meaning of "subsequent litigation" as used in the proposed emergency clause, nor should we attempt to use the failed clause to attempt to illuminate the intent of the legislature.

Cadillac Cowboy also relies upon our decisions in *Treiber v. Hess*, 301 Ark. 97, 782 S.W.2d 43 (1990), and *VanHook v. McNeil Monumnet Co.*, 107 Ark. 292, 155 S.W. 110 (1913), for the proposition that the trial court was obligated to apply the Dramshop Act to the case upon remand. In both *Treiber v. Hess* and *VanHook v. McNeil,* we applied legislation that had taken effect subsequent to the trial below but before the respective cases came to this court on a first appeal. Thus, the procedural posture in *Treiber* and *VanHook* is

[1] The Arkansas Code Revision Commission is not authorized to change in "substance or meaning . . . any Act of the General Assembly." *See* Ark. Code Ann. § 1-2-303(d)(1) (Supp. 2001).

inapposite to the instant case. Moreover, in *Treiber, supra,* we followed an express provision of the act which stated that the abolition of the cause of action for alienation of affection did "not apply to litigation pending before the effective date of [the] act." *Treiber v. Hess*, 301 Ark. at 97, 782 S.W.2d at 43 (construing section 8 of Act 46 of 1989). Cadillac Cowboy cites no authority, and we aware of none, in which this court has affirmed a trial court that ignored our mandate and applied a statute enacted after our remand of a case.

In *Jackson I*, we conclusively set forth the standard of the duty of care as contained in the statutes that existed at the time of our decision. We held:

> the General Assembly has spoken on this point and has established a high duty of care on the part of holders of alcohol licenses, which includes *the duty not to sell alcohol to high-risk groups, including intoxicated persons.* Stated a different way, a duty of care exists on the part of licensed alcohol vendors not to endanger the public health, welfare, or safety, and *that duty is breached when vendors sell alcohol to intoxicated persons in violation of § 3-3-209.*

337 Ark. at 29, 986 S.W.2d at 413 (emphasis added). Upon remand, the trial court concluded that it was bound by our mandate in *Jackson I* and charged the jury accordingly. The court gave the standard negligence instructions from Arkansas Model Jury Instructions—Civil (AMI Civil 3d 203, 302, 303, and 305), as well as the following instructions:

> A person is intoxicated when, as a result of drinking alcoholic beverages, he has lost the normal control of his physical or mental faculties. AMI 606
>
> In connection with the following question, you should consider that there was in force in the State of Arkansas at the time of the occurrence a statute which provided that no person shall sell intoxicating liquor to an intoxicated person.
>
> A violation of this statute, although not necessarily negligence, is evidence of negligence to be considered by you, along with all the other facts and circumstances in the case. AMI 601 and A.C.A. 3-3-209

Mrs. Jackson contends that the trial court was correct in following the law of the case as set forth in our mandate. We agree.

The venerable doctrine of law of the case prohibits a court from reconsidering issues of law and fact that have already been decided on appeal. The doctrine serves to effectuate efficiency and finality in the judicial process. *Frazier v. Fortenberry*, 5 Ark. 200 (1843); *see also*, 5 AM. JUR. 2D *Appellate Review* § 605 (1995). We have said the following with regard to the law-of-the-case doctrine:

> 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 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).

Clemmons v. Office of Child Support Enforcement, 345 Ark. 330, 346, 47 S.W.3d 227, 237 (2001). The rationale for the adherence to a strict application of the rule — the avoidance of the disorder and unpredictability that would follow a departure from the doctrine — has not changed. In its brief, Cadillac Cowboy does not address the doctrine of law of the case, nor does it cite any relevant authority for a deviation from the doctrine in this case. As this court has stated many times, arguments that are unsupported by convincing argument or authority will not be considered on appeal, unless it is apparent without further research that the arguments are well-taken. *Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001) (citing *Perryman v. Hackler*, 323 Ark. 500, 916 S.W.2d 105 (1996) and *Thomson v. Littlefield*, 319 Ark. 648, 893 S.W.2d 788 (1995)). Likewise we will not modify our well-established judicial doctrine and reverse the trial court when an appellant neither cites authority nor makes an argument in support of such a result.[2] Moreover, because the General Assembly was aware of our decision in *Jackson I* when it enacted the Dramshop Act, Ark. Code Ann. § 16-126-101, we must assume that it was also aware of our remand in *Jackson I*, as well as the judicial doctrine of the law of the case.

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[2] In urging reversal of this case based upon arguments not made and authority not cited by Cadillac Cowboy, the dissenting opinion completely ignores our basic principles of appellate review.

Substantial Evidence

Cadillac Cowboy moved for a directed verdict and for a judgment notwithstanding the verdict on grounds that there was "no evidence in the record from which a jury could infer that Kevin Holliday was intoxicated or [. . .] was in the club on the night in question." On appeal, Cadillac Cowboy first asserts that there was insufficient evidence to support a finding of liability under the Dramshop Act; that is, that the jury could not have concluded with a reasonable certainty that Cadillac Cowboy was aware that Mr. Holliday was "clearly intoxicated" as defined by the Act. In view of our previous holding that the trial court properly instructed the jury in accordance with the standard of care set forth in *Jackson I*, we need not address this argument. Thus, we limit our review on this point to Cadillac Cowboy's alternative argument that there was no substantial evidence to support a verdict that Cadillac Cowboy sold alcohol to an "intoxicated person" in violation of the standard of care set forth in *Jackson I*.

The standard of review for a motion for judgment notwithstanding the verdict is whether there is substantial evidence to support the jury verdict. *Gibson Appliance Co. v. Nationwide Ins. co.*, 341 Ark. 536 (2000); *Esry v. Carden*, 328 Ark. 153 (1997). Substantial evidence is defined as "evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond suspicion or conjecture." *Esry v. Carden, supra.* In addition, we have held that in examining whether substantial evidence exists, all evidence must be examined in the light most favorable to the party on whose behalf the judgment was entered and given its highest probative value, taking into account all reasonable inferences deducible from it. *Id.* In reviewing the evidence, the weight and value to be given the testimony of witnesses is a matter within the exclusive province of the jury. *Hall v. Grimmett*, 318 Ark. 309, 855 S.W.2d 297 (1999).

According to the evidence presented at trial, Mr. Holliday had consumed a large quantity of alcohol on August 31 and September 1, 1994. Robert "Yankee Bob" Wehrheim testified that he was with Mr. Holliday most of the day of the accident, and that he had seen Mr. Holliday consume six to eight beers during the day, one beer in the truck on the way to the Sundowners Club, and several more beers and at least one mixed drink at the club. Although Mr. Wehrheim stated that he "did not see Kevin act in a way that would tell me or anyone that was looking at him that he was intoxicated,"

he also admitted that he had been drinking alcohol with Mr. Holliday most of the day.

Kevin Holliday's own testimony confirmed that he started drinking beer about noon that day and continued drinking throughout the entire afternoon and into the night. With regard to the amount of alcohol he consumed that afternoon, he could not recall whether he and Mr. Wehrheim shared a case of beer (24 cans) or a half-case of beer (12 cans). Mr. Holliday acknowledged drinking beer during the whole period of time he was the club; but, he denied drinking any alcohol after leaving the club that night "at about between 11:00 and 11:30, closer to 11:30." He estimated that it took no more than one hour to travel from the club to the scene of the accident. Finally, while he could not state how much alcohol he had consumed on the day of the accident, Mr. Holliday conceded that if he had been intoxicated, he would have been intoxicated when he left the club.

Sergeant John Watson of the Arkansas State Police, who arrived at the scene of the accident shortly after 12:45 a.m. on September 1, 1994, testified that Mr. Holliday appeared to be intoxicated. Despite Sergeant Watson's testimony that he could not say what Mr. Holliday's condition was between eight and eleven o'clock earlier that evening, the jury could have inferred from the testimony summarized above that Mr. Holliday was intoxicated while he was drinking at the Sundowners Club. Moreover, the jury was not required to believe that Mr. Holliday drove away from the club promptly at eleven o'clock. Both Mr. Wehrheim and Mr. Holliday stated that their departure time could have been as late as 11:30 p.m., rather than 11:00. Furthermore, Elaine Atkins testified that she had seen Mr. Holliday in an "extremely intoxicated" condition on more than one occasion at the Sundowners Club.

Cadillac Cowboy nonetheless contends that "the only testimony concerning Mr. Holliday's condition while being served at the club on the night in question was that he was not impaired, intoxicated, or clearly intoxicated." In that regard, it points to the testimony of Billy Burns, the manager of the Sundowners Club, Mike Tony, a bartender at the club, and Dennis Tate, a former bartender at the club. We do not agree that this testimony by both past and present club employees is undisputed. It has long been the law that the testimony of a party interested in the result of the action will not be regarded as undisputed in determining the sufficiency of the evidence. *Wingate Taylor-Maid Transport. v. Baker,* 310 Ark. 731, 840 S.W.2d 179 (1992); *Cousins v. Cooper,* 232 Ark. 605,

339 S.W.2d 316 (1960). As to any conflicting evidence presented in this case, it is up to the jury to resolve the conflicts in the testimony and judge the weight and credibility of the evidence. *Hall v. Grimmett, supra*; *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993). Based on the evidence presented at trial, the jury could have concluded, without speculation, that Mr. Holliday was intoxicated during the time he was being served alcohol at the Sundowners Club. Reviewing the evidence in the light most favorable to Mrs. Jackson, we conclude there was substantial evidence to support the jury's verdict.

Apportionment of Fault

Cadillac Cowboy's final point on appeal is that the trial court should not have submitted the following interrogatory to the jury on the question of liability:

> Answer this interrogatory only if you have answered "yes" to more than one of the Interrogatories numbered 1 and 2.[3]
>
> Using 100 percent to represent the total responsibility for the occurrence and any injuries or damages resulting from it, apportion the responsibility between the parties whom you have found to be responsible.
>
> Kevin Holliday: _____%
>
> Cadillac Cowboy, Inc.: _____%

The jury found Mr. Holliday 75% at fault, and Cadillac Cowboy 25% at fault. Cadillac Cowboy argues that there was "no need to submit the comparative causation interrogatory," because neither of the defendants had pled, proved, or argued that the decedent was in any way negligent in connection to the accident. Although Cadillac

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[3] Interrogatory No. 1 read as follows:

> Do you find from a preponderance of the evidence that there was negligence upon the part of Kevin Holliday which was a proximate cause of any damages to Plaintiffs?

Interrogatory No. 2 read as follows:

> Do you find from a preponderance of the evidence that there was negligence upon the part of Cadillac Cowboy, Inc. which was a proximate cause of any damages to Plaintiffs?

Cowboy concedes that "ordinarily this error might be considered harmless," it proceeds summarily to conclude that the comparative fault interrogatory, combined with comments made by Mrs. Jackson's counsel during voir dire, "apparently led the jury to believe it had to put some percentage of responsibility on [Cadillac Cowboy] for Plaintiff to obtain a recover." This argument is without merit.

The challenged interrogatory was preceded by two interrogatories asking the jury to make a finding as to whether or not each of the respective defendants was negligent. The trial court directed the jury to consider each of the interrogatories as a separate verdict. Furthermore, the jury was clearly instructed to answer the challenged interrogatory *only* if it found negligence on the part of both Mr. Holliday and Cadillac Cowboy. Absent evidence to the contrary, there is a presumption that the jury obeyed the court's instructions. *State v Robbins*, 342 Ark. 262, 27 S.W.3d 419 (2000); *Pearson v. Henrickson*, 336 Ark. 12, 983 S.W.2d 419 (1999). Even assuming the unnecessary interrogatory was erroneous, we must conclude that the jury was not misled because the instruction was obviously cured by other correct instructions. *Davis v. Davis*, 313 Ark. 549, 856 S.W.2d 284 (1993); *Skinner v. R.J. Griffin & Co.*, 313 Ark. 430, 855 S.W.2d 913 (1993).

Counterpoints on Appeal

In a section of her brief captioned "Counterpoints on Appeal," Mrs. Jackson raises an argument that the trial court erred in refusing to allow her to present evidence that a young man accompanying Mr. Holliday on the night of the accident was a minor. She contends that such evidence would have been relevant to impeach Mr. Wehrheim's testimony, as well as to impeach several other witnesses regarding their observations and perceptions. Mrs. Jackson also argues that the trial court erred in excluding evidence that Mr. Holliday called the club to see if he could bring his "underage companion" with him.

Mrs. Jackson, however, never filed a notice of cross-appeal in order to preserve these issues for our review. *See* Ark. R. App. P.—Civil 3(d) (2001). She also failed to prepare a supplemental abstract of a proffer of the excluded testimony. Failure to proffer evidence so that this court can determine if prejudice has resulted from its exclusion precludes review of the evidence on appeal. *Duque v. Oshman's Sporting Goods & Servs., Inc.*, 327 Ark. 224, 937 S.W.2d 179 (1997); *Carr v. General Motors Corp.*, 322 Ark. 664, 911

S.W.2d 575 (1995). Furthermore, because we affirm on direct appeal, it is not necessary that we address the points on cross-appeal.

Affirmed.

CORBIN and THORNTON, JJ., dissent.

RAY THORNTON, Justice, dissenting. Because the majority opinion completely ignores the principles of separation of powers, and chooses to arbitrarily apply the doctrine of law of the case, I must respectfully dissent. While the majority opinion is correct that Arkansas has never had an opportunity to consider the implications of an intervening legislative enactment on the law of the case in a pending legal action, other jurisdictions have encountered this situation and have determined that the law of the case doctrine does not apply. Specifically, in *Reich v. Miller*, 260 Iowa 929, 151 N.W.2d 605 (1967), the Iowa Supreme Court held:

> [T]he doctrine of the law of the case has been held to have no application where, in the interval between the two appeals, there has been a change in the law by legislative enaction or judicial ruling.

Id. See also Jordon v. Jordon. 132 Ariz. 38, 643 P.2d 1008 (1982). The Supreme Court of Utah, agreeing with Iowa and Arizona, acknowledged that:

> the law of the case doctrine does not apply to a case where the policy of the law has been changed in the meantime by a legislative enactment, in a case where the amended provision deals only with procedure rather than with making a change in substantive law[.]

Petty v. Clark, 113 Utah 205, 192 P.2d 589 (1948). In *Petty*, the Utah Court also explained that "an extensive research has failed to disclose *any case* where *any court* has held that the law of the case doctrine applies to this kind of a situation." *Id.* (emphasis added). Unfortunately, pursuant to the majority opinion, Arkansas will fill the gap in the case law as the only state in which a court chooses to ignore a legislative enactment changing the guidelines for implementation of the policy of the law between two appeals both of which were grounded upon the public policy as established by the legislature.

Applying the doctrine of law of the case to the case now on review forces an absurd result that is contrary to the case law of

other jurisdictions. In the first appeal of this case, we determined that the trial court had erred in dismissing Mrs. Jackson's cause of action against Cadillac Cowboy pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure. *Jackson v. Cadillac Cowboy, Inc.*, 337 Ark. 24, 986 S.W.2d 410 (1999) (*Jackson I*). After reviewing several regulatory statutes, we determined that the legislature intended to reverse at least thirty-four years of judicial interpretation of the common law and to establish a cause of action for negligence which could be pursued by Mrs. Jackson against Cadillac Cowboy. *Id.* Based upon these regulatory statutes, we concluded that a vendor licensed to serve alcoholic beverages could be subjected to civil liability for negligence when that sale was to an intoxicated person who then causes injury to a third party. *Id.* After reaching this conclusion, we declined to specifically articulate standards or guidelines for pursing the of cause of action. *Id.* Indeed, the matter before us for decision in *Jackson I* was an Ark. R. Civ. P. 12(b)(6) motion testing only whether such a cause of action had been created by regulatory statutes adopted by the legislature.

Approximately one month after our decision in *Jackson I*, the General Assembly enacted Act 1596 of 1999. The Act, which was codified at Ark. Code Ann. § 16-126-101, *et seq.* (Supp. 2001), stated that it intended to clarify and establish the legislative intent regarding the sale of alcoholic beverages as addressed by our court in *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997) and *Jackson I*. Act 1596 legislatively identified a civil cause of action that may be brought against a retailer who knowingly sells alcoholic beverages to a person who is clearly intoxicated when that sale is the proximate cause of injuries to a third person.

Act 1596 was the General Assembly's response to our interpretation of its regulatory statutes, and its attempt to clarify and mandate guidelines and procedures to be followed in such cases. Specifically, the General Assembly, acting within its legislative powers, chose to specify a framework for the cause of action articulated by us in *Jackson I* on the basis of regulatory statutes previously adopted by the legislature. Act 1596 expressed a change in the regulations and guidelines for implementation of the policy of the law as established by the legislature for the State of Arkansas. For us to thereafter refuse to apply the legislative directives is violative of the principles of separation of powers. By applying the law-of-the-case doctrine to the facts of this case, and ignoring the subsequent legislative enactment, we are acting as lawmakers instead of interpreters of the law.

I respectfully dissent.

I am authorized to state that Justice CORBIN joins in this dissent.

PREMIUM AIRCRAFT PARTS, LLC,
and Christopher Roger Baker *v.*
The CIRCUIT COURT of CARROLL COUNTY;
The Honorable Alan D. Epley, Judge;
Performance Aircraft Parts, Inc., and
Performance Aircraft Power Plants, Inc.

01-888 69 S.W.3d 849

Supreme Court of Arkansas
Opinion delivered March 14, 2002

Hardin, Jesson & Terry, PLC, by: *Robert M. Honea*, for petitioners.

Vowell & Atchley, by *Russell C. Atchley, P.A.*, for respondents.

ANNABELLE CLINTON IMBER, Justice. A writ of prohibition is sought to prohibit the Carroll County Circuit Court from proceeding in connection with an action brought by Performance Aircraft Parts, Inc., and Performance Aircraft Power Plants, Inc., against Premium Aircraft Parts, LLC, and Christopher Baker.[1] In support of the petition, Premium and Baker argue that Performance may not bring an action for misappropriation of trade secrets, dilution of trade name, or breach of fiduciary duty in the county of its residence pursuant to Ark. Code Ann. § 16-60-113(a) (1987). We agree and grant the writ.

On March 27, 2001, Performance filed a complaint in Carroll County Chancery Court alleging that Premium, a Texas limited liability company with its principal place of business in Sebastian County, and Baker, a resident of Sebastian County, had misappropriated trade secrets in the form of customer lists and vendor lists, and that Premium's use of the trade name "P.A.P., Inc." was likely (1) to dilute the distinctive quality of the trade name and (2) to cause injury to the businesses and reputation of Performance. The complaint also alleged that Baker had breached his fiduciary duty to Performance and its shareholders. Baker was terminated as an employee of Performance on or about March 2, 2001. Shortly thereafter, he and co-defendant William DeArman, a resident of Texas, formed Premium, which is a competitor of Performance in the purchase and sale of aircraft parts. In its prayer for relief, Performance seeks compensatory damages and the issuance of a temporary restraining order enjoining Premium and Baker from using Performance's customer lists and vendor lists, and enjoining Premium from using the trade name "P.A.P., Inc.," and certain telephone numbers.

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[1] Though the style of the petition is also couched in terms of an individual circuit judge, prohibition lies to the circuit court and not to a judge. *Ford v. Wilson*, 327 Ark. 243, 939 S.W.2d 258 (1997) (citing *Lee v. McNeil*, 308 Ark. 114, 823 S.W.2d 837 (1992)).

The petitioners and DeArman moved to dismiss on the basis of improper venue, contending that they are not residents of Carroll County, that they were not served there, and that there is no basis under the governing venue statute, Ark. Code. Ann. § 16-60-116 (1987), for laying venue in Carroll County. The motion to dismiss was granted as to the only cause of action against DeArman. The circuit court, however, denied the motion as to Premium and Baker, finding that "the Plaintiffs' other causes of action assert claims for conversion of personal property within the meaning of A.C.A. § 16-60-113," and concluding that venue is proper in Carroll County as to the claims asserted by "the Plaintiffs' against the separate Defendant Premium Aircraft Parts, LLC, and Christopher Baker as Carroll County is the residence of the Plaintiffs for venue purposes."[2]

The petitioners next filed a petition for a writ of prohibition in this court, contending that venue was not proper in Carroll County. In response, Performance asserts that its action against the petitioners should be allowed to remain in Carroll County pursuant to Ark. Code Ann. § 16-60-113(a), and the writ should be denied.

A writ of prohibition is an original action in this court under which we may consider the issue of whether venue is proper in the Carroll County Circuit Court. In *Willis v. Circuit Court of Phillips County*, 342 Ark. 128, 27 S.W.3d 372 (2000) (*per curiam*), we stated the requirements for a writ of prohibition:

> A writ of prohibition is extraordinary relief which is appropriate only when the trial court is wholly without jurisdiction. The writ is appropriate only when there is no other remedy, such as an appeal, available. When deciding whether prohibition will lie, we confine our review to the pleadings in the case.

Id. at 131, 27 S.W.3d at 374 (citations omitted). Where the issue of the writ of prohibition alleges improper venue, this court will grant the writ only when there are no disputed facts regarding venue. *Henderson Specialties Inc. v. Boone County Circuit Court*, 334 Ark. 111, 971 S.W.2d 234 (1998). Furthermore, we will look only to the

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[2] Pursuant to the passage of Arkansas Constitutional Amendment 80, which went into effect on July 1, 2001, our state courts are no longer separated into chancery and circuit courts. Rather, these courts have merged and now carry only the designation of "circuit court." Therefore, although the trial court in this case was originally a chancery court, it will herein be referred to as the circuit court.

pleadings to determine if a complaint lacks sufficient facts to support venue, and we ascertain the character of the action and the primary right asserted from the face of the complaint. *Id.*

In *Quinney v. Pittman*, 320 Ark. 177, 183, 895 S.W.2d 538, 541 (1995), we stated that "[i]t is our fundamental duty, of course, to give effect to the legislative purpose set by the venue statutes." The two venue statutes at issue are sections 16-60-113(a) and 16-60-116(a). Section 16-60-113(a) is the specific venue statute for actions for damages to personal property by wrongful or negligent action. Specifically, it provides:

> (a) Any action for damages to personal property by wrongful or negligent act, whether arising from contract, tort, or conversion of personal property, may be brought either in the county where the damage occurred, or in the county where the property was converted, or in the county of residence of the person who was the owner of the property at the time the cause of action arose.

Ark. Code Ann. § 16-60-113(a) (1987). Section 16-60-116(a) governs other actions and provides: "(a) Every other action may be brought in any county in which the defendant, or one (1) of several defendants, resides or is summoned." Ark. Code Ann. § 16-60-116(a) (1987).

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. *Stephens v. Arkansas School for the Blind*, *supra*. 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.* If the language of a statute is unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation. *Id.*

Section 16-60-113(a) first identifies the type of action and then specifies where venue is proper. The claim must state a cause of "action for damages to personal property by wrongful or negligent

act." The cause of action may arise from "contract, tort, or conversion of personal property." If these requirements are met, venue is proper in any of the following counties: the county where the damage occurred; the county where the property was converted; or the county in which the plaintiff resides.

Section 16-60-113(a) fails, however, to specify the type of damages or the type of personal property that must be the subject of the action. It, therefore, falls to this court to construe the phrase "damages to personal property." Where the meaning of a statutory phrase or term 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. *Ford v. Keith*, *supra*. A review of the history of the statute and our case law reveals that there must be physical damage to tangible personal property.

Section 16-60-113(a) traces its origins to Act 314 of 1939, the Venue Act, which permitted an action for personal injury or wrongful death to be filed in the county where the accident occurred or in the county where the person injured or killed resided at the time of the injury. *FirstSouth, P.A. v. Yates*, 286 Ark. 82, 689 S.W.2d 532 (1985). The Venue Act had a defect in that a plaintiff might have to sue for personal injuries in one of two counties and sue for damages to the car in yet a third county where the defendant resided. *Id.* The legislature corrected that defect by Act 182 of 1947 that permitted an action for damages to personal property by wrongful or negligent act to be brought in either the county where the accident occurred or in the county where the owner of the property resided at the time of the accident. Act 182 of 1947.[3] In 1952, we held that the 1947 amendments did not provide for venue where the action was based on conversion of personal property. *Terry v. Plunkett-Jarrell Grocer Co.*, 220 Ark. 3, 246 S.W.2d 415 (1952). Twenty-five years later, the legislature amended the venue statute to include conversion of personal property. Act 830 of 1977.[4] After the 1977 amendments, we held that venue did

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[3] Act 182 of 1947 provided:

Any action for damages to personal property by wrongful or negligent act may be brought either in the County where the accident occurred which caused the damage or in the county of the residence of the person who was the owner of the property at the time the cause of action arose.

[4] Act 830 of 1977 provided:

Any action for damages to personal property by wrongful or negligent act, or for the conversion of personal property, may be brought either in the county where the accident

not lie where the action arose out of a contract and did not involve an accident or violence or a conversion. *Hooper v. Zajac*, 275 Ark. 5, 627 S.W.2d 2 (1982). *See also Beatty v. Ponder*, 278 Ark. 41, 642 S.W.2d 891 (1982). In 1983, the legislature again amended the statute to extend the reference to wrongful or negligent acts by the addition of "whether arising from contract, tort, or conversion," and to substitute the words "where the damage occurred" for the phrase "where the accident occurred." Act 642 of 1983.[5]

Since 1983, three decisions by this court have addressed the type of damage and the type of personal property contemplated under section 16-60-113(a). In *FirstSouth, P.A. v. Yates*, the complaint alleged that FirstSouth misrepresented the Sundance project as a new development when in fact the loan was to restructure an existing development. The complaint also alleged that FirstSouth negligently failed to investigate the guarantor's financial statement and the appraisal of the Sundance development. *FirstSouth, P.A. v. Yates*, 286 Ark. 82, 689 S.W.2d 532 (1985). This court stated that since 1947, "the reference to actions 'for damages to personal property by wrongful or negligent act' has meant a *physical* damage to tangible property, because the purpose of the statute was to permit actions for that kind of damage to be joined with actions for personal injury and wrongful death." *Id.* at 86, 689 S.W.2d at 534 (emphasis added). Furthermore, the amendments to the venue statute "carry no implication that injury to intangible property or the sustaining of an economic loss is being brought within the legislative intent." *Id.* Because there was no physical damage to tangible personal property in *FirstSouth*, venue was not proper under Ark. Stats. Ann. § 27-611, now codified at Ark. Code Ann. § 16-60-113(a). *Id.*

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occurred which caused the damage, or in the county where the property was converted, or in the county of the residence of the person who was the owner of the property at the time the cause of action arose.

[5] Act 642 of 1983 is currently codified at Ark. Code Ann. § 16-60-113(a) (1987), and provides:

> Any action for damages to personal property by wrongful or negligent act, whether arising from contract, tort, or conversion of personal property, may be brought either in the county where the damage occurred, or in the county where the property was converted, or in the county of residence of the person who was the owner of the property at the time the cause of action arose.

The most recent amendment by the legislature added section (b) providing alternative venues for actions based on fraud. *See* 1985 Ark. Acts 921, codified at Ark. Code Ann. § 16-60-113(b) (1987).

In *Wilson-Pugh, Inc. v. Taylor*, 289 Ark. 102, 709 S.W.2d 93 (1986), the issue was "whether the holder of a security interest in a crop may bring an action for conversion of that interest in the county of his residence pursuant to Ark. Stat. Ann. 27-611." *Id.* at 103, 709 S.W.2d at 93. This court noted that "the opening words of the statute, '[a]ny action for damages to personal property . . .' had not been changed for . . . thirty-nine years." *Id.* at 104, 709 S.W.2d at 94. We reiterated what this court said in the *FirstSouth* case: "[I]t was not the intent of the General Assembly to permit a plaintiff alleging an injury to an intangible, or an economic injury, to bring it in his home county . . . the statute extended venue . . . only when there was a statement of 'physical damage to tangible property.'" *Id.*

In *Henderson Specialties Inc. v. Boone County Circuit Court, supra*, we considered whether venue was proper in the county where the plaintiff resided for a claim of negligent construction of improvements to a mill. Based on an analysis of the pleadings, we determined that because plaintiff pleaded that the negligent construction resulted in damage to the original mill, the action sounded primarily in tort resulting in physical damage to tangible property. Once again, we noted that "since 1947, the reference to personal property has meant physical damage to *tangible* property, as we have here." *Id.* at 117, 971 S.W.2d at 237 (emphasis in original). Fifty-five years after its original enactment, section 16-60-113(a) continues to use the same opening words, "[a]ny action for damages to personal property," and our case law has consistently construed that language to extend venue to the county where the owner of the property resides only when an action states a claim for physical damage to tangible personal property.

In this case, we examine the face of the complaint to determine whether it states sufficient facts to establish venue under section 16-60-113(a). Paragraph No. 1 identifies the residence of the parties and asserts that (a) the plaintiff companies (Performance) are Arkansas corporations, and each company has its principal place of business in Carroll County; (b) the defendant Premium is a Texas LLC registered to do business in Arkansas, with its primary place of business in Sebastian County; (c) the defendant Baker is a resident of Sebastian County; and (d) the defendant DeArman is a resident of Texas. Because no defendant is a resident of Carroll County, venue would not be proper in Carroll County under section 16-60-116(a), which limits venue to counties in which a defendant resides or is summoned. For venue to be proper, the character and nature of the complaint must meet the requirements of section 16-60-113(a), *i.e.*, there must be a statement of "physical damage to

tangible property." Therefore, we continue our examination of the complaint to ascertain if it states facts sufficient to support venue in Carroll County.

Paragraph Nos. 2 through 6 contain a description of the corporate history of the Performance companies, as well as the positions held by the parties in those companies. Paragraph No. 7 alleges that shortly after defendant Baker's employment at Performance was terminated, he and defendant DeArman formed a limited liability company in Texas for the purpose of competing with Performance. In Paragraph Nos. 8 through 12, Performance alleges misappropriation of trade secrets in the form of vender and customer lists, and Performance seeks a temporary restraining order and compensatory damages. In Paragraph Nos. 13 through 16, Performance alleges dilution of the trade name, "P.A.P., Inc.," and unfair competition. Included in this count is a request for compensatory damages and a temporary order enjoining the defendant Premium from using the "P.A.P., Inc." trade name. Finally, in Paragraph Nos. 17 through 23, Performance alleges breach of fiduciary duty on the part of the defendant Baker, and Performance seeks compensatory damages and a temporary order enjoining the defendant Premium from using certain telephone numbers.

Based upon the above in-depth review of the allegations contained in the complaint filed by Performance in Carroll County, it is clear that Performance has not asserted any physical damage to personal property, but instead claims an economic injury. This court has consistently held that an economic injury alone is not sufficient to establish venue under section 16-60-113(a). *Henderson Specialties Inc. v. Boone County Circuit Court*, *supra*; *Wilson-Pugh, Inc. v. Taylor*, *supra*; *FirstSouth, P.A. v. Yates*, *supra*. Performance has failed to plead sufficient facts in its complaint to establish that it has suffered physical damage to tangible personal property as required by the statute. Moreover, the petitioners are not residents of Carroll County, and they were not served there. Accordingly, venue in Carroll County is improper, and the Carroll County Circuit Court is wholly without jurisdiction.

Writ of prohibition granted.

Marcus THREADGILL *v.* STATE of Arkansas

CR 01-785 69 S.W.3d 423

Supreme Court of Arkansas
Opinion delivered March 14, 2002

[redacted]

Arkansas Public Defender Commission, by: *Latrece Gray* and *Lott Rolfe*, for appellant.

Mark Pryor, Att'y Gen., by: *John Ray White*, Deputy Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellant, Marcus Threadgill, was convicted in Miller County Circuit Court of first-degree murder and sentenced to thirty-three years' imprisonment. Appellant appealed his conviction to the court of appeals, asserting two arguments: (1) that the trial court erred when it allowed the introduction of extrinsic evidence to impeach a witness who had admitted that she lied when she gave a statement to police, and (2) that the trial court erred in admitting the eyewitness testimony of Christopher Parker. The court of appeals affirmed the conviction. *See Threadgill v. State*, 74 Ark. App. 301, 47 S.W.3d 304 (2001).

We granted appellant's petition for review, pursuant to Ark. Sup. Ct. R. 1-2(e)(ii). When we grant a petition for review of a decision from the court of appeals, we review the findings of the trial court as though the appeal had originally been filed with this court. *Laime v. State*, 347 Ark. 142, 60 S.W. 3d 464 (2001). We find no reversible error, and we affirm the trial court for somewhat different reasons than those relied upon by the court of appeals.

Appellant does not challenge the sufficiency of the evidence to support the conviction, so our recitation of the facts will be concise. Appellant stipulated that he was in the car being driven by the victim, Larry Roberson, at the time the victim was shot in the back of his head. Christopher Parker testified that he was riding in the passenger seat and that the appellant, who was in the back seat, shot the victim. Forensic evidence showed that the victim, while seated in the driver's seat, was killed by a bullet that entered the back of his head and exited toward the steering wheel.

Witness for the State, Tequila Hall, made a taped statement to the police where she stated that she overheard the appellant say that he "shot that dude." At trial, Ms. Hall testified that she did not

remember overhearing such a statement by appellant; further that she did not remember making any statement to the officers; and that if she did make such a statement, she was lying, in an effort to get the police to leave her alone. The trial court ruled that the taped statements (exhibits 25 and 26) were admissible to impeach the witness on the basis of her prior inconsistent statements.

Appellant's first point on appeal asserts that the trial court committed reversible error in allowing the use of Hall's earlier inconsistent statements to improperly impeach a witness. Before reaching the merits of this contention, we note that the State argues that no proper objection to the use of this earlier statement was timely made by appellant.

We will not consider an argument raised for the first time on appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998). To preserve an argument for appeal, there must be an objection in the trial court that is sufficient to apprise the court of the particular error alleged. *Id.* Furthermore, the basis for objection on appeal must be the same basis for objection as at the trial court level. *Id.*

In the case before us, appellant objected to the admission of Tequila Hall's taped statement, exhibit 25, on the basis of Ark. R. Evid. 613(b). We review allegations of evidentiary errors under the abuse-of-discretion standard. *Parker v. State*, 333 Ark. 137, 968 S.W.2d 592 (1998). The trial court has broad discretion in its evidentiary rulings; hence, the trial court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. *Id.*

Arkansas Rule of Evidence 613(b) states:

> 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 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).

Appellee contends that at trial the basis for objection was Ark. R. Evid. 613(b), and therefore any other objection the Appellant may assert upon review has not been preserved. Appellant agrees that the objection was based on 613(b), but contends further that the objection asserted upon review, is based upon an interpretation of Rule 613(b) as established by case law. We agree that the

issue of the admissibility of Hall's first taped statement, exhibit 25, was properly raised for our review by the appellant's objection on the basis of Rule 613(b) and we turn to the merits of the trial court's ruling.

Rule 613 of the Arkansas Rules of Evidence permits extrinsic evidence of prior inconsistent statements of a witness for the purpose of impeachment if the witness is afforded the opportunity to explain or deny the statement, and does not admit having made it, and the other party is afforded the opportunity to interrogate the witness on that statement. *Kennedy v. State*, 344 Ark. 433, 42 S.W.3d 407 (2001). If the witness, however, admits making the prior inconsistent statement, then extrinsic evidence of that statement is not admissible. *Id*; *Ford v. State*, 296 Ark. 8, 753 S.W.2d 258 (1988); *Gross v. State*, 8 Ark. App. 241, 650 S.W.2d 603 (1983). Here, Ms. Hall did not unequivocally admit that her prior statement to the police was a lie. She testified that she could not remember her earlier testimony and then stated that she did not remember making the statement, or, that if she made the statement it was a lie. The following colloquy occurred:

> STATE'S ATTORNEY: Okay. But you don't remember telling any of those officers that this defendant told you he shot that dude?
>
> MS. HALL: No. If I said it, it's not true.
>
> STATE'S ATTORNEY: Okay. Why would you go to the police and tell them something that wasn't true?
>
> MS. HALL: Because at the time I was scared. I had, I've been in trouble myself. I had a lot of stuff on me, and I figured I would get in trouble, or they might use that against me or somethin'.

Her testimony left doubt as to whether she admitted that the earlier statement was a lie, as required by the case law interpreting Rule 613(b). Under the circumstances, the trial court was not in error, nor did it abuse its discretion in admitting exhibit 25 for purposes of impeachment of her own testimony at trial. On that point, we affirm the trial court.

The trial court also admitted exhibit 26, Tequila Hall's taped statement from May 14, 1998. However, the issue of admissibility of the statement pursuant to Rule 613(b) was raised for the first time on appeal, and as previously noted, we have held that "[t]he supreme court will not consider an argument raised for the first

time on appeal; to preserve an argument for appeal, there must be an objection in the trial court that is sufficient to apprise the court of the particular error alleged." *Ayers, supra.*

At the trial, the Appellant objected to the second taped statement of Ms. Hall, exhibit 26, as "cumulative and unnecessary" and on appeal sought to make two new objections: first, on the basis of 613(b), exactly as presented in regard to the first taped statement, and second, that the witness had already admitted this particular inconsistent statement. Appellee argues that the Appellant did not make a Rule 613(b) objection to the second tape, nor did he make an objection based on the grounds that the witness had already admitted this particular inconsistent statement. Indeed, the colloquy reveals that neither ground was raised:

> MR. ROLFE: I would object. It's cumulative and unnecessary.
>
> THE COURT: This is offered for what purpose, Mr. Haltom?
>
> MR. HALTOM: The same purpose. That she made statements to the police saying that Mr. Threadgill killed Mr. Roberson on the different occasions.
>
> THE COURT: Separate statements to law enforcement?
>
> MR. HALTOM: Yes, sir.
>
> MR. ROLFE: Same statement, just different occasions.
>
> MR. HALTOM: Well, if they want to stipulate to the statements made, we don't need to play the tape. I mean, otherwise, it's for impeachment. Prior inconsistent statements. When you have the defendant telling the witness they killed somebody, that's pretty important for this trial.
>
> MR. ROLFE: Judge, I've raised my objection already.
>
> MR. HALTOM: We'll stand on our contention that it's relevant. Very relevant.
>
> THE COURT: The objection is overruled. Two statements are not so cumulative as to waste the Court's time. You may play it.

Clearly, the trial court understood the objection as being based on efficiency and avoiding redundant testimony, and appellant did not clarify his objection, impliedly assenting to the court's interpretation. On appeal, appellant based his new argument on Rule 613(b) and asserts that the taped statement was offered for impeachment purposes, not to refresh memory. This is a new objection to exhibit 26 that was not raised below, and therefore we do not consider it.

The State agreed with appellant that the issue of Sabrina Maxwell Herron's testimony was preserved for appeal, and the objection based on hearsay and improper impeachment was timely. Though allowing Ms. Herron to testify to Ms. Hall's prior statement to her notwithstanding an objection that the testimony was hearsay, the trial court did not abuse its discretion. The colloquy gives the context of the objection:

> MR. HALTOM: Did you ever have an opportunity around 1998, to have a conversation with Tequila Hall in regard to Mr. Roberson's death?
>
> MS. HERON: Yes, sir.
>
> MR. ROLFE: Your Honor, at this time, I would object as to hearsay.
>
> THE COURT: Offered for impeachment, I assume?
>
> MR. HALTOM: Yes, sir.
>
> MR. JONES: Yes, sir.
>
> THE COURT: Overruled.

Abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Nazarenko v. CTI Trucking Co., Inc*, 313 Ark. 570, 856 S.W.2d 869 (1993). Here, the court erred, but we cannot say that the trial court's action in admitting a statement for the purpose of impeachment was improvident, thoughtless, or without due consideration. We conclude that the trial court's actions do not require reversal as an abuse of its discretion.

Next, we address the issue of whether the cumulative prejudicial effect of the exhibits and Ms. Herron's testimony was enough to constitute reversal. The court of appeals has recently refused to find prejudicial error when the evidence in question was merely cumulative to other evidence admitted at trial. *Camp v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999). Furthermore, prejudice is not presumed. *Llewellyn v. State*, 4 Ark. App. 326, 630S.W.2d 555 (1982). The appellate court will not reverse absent a showing of prejudice. *Id.*

Ms. Herron's testimony was cumulative of what had already been presented in her first recorded statement. In *Camp,* the court of appeals specifically held that merely cumulative evidence was not prejudicial. We agree and adopt the principle articulated by the Court of Appeals in *Camp*, *supra*, and in *Llewellen*, *supra*. Appellant in this case is required to show prejudice, but does not support that required showing. Appellant simply argues that all three items of extrinsic evidence were unnecessary and cumulative, and that if they had all been excluded, the State would have been left with very little evidence. Appellant speculates that he might have received a directed verdict or less than a thirty-three-year sentence. Appellant's objection, however, to the first recorded statement as being cumulative in nature was not raised before the trial court, and therefore he cannot now raise that argument on appeal. As we have already pointed out, Appellant's objection to the second recorded statement was not preserved for appeal. Finally, we note that Sabrina Maxwell Herron's testimony was repetitive of exhibit 25, but as explained in *Camp*, *supra*, merely cumulative evidence is not prejudicial.

We now turn to the remaining issue on appeal: whether the trial court abused its discretion by refusing to exclude the testimony of Christopher Parker as a sanction against the prosecutor for violating discovery and for engaging in prosecutorial misconduct. The trial court refused to exclude Christopher Parker's testimony, but rather afforded the appellant wide latitude in cross-examination of the police officers to remedy discovery violations. The State argues that there was no abuse of discretion because the appellant presented no evidence of bad faith on the part of the prosecutor, as required to prove prosecutorial misconduct, nor did appellant present evidence of prejudice.

With respect to a similar argument relating to a failure to disclose the intention to call an expert witness, we have held that the appellant must show not only bad faith on the part of the

prosecutor, but also that the breach of duty to disclose caused prejudice severe enough to undermine confidence in the outcome of the trial. *Nicholson v. State*, 319 Ark. 566, 892 S.W.2d 507 (1995). Likewise, we have held that the defendant must show that any misconduct done by the prosecutor was in bad faith, and that the prosecutor's actions caused prejudice to the defendant before the double jeopardy bar could be invoked. *Timmons v. State*, 290 Ark. 121, 717 S.W.2d 208 (1986). Following the Eighth Circuit holding in *U.S. v. Martin*, 561 F.2d 135 (8th Cir. 1977), we held that prosecutorial misconduct motivated by bad faith that caused prejudice to the defendant enough to merit a mistrial would bar retrial. *Timmons, supra.*

In several cases since then, we have required a showing of bad faith on the part of the prosecutor before the court would require sanctions. *Ford v. Wilson*, 327 Ark. 243, 939 S.W.2d 258 (1997) (holding that double jeopardy was not invoked because there was no prejudice sufficient to cause a mistrial based on the prosecutor's bad-faith misconduct); *Jackson v. State*, 322 Ark. 710, 911 S.W.2d 578 (1995) (The appellant asserted that the state prosecutor engaged in bad faith misconduct with the intention of goading Jackson into moving for a mistrial, and the trial court found no bad faith and affirmed.) *Pickens v. State*, 301 Ark. 244, 783 S.W.2d 341 (1990) (The appellant argued that the prosecutor committed bad faith misconduct on three occasions: 1) The prosecutor intended to inflame the jury by referring to the race of the victims; 2) The prosecutor implied that the appellant fabricated evidence of an abusive upbringing; 3) The prosecutor objected during a defense witness's testimony concerning mitigating evidence. The trial court refused to grant a mistrial and we affirmed, finding no prejudice on the first argument and no bad faith on the part of the prosecutor on the second two arguments.)

In the present case, there was no showing by appellant of bad faith involved in the prosecutor's loss of two earlier recorded statements from Christopher Parker that, as a result of being lost, were unavailable for discovery. Not only was no showing of bad faith made, but also there was no showing of any prejudice resulting from the unavailability of the tapes. In these circumstances, we cannot say that the trial court's decision to sanction the violation of discovery by means of allowing wide latitude in cross-examination of the police officers was an abuse of discretion.

Accordingly, we affirm.

CORBIN, J. not participating.

William Lee NIELSEN *v.* Deborah BERGER-NIELSEN and Joe Benson

01-997 69 S.W.3d 414

Supreme Court of Arkansas
Opinion delivered March 14, 2002

Harry McDermott, for appellant.

Taylor Law Firm, by: *Terry D. Harper* and *Chris D. Mitchell*, for appellee Deborah Berger-Nielsen.

Benson, Robinson & Wood, P.L.C., by: *Joe P. Robinson*, for appellee Joe Benson.

JIM HANNAH, Justice. Appellant William Lee Nielsen ("William") appeals the Washington County Circuit Court's dismissal of his complaints against Appellee Joe Benson and Appellee Deborah Berger-Nielsen ("Deborah").

On February 14, 2000, Deborah filed for divorce from William. Deborah's attorney was Benson. William filed a general answer on March 14, 2000, and then counterclaimed against Deborah on September 11, 2000, seeking the divorce in his favor and for division of the marital property. Deborah filed her answer to the counterclaim on September 20, 2000.

Around September 2000, the parties began negotiations for a property settlement in the divorce action. Documents in the record indicate that Benson and William's attorney, Harry McDermott, spoke on the phone on September 12, 2000, regarding the terms of the property settlement, to which Benson followed up by letter on September 15, 2000, laying out the general terms of the settlement agreement. This letter stated:

> This confirms our phone call of September 12, 2000 wherein I advised that my client, Deborah Nielsen, had agreed to the terms of your client's settlement proposal in this divorce matter. Mr. Berger is transferring $61,600 to my trust account which will be dispersed upon signature of the Property Settlement Agreement. Mrs. Nielsen will present a title to the '91 Isuzu Trooper at that time. I will provide you a Quitclaim Deed for Bill's signature of the marital residence and the Property Settlement Agreement once drafted, however, I need verification of Bill's income to complete the support clause. Accordingly, please provide me copies of his

> most recent payroll stubs. Also, please enter an Order of Dismissal of the partition action which you filed against Mr. and Mrs. Berger and Deborah.

On the same day Benson wrote this letter to McDermott, he wrote a letter to the chancery court noting that the parties had reached a settlement resolving the issues and, therefore, the full-day trial set for September 22, 2000, was not needed.

Five days after Benson wrote these letters, he filed a motion on September 20, 2000, to withdraw as Deborah's counsel. In the motion, Benson cited as his reason for withdrawal as "irreconcilable differences between the Plaintiff, Deborah Berger-Nielsen and her attorney, Joe Benson regarding the terms of a proposed property settlement agreement." The trial court granted Benson's motion to withdraw on October 4, 2000.

On November 14, 2000, Attorney Terry Harper entered his appearance as Deborah's attorney. Approximately one month later on December 8, 2000, William filed a motion to compel settlement and for a temporary hearing, claiming that a settlement agreement had been reached, and asking the court to compel action on that settlement. He attached two exhibits to this motion: a written copy of his basic terms of the settlement agreement and Benson's letter to McDermott on September 15, 2000. Deborah responded to this motion on December 18, 2000. The trial court set a hearing on all pending motions for February 7, 2001.

Prior to the hearing, William attempted to subpoena Benson's appearance at the hearing, presumably seeking testimony that an oral property settlement agreement had been reached by the parties. On January 30, 2001, Benson filed a motion on his own behalf to quash the subpoena claiming that the testimony sought by William was protected by attorney-client privilege. The trial court heard the motion to quash on February 5, 2001. At the hearing, the trial court determined that Deborah did not intend to waive the attorney-client privilege; therefore, the court granted Benson's motion to quash the subpoena. An order was entered to this effect on February 13, 2001.

William filed a brief in support of his motion to compel the settlement on February 6, 2001. In this brief, William argued that Arkansas law indicates that an attorney can authorize a settlement

for his or her client, and that Benson clearly authorized this settlement by letter and over the phone for his client, Deborah. Following this filing, William filed an amended counterclaim and third-party complaint against Deborah and, for the first time, against Benson as a third-party defendant. He included a claim for breach of contract against Deborah, claiming that she agreed to the property settlement agreement and then withdrew this agreement. He filed his third-party complaint against Benson on a theory of a "breach of an implied promise" to William representing that he had the authority to contractually bind Deborah to the settlement agreement. William concluded his amended pleading by stating:

> Wherefore, premise considered, Bill Nielsen, defendant/counterclaimant, prays that the complaint of Deborah Berger-Nielsen be dismissed, he be granted a divorce from the defendant as well as awarded his attorney's fees and court costs, the marital property of the parties be divided by the Court pursuant to the property settlement agreement attached and for all other relief to which he may be entitled including his additional attorney's fees and cost directly caused by the plaintiff's breach of the property settlement agreement.
>
> In the alternative, Bill Nielsen, defendant/counterclaimant, prays that the complaint of Deborah Berger-Nielsen be dismissed, he be granted a divorce from the defendant as well as payment of his attorney's fees and court costs, the marital property of the parties be divided by the Court, and for all other relief to which he may be entitled. Plaintiff further prays for damages in excess of $1,000 against third party defendant Joe Benson as well as for all his attorney's fees and costs resulting from the plaintiff's failure to affirm or agree to the settlement agreement agreed to by third party defendant Joe Benson on her behalf and for all other relief to which he may be entitled.

William attached to this complaint the exhibit of his proposed property settlement agreement and a copy of Benson's September 15, 2000, letter.

On February 21, 2001, Benson filed a motion and supporting brief to dismiss Nielsen's third-party complaint, noting that the complaint was not timely filed, that a settlement that deals with real property must be in writing and signed by the parties to be bound according to the statute of frauds, that Benson was not in privity of contract with Deborah or William, and that the third-party complaint fails to state facts upon which relief could be granted.

Deborah filed her answer to William's amended counterclaim on February 22, 2001. William filed his response to the motion to dismiss on February 28, 2001, claiming that he amended his complaint to include claims for breach of contract against Deborah, breach of duty against Benson, and that one of them is liable for the failure to honor the proposed settlement agreement.

On March 7, 2001, the trial court held a hearing on Deborah's and Benson's motions to dismiss the third-party complaint against Benson and on William's motion to compel discovery. The court first heard arguments on the motion to dismiss, and concluded that because the property settlement dealt with real property, it had to have been in writing to be binding on the principals as well as on Benson, an agent. Because it was not, there was no contract and, therefore, the third-party complaint was meritless. Following the hearing, William filed a motion for findings of fact and conclusions of law on the dismissal, and set out his claims in a letter to the court filed on March 20, 2001. In that letter, William indicated that he wanted the findings of fact and conclusions of law in writing because he planned to immediately appeal that order, in that he had "nonsuited his amended claim against the plaintiff," presumably meaning he had dismissed his counterclaim against Deborah. The trial court filed its order on March 20, 2001, noting that it had taken into account the "[m]otion, representations of counsel, and other facts and matters appearing before the Court" in deciding to dismiss William's complaint against Benson. Specifically, the court found that William did not have a claim against Benson for breach of an implied contract because the settlement agreement had to be in writing and signed by the parties to that contract because it transferred real property. Furthermore, the court found that the dismissal was pursuant to Ark. R. Civ. P. 12(b)(6) because William pled no fact holding Benson liable for a contract on which he was not in privity with the parties. The court also awarded attorney's fees in the amount of $1,062.50 to Benson's attorney.

Ultimately, William and Deborah reached a property settlement agreement and child-custody and support agreement filed on March 20, 2001. The parties's divorce decree was also filed on March 20, 2001. William indicated at that time that he dismissed his counterclaim against Deborah, thus allowing her to proceed on her original divorce petition.

Although the divorce was finalized on March 20, 2001, the court considered William's second motion to compel answers to interrogatories and for production of documents on March 30,

2001. The court ordered Deborah to produce certain documents by March 23, 2001, (although that was impossible by the date of the order), and ruled that no attorney's fees were due for William's pursuit of this motion. Following this on May 11, 2001, William filed a motion for an extension of time to file an appeal claiming that he did not find out about this order until May 10, 2001, and that too much time had passed to timely file an appeal. He also claimed that he had not discovered the March 20, 2001, order dismissing his third-party complaint against Benson, in which fees were awarded to Benson's attorney, until May 10, 2001, as well. He noted that the time for appeal from both of these orders had passed. Deborah responded on May 25, 2001, and Benson joined in this response on May 29, 2001. On that same day, Benson filed a motion for Rule 11 sanctions against William's attorney, Harry McDermott, claiming that the action against Benson was frivolous. A hearing on these motions was held on June 7, 2001. The court entered its order on June 14, 2001, finding that William had good cause to ask for the extension to file an appeal under Ark. R. App. P.—Civ. 4(b)(3), and allowed him until June 21, 2001, to file that appeal. The docket sheet also indicates that Benson's Rule 11 motion was denied as filed on June 25, 2001. William filed his notice of appeal from the trial court's March 20, 2001, and March 30, 2001, orders on June 18, 2001.

We review chancery cases *de novo* on the record, but we do not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.*

While the trial court's order indicates that the dismissal of William's third-party complaint against Benson was under Ark. R. Civ. P. 12(b)(6), it is clear that the trial court took into account other pleadings, documents, and information when making its decision. As such, it is not a dismissal, but instead a summary judgment. Pursuant to Ark. R. Civ. P. 12(b) and (c), a motion to dismiss is converted to a motion for summary judgment when matters outside of the pleadings are presented to and not excluded by the court. *Francis v. Francis*, 343 Ark. 104, 31 S.W.3d 841 (2000); *McQuay v. Guntharp*, 331 Ark. 466, 963 S.W.2d 583 (1998); *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996). Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Ford v. Arkansas Game and Fish Comm'n*, 335 Ark. 245, 979 S.W.2d

897 (1998); *Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

I. William's Appeal against Deborah

Although William's notice of appeal included both Deborah and Benson, his arguments on appeal include only his claim against Benson. In fact, he fails to direct any argument towards his appeal from the March 30, 2001, order entered by the trial court directing Deborah to comply with certain discovery requests. The trial court also denied attorney's fees to William for pursuing those discovery requests. As such, because William fails to offer any argument or legal authority to support a claim against Deborah on appeal, we affirm the trial court's ruling from that order. *See Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001); *Womack v. Foster*, 340 Ark. 124, 8 S.W.3d 854 (2000).

II. William's Appeal against Benson

In William's third-party complaint against Benson, he first alleged that Benson, acting with full authority and on behalf of Deborah, misrepresented orally and by letter that the case was settled under William's terms that Deborah pay him $61,500 and, in return, he would sign a quit-claim deed to the house and real estate. However, William then alleged that when Deborah refused to honor the settlement agreement, Benson became personally liable because "he was not acting at the direction and control of the plaintiff and with specific authority to settle all of the parties' property issues . . . even though at all times he represented he was." As such, Benson "breached his implied promise to the defendant . . . that he had the specific authority to bind the plaintiff and was attempting to contractually bind the plaintiff to a settlement agreement . . . pursuant to her instructions." William claimed

damages in the amount of $1,000 plus attorney's fees and costs "resulting from the plaintiff's failure to honor said agreement." It should be noted that William never sued Benson for breach of contract in that he acknowledges that Benson did not have the authority to contract for Deborah. In addition, William never followed through on his breach of contract claim against Deborah — he nonsuited it — so there is no finding that there was a breach of contract here.

Although the trial court "dismissed" William's claim against Benson because there was no written contract for the sale of property and Benson was not in privity of contract with William to be liable on the contract, we will only address this second finding by the trial court. We hold that Benson cannot be liable to William for this "breach of implied promise" claim under Ark. Code Ann. § 16-22-310, an attorney-immunity statute. Arkansas Code Annotated § 16-22-310, titled "Liability for civil damages," states:

> (a) No person licensed to practice law in Arkansas and no partnership or corporation of Arkansas licensed attorneys or any of its employees, partners, members, officers, or shareholders shall be liable to persons not in privity of contract with the person, partnership, or corporation for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by the person, partnership, or corporation, except for:
>
> (1) Acts, omissions, decisions, or conduct that constitutes fraud or intentional misrepresentations; or
>
> (2) Other acts, omissions, decisions, or conduct if the person, partnership, or corporation was aware that a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action. For the purposes of this subdivision, if the person, partnership, or corporation:
>
> > (A) Identifies in writing to the client those persons who are intended to rely on the services, and
> >
> > (B) Sends a copy of the writing or similar statement to those persons identified in the writing or statement, then the person, partnership, or corporation or any of its employees, partners, members, officers, or shareholders may be held liable only to the persons intended to so rely, in addition to

> those persons in privity of contract with the person, partnership, or corporation.
>
> (b) This section shall apply only to acts, omissions, decisions, or other conduct in connection with professional services occurring or rendered on or after April 6, 1987.

This immunity statute for attorneys protects them from civil liability for actions they take during the course of their employment as an attorney. This court has held that "[t]he plain language of Ark. Code Ann. § 16-22-310 requires the plaintiff to have direct privity of contract with 'the person, partnership, or corporation' he or she is suing for legal malpractice." *McDonald v. Pettus*, 337 Ark. 265, 271, 988 S.W.2d 9, 12 (1999). Similarly, this court has held that Ark. Code Ann. § 16-22-310 "enunciates the parameters for litigation by clients against attorneys[.]" *Clark v. Ridgeway*, 323 Ark. 378, 388, 914 S.W.2d 745, 750 (1996).

In *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001), the plaintiffs sued an attorney under a claim of negligent hiring and supervising of another attorney-employee who defrauded the plaintiffs in an adoption case. The attorney defendant argued in part that she was immune from suit under Ark. Code Ann. § 16-22-310 because the plaintiffs's claims arose from a legal-malpractice action. The plaintiffs argued that Ark. Code Ann. § 16-22-310 provided immunity to attorneys only when they are sued for legal malpractice or professional negligence, and since that claim was neither, the attorney was not immune. This court agreed that the plain language of the provision demonstrates that the immunity provided is limited to suits based on conduct in connection with professional services rendered by the attorney. As such, because the claim was for negligent hiring and supervising of an employee, as opposed to malpractice in the adoption action itself, the attorney defendant was not immune under the statute.

In contrast, however, this court in *McDonald, supra,* found that a decedent's attorney was not liable to the decedent's children individually or as third-party beneficiaries of the estate for alleged negligence in the drafting of the decedent's will. We determined that the children were not in privity of contract with the attorney and, thus, the attorney was immune from suit under Ark. Code Ann. § 16-22-310 for his alleged negligence in drafting the decedent's will. This court stated:

> The plain language of Ark. Code Ann. § 16-22-310 requires the plaintiff to have direct privity of contract with "the person, partnership, or corporation" he or she is suing for legal malpractice. Likewise, we have narrowly construed the privity requirement to require direct privity between the plaintiff and the attorney or entity to be held liable for legal malpractice. *See Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996); *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993). In particular, in Clark we said that "the language of this section [Ark. Code Ann. § 16-22-310(a)] is precise and clear and reveals that the contract contemplated by the statute relates to a contract for professional services performed by the attorney for the client." *Clark, supra.*

McDonald, 337 Ark. at 271-272. This court did, however, remand the case to the trial court for further proceedings in the tort and breach-of-contract claims filed by the personal representatives of the estate against the attorney. We did so because the personal representatives brought the claims on behalf of the decedent, because the estate "stood in the shoes" of the decedent, who was in privity of contract with the attorney.

These cases define the parameters of the statute by showing that an attorney may not be sued by a third party for his nonfraudulent acts committed during the course of his representation of his client because he was not in privity with the third party. This is what the trial court found here where the trial court determined that Benson was not in privity of contract with William and, thus, could not be liable to him for his professional dealings on that contract.

Regarding privity, William argues that general agency law in Arkansas allows this lawsuit. He cites the case of *Hart v. Bridges*, 30 Ark. App. 262, 786 S.W.2d 589 (1990), for the proposition that "Arkansas recognizes the liability of an agent for contracts created outside his authority for a disclosed principal." In *Hart*, the court of appeals determined that a school principal was personally liable on a contract that he had a prospective teacher sign, despite the fact that the principal did not have the authority to hire the teacher without the school board's approval. The teacher, relying on this signed contract, incurred debt by buying a car and other items, believing that he had a job. The school board, however, refused to hire the teacher. The teacher sued the school principal on a breach of contract claim, arguing that the principal was personally liable on the contract. While the court of appeals recognized that the statutes clearly indicate that only a school board can hire a teacher, and that

the teacher was charged as knowing these laws, the court determined that Arkansas's general agency law still bound the principal to the contract. The court of appeals stated:

> Appellant is correct in his assertion that, generally, an agent who contracts in the name of his principal without authority, so that the principal is not bound, may be personally liable to the other contracting party. *See Lasater v. Crutchfield*, 92 Ark. 535, 538, 123 S.W. 394, 395 (1909). In such cases, the law may imply a contract between the injured party and the agent upon the agent's implied warranty of his authority. *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 192, 2 S.W. 703, 704 (1886).

Hart, 30 Ark. App. at 268. Based on this general premise, the court of appeals reversed the trial court's grant of summary judgment finding that questions of fact remained.

Hart is different from this case, however, for the specific reason that while the court of appeals held that the principal was subject to general agency provisions despite the statutes that stated that only the school board could approve a contract, here Benson, as an attorney, is specifically immune from liability absent fraud or intentional misrepresentation. In other words, there is a specific statute that protects Benson from liability here, whereas in *Hart* the principal had no such protection and was subject to general agency principles.

This conclusion, however, does not end the analysis because the lawyer-immunity statute contains two exceptions to the privity requirement. First, no privity is required for "[a]cts, omissions, decisions, or conduct that constitutes fraud or intentional misrepresentations." Ark. Code Ann. § 16-22-310(a)(1). However, constructive fraud, for example, is not included in this exception because the exception is one for intentional acts. *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993). This section is clearly inapplicable because William did not assert fraud or intentional misrepresentations in his third-party complaint, but instead asserts an amorphous "breach of implied promise" claim, which necessarily had to arise from Benson's conduct as Deborah's attorney. Therefore, because Benson was only in privity of contract with Deborah for attorney services rendered in connection with her divorce claim, William cannot assert a claim against Benson without some showing of fraud or intentional misrepresentation, which he never alleges in this case.

In looking at the trial court's order, the judge effectively applied the immunity statute by finding that there were no facts to show that Benson was in privity of contract with William. As such, regardless of general Arkansas agency law and in the complete absence of any allegations of intentional misrepresentation or fraud, Ark. Code Ann. § 16-22-310 applies to shield Benson in this lawsuit.

II. Attorney's Fees

Finally, William argues that the trial court erred in awarding $1,062.50 in attorney's fees to Benson. William, however, fails to provide any authority as to why this award was unwarranted. The failure to cite authority is sufficient reason to affirm the trial court's ruling on this point. *Middleton, supra*; *Womack, supra.*

Affirm.

CORBIN, J., not participating.

CONCRETE CONSTRUCTION, INC. *v.*
Judge Stephen P. SAWYER

02-129 69 S.W.3d 422

Supreme Court of Arkansas
Opinion delivered March 14, 2002

Law Offices of Susan A. Fox, by: *Susan A. Fox*, for appellant.

Mark Pryor, Att'y Gen., by: *Jill Jones*, Ass't Att'y Gen., for appellee.

PER CURIAM. On February 7, 2002, Concrete Construction, Inc., by its attorney, Susan A. Fox, filed a petition for writ of mandamus contending that the Honorable Stephen P. Sawyer, acting as Special Benton County Circuit Judge pursuant to Arkansas Supreme Court Administrative Order Number 1 — Special Judges, had failed to render a decision within a reasonable time after the case was tried.

The initial complaint in the underlying cause of action was filed on January 27, 1999. The case was tried to the court on June 1, 2000. The court took the case under advisement and has not issued a ruling as of this date. Counsel for the defendant in the underlying cause of action mailed a letter to Judge Sawyer on October 26, 2000, reminding the court of certain crucial facts established by the evidence. Counsel for the petitioner sent letters to Judge Sawyer on November 7, 2000, and September 11, 2001, requesting a ruling and has not received a response.

On March 4, 2002, the Attorney General responded to the mandamus action urging that the petition be denied because Judge Sawyer has demonstrated good cause for delay and demonstrated that a judicial decision is forthcoming. The memorandum of authority attached to the response to petition for writ of mandamus states:

> Judge Sawyer drafted the liability portion of the Order on the underlying contract action. Thereafter, he requested the exhibits from the court reporter so that he could draft the damages portion of the Order. Because the court reporter was unable to locate the

exhibits, a final Order could not be completed. The exhibits were located by the court reporter on February 11, 2002 and anticipated a final Order will be rendered by March 15, 2002.

The Code of Judicial Conduct, Canon 3(B)(8), requires that a judge dispose of all judicial matters promptly. We conclude that the response does not state a good cause to justify the delay in the ruling on this underlying cause of action.

A judgment was entered in the underlying cause of action by Judge Sawyer and filed with the Benton County Circuit Clerk on Wednesday, March 6, 2002, rendering this petition for writ of mandamus moot.

A copy of this opinion will be forwarded to the Arkansas Judicial Disability and Discipline Commission.

Petition moot.

IN RE: RULE 37.5(b)(1)(A) of the ARKANSAS RULES of CRIMINAL PROCEDURE

Supreme Court of Arkansas
Delivered November 29, 2001

PER CURIAM. The Arkansas Supreme Court Committee on Criminal Practice has recommended an amendment to Rule 37.5(b)(1)(A) of the Rules of Criminal Procedure in response to the adoption of Rule 10 of the Arkansas Rules of Appellate Procedure—Criminal (Automatic Review in Death Cases). *See In Re: Amendment to Rule 10*, 345 Ark. Appx. (July 9, 2001). Because of the adoption of Rule 10, certain language in Rule 37.5 (b)(1)(A) became obsolete.

We agree with the Committee's recommendation and adopt, effective immediately, the amendment to Rule 37.5 (b)(1)(A) as republished below.

We express our gratitude to the members of the Criminal Practice Committee for their work on this matter.

Rule 37.5. Special rule for persons under sentence of death.

* * *

(b) Requirement of Hearing on Appointment of Attorney.[1]

(1)(A) Upon affirmance of a sentence of death by the Supreme Court of Arkansas, the clerk of the court shall forward a copy of the

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[1] *"Line-in, line-out" version of Rule 37.5 (b)(1)(A) to illustrate changes:*

Upon affirmance of a sentence of death by the Supreme Court of Arkansas, the clerk of the court shall forward a copy of the mandate to the circuit court that imposed the sentence of death and to the Attorney General. The circuit court shall conduct a hearing to consider the appointment of an attorney to represent the person in post-conviction proceedings under this rule. If the Supreme Court affirms a sentence of death ~~or affirms the trial court's finding of competency to waive an appeal from a sentence of death,~~ the hearing shall be held not later than twenty-one (21) days after the mandate is issued by the Supreme Court. ~~If an appeal is taken from the sentence of death but later dismissed by the Supreme Court, the hearing shall be held not later than twenty-one (21) days after the date the appeal is dismissed. If a timely notice of appeal is filed with the trial court but the trial record is never lodged in the Supreme Court, the hearing shall be held not later than twenty-one (21) days after the last date for lodging the trial record in the Supreme Court. If no timely notice of appeal is filed, the hearing shall be held not later than twenty-one (21) days after the last date on which a notice of appeal could have been filed.~~

mandate to the circuit court that imposed the sentence of death and to the Attorney General. The circuit court shall conduct a hearing to consider the appointment of an attorney to represent the person in post-conviction proceedings under this rule. If the Supreme Court affirms a sentence of death, the hearing shall be held not later than twenty-one (21) days after the mandate is issued by the Supreme Court.

In RE: ESTABLISHMENT of the ARKANSAS LAWYERS ASSISTANCE PROGRAM

Supreme Court of Arkansas
Delivered December 13, 2001

PER CURIAM. By way of *per curiam* order dated September 20, 2001, we published the proposed policies and procedures of the Arkansas Lawyers Assistance Program (ALAP). In that order, we invited comment within sixty days of that date.

Upon review of the Clerk's records, we find that no comments have been received. We have concluded our review of the proposed policies and procedures and approve them as published on September 20, 2001.

IN RE: ARKANSAS CODE of JUDICIAL CONDUCT, CANON 5

Supreme Court of Arkansas
Delivered December 20, 2001

PER CURIAM. On October 11, 2001, we published for comment the Judicial Discipline and Disability Commission's

proposed amendments to Canon 5 of the Code of Judicial Conduct. The Commission made its recommendation in a petition filed on October 1, 2001 in response to the passage of Amendment 80 to the Arkansas Constitution. This constitutional amendment, which makes judicial elections nonpartisan, necessitated modifications to Canon 5.

Numerous comments were received, and the Court has deliberated over the Commission's proposal and the comments. We thank the Commission for its work and all who took the time to review the proposal and submit comments. In light of the comments and the Court's own concerns, we have not adopted all of the Commission's recommendations but have revised Canon 5 as set out below.

In addition to Canon 5, we are also amending the Application Section and the Terminology Section of the Code. We adopt, effective this date, all of these amendments and republish these provisions of the Code of Judicial Conduct.

First, we are publishing a "line-in, line-out" version to illustrate the changes, then a clean version of the amended provisions of the Code is republished.

GLAZE, J., not participating.

Terminology.

. . . .

"Political organization" denotes a ~~political party or other~~ group, other than a political party, ~~the principal~~ a purpose of which is to participate in the political process ~~further the election or appointment of candidates to political office~~. ~~See Sections 5A(1), 5B(2) and 5C(1).~~

"Political party" has the same meaning as provided in Ark. Code Ann. § 7-1-101 (16)(A), that is, "any group of voters which at the last-preceding general election polled for its candidate for Governor in the state or nominees for presidential electors at least three percent (3%) of the entire vote cast for the office." In the case of a newly organized political party, the term "political party" shall mean a party that satisfies the requirements contained in Ark. Code Ann. § 7-3-108(b).

. . . .

CANON 5

A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.

A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:

(a) act as a leader or hold an office in a political organization or a political party;

(b) publicly endorse or publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization or a political party;

(d) ~~attend political gatherings; or~~ directly or indirectly seek or use endorsements from a political party;

(e) solicit funds for, pay an assessment to or make a contribution to a political ~~organization~~ party or candidate; or ~~purchase tickets for political party dinners or other functions,~~

(f) publicly identify his or her current political party affiliation or lend one's name to a political party.

Commentary:

A judge or candidate for judicial office retains the right to participate in the political process as a voter. As an individual, a judge is entitled to his or her personal view on political questions and to rights and opinions as a citizen. However, as a member of Arkansas non-partisan judiciary, a judge and judicial candidate must avoid any conduct which associates him or her with a political party.

As Arkansas maintains a partisan primary election process, this provision ensures that a judge or candidate may ask for a ballot in a party's primary or declare a party affiliation for voting purposes without violating ethical standards.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

Section 5A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization or a political party."

Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office. Former judges and retired judges are encouraged to not publicly endorse or publicly oppose a candidate for any public office with the use of their former title.

A candidate does not publicly endorse another candidate for public office by having that judicial candidate's name on the same ~~ticket~~ ballot of a political party primary in the section of the ballot designated as a nonpartisan judicial candidate.

Restricting candidates for judicial office from publicly identifying their affiliation in a political party and seeking or using a political party endorsement is necessary for an independent and impartial judiciary and in preserving public confidence in that independence and impartiality.

Judicial elections are nonpartisan and show that judges are impartial and independent. Such elections and those seeking judicial office should do nothing which would create the appearance of any lack of impartiality or independence on the part of the candidate and the Arkansas Judiciary.

(2) A judge shall resign from judicial office upon becoming a candidate for a non-judicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of

the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

Commentary:

Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of the Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

Commentary:

Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the Arkansas Rules of Professional Conduct.

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

B. Candidates Seeking Appointment to Judicial or Other Governmental Office.

(1) A candidate for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may:

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and

(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office;

(b) a non-judge candidate for appointment to judicial office may, in addition, unless otherwise prohibited by law;

(i) retain an office in a political organization or a political party,

(ii) attend ~~political~~ gatherings of political organizations and political parties, and

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization or a political party or candidate and purchase tickets for political party dinners or other functions.

Commentary:

Section 5B(2) provides a limited exception to the restrictions imposed by Sections 5A(1) and 5D. Under Section 5B(2), candidates seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may apply for the appointment and seek appropriate support.

Although under Section 5B(2) non-judge candidates seeking appointment to judicial office are permitted during candidacy to retain office in a political organization or a political party, attend ~~political~~ gatherings of political parties and political organizations and pay ordinary dues and assessments, they remain subject to other provisions of this Code during candidacy. See Sections 5A (1), 5B(1), 5B(2)(a), 5E and Application Section.

C. Judges and Candidates Subject to Public Election.

(1) A judge, or a candidate subject to public election may, except as prohibited by law:

(a) at any time

(i) purchase tickets for and attend ~~political~~ gatherings of a political organization or a political party;

(ii) contribute to a political organization;

(iii) privately identify himself or herself as affiliated with a political party.

(b) when a candidate for election

(i) speak to gatherings on his or her own behalf and may speak at gatherings of political organizations or political parties where all opposing judicial candidates for the same office ~~are invited~~ have the opportunity to speak ~~at the same gathering~~;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

(iii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

Commentary:

Section 5C(1)(b)(iii) allows a judicial candidate to ask an individual to place a sign supporting the candidate in his or her yard.

~~Section 5C(1) permits judges subject to election at any time to be involved in limited political activity. Section 5D, applicable solely to incumbent judges, would otherwise bar this activity.~~

(2) A candidate shall not personally solicit or accept campaign contributions. ~~or personally solicit publicly stated support.~~ A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support other than from political ~~organizations~~ parties for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers.

A candidate's committee may solicit contributions and public support for the candidate's campaign no earlier than 180 days before ~~a primary~~ an election and no later than 45 days after the last contested election in which the candidate participates during the election year. Funds received prior to the 180 day limitation or after the 45 day limitation shall be returned to the contributor. If funds are received personally by a judicial candidate, the candidate shall promptly turn them over to the campaign committee. A candidate

shall not use or permit the use of campaign contributions for the private benefit of the candidate or others. Any campaign fund surplus shall be returned to the contributors or turned over to the State Treasurer as provided by law.

Commentary:

Section 5C(2) permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. At the start of the campaign, the candidate must instruct his or her campaign committees to solicit or accept only contributions that are *permitted by law and* reasonable under the circumstances. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.

Campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible.

Section 5C(2) does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.

(3) ~~Except as prohibited by law, a candidate for judicial office in a public election may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotions of the ticket.~~

(3) A candidate for judicial office in a public election may not directly or indirectly solicit or promote the candidate's name to appear in promotions on a political party's ticket or materials paid for by a political party. Except as prohibited by law, a candidate's name, picture or other identifying information may be listed in election material sponsored by a political organization.

Commentary:

Election material published by a political organization, such as the League of Women Voters or a bar association, is unobjectionable.

~~Section 5C(3) provides a limited exception to the restrictions imposed by Section 5A(1).~~

D. Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law, the legal system or the administration of justice, or (iii) as expressly authorized by law.

Commentary:

Neither Section 5D nor any other section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary.

E. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 8.2(b) of the Arkansas Rules of Professional Conduct.

APPLICATION OF THE CODE OF JUDICIAL CONDUCT

A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.

Commentary:

The three categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this Section, as long as a retired judge is subject to recall the judge is considered to "perform judicial functions." The determination of which category and, accordingly, which specific Code provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.

B. Continuing Part-time Judge. A continuing part-time judge:

(1) is not required to comply:

(a) except while serving as a judge, with Section 3B(9); and

(b) at any time with Sections 4C(2), 4D(3), 4E(1), 4F, 4G, and 4H. ~~5A(1), 5B(2) and 5D.~~

(2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

Commentary:

When a person who has been a continuing part-time judge is no longer a continuing part-time judge, including a retired judge no longer subject to recall, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to Rule 1.12(a) of the Arkansas Rules of Professional Conduct.

C. Pro Tempore Part-time Judge or Periodic Part-time Judge.

A pro tempore part-time judge or periodic part-time judge:

(1) is not required to comply:

(a) except while serving as a judge, with Sections 2A, 2B, 3B(9) and 4C(1);

(b) at any time with Sections 2C, 4C(2), 4C(3)(a), 4C(3)(b), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), 5A(2), 5B(2) and 5D.

(2) A person who has been a pro tempore part-time judge or periodic part-time judge shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by Rule 1.12(a) of the Arkansas Rules of Professional Conduct.

Commentary:

A full time governmental official who has judicial powers which are exercised infrequently, such as a county judge, is a pro tempore part-time judge.

D. Time for Compliance. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2), 4D(3) and 4E and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

Commentary:

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period but in no event longer than one year.

ARKANSAS CODE OF JUDICIAL CONDUCT

Terminology.

. . . .

"Political organization" denotes a group, other than a political party, a purpose of which is to participate in the political process.

"Political party" has the same meaning as provided in Ark. Code Ann. § 7-1-101 (16)(A), that is, "any group of voters which at the last-preceding general election polled for its candidate for Governor in the state or nominees for presidential electors at least three percent (3%) of the entire vote cast for the office." In the case of a newly organized political party, the term "political party" shall mean a party that satisfies the requirements contained in Ark. Code Ann. § 7-3-108 (b).

. . . .

CANON 5

A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.

A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:

(a) act as a leader or hold an office in a political organization or a political party;

(b) publicly endorse or publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization or a political party;

(d) directly or indirectly seek or use endorsements from a political party;

(e) solicit funds for, pay an assessment to or make a contribution to a political party or candidate; or

(f) publicly identify his or her current political party affiliation or lend one's name to a political party.

Commentary:

A judge or candidate for judicial office retains the right to participate in the political process as a voter. As an individual, a judge is entitled to his or her personal view on political questions and to rights and opinions as a citizen. However, as a member of Arkansas non-partisan judiciary, a judge and judicial candidate must avoid any conduct which associates him or her with a political party.

As Arkansas maintains a partisan primary election process, this provision ensures that a judge or candidate may ask for a ballot in a party's primary or declare a party affiliation for voting purposes without violating ethical standards.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

Section 5A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization or a political party."

Section 5A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office. Former judges and retired judges are encouraged to not publicly endorse or publicly oppose a candidate for any public office with the use of their former title.

A candidate does not publicly endorse another candidate for public office by having that judicial candidate's name on the same ballot of a political party primary in the section of the ballot designated as a nonpartisan judicial candidate.

Restricting candidates for judicial office from publicly identifying their affiliation in a political party and seeking or using a political party endorsement is necessary for an independent and impartial judiciary and in preserving public confidence in that independence and impartiality.

Judicial elections are nonpartisan and show that judges are impartial and independent. Such elections and those seeking judicial office should do nothing which would create the appearance of any lack of impartiality or independence on the part of the candidate and the Arkansas Judiciary.

(2) A judge shall resign from judicial office upon becoming a candidate for a non-judicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of

the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

Commentary:

Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of the Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

Commentary:

Section 5A(3)(d) prohibits a candidate for judicial office from making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Section 3B(9), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court

administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the Arkansas Rules of Professional Conduct.

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

B. Candidates Seeking Appointment to Judicial or Other Governmental Office.

(1) A candidate for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may:

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and

(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to his or her qualifications for the office;

(b) a non-judge candidate for appointment to judicial office may, in addition, unless otherwise prohibited by law;

(i) retain an office in a political organization or a political party,

(ii) attend gatherings of political organizations and political parties, and

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization or a political party or candidate and purchase tickets for political party dinners or other functions.

Commentary:

Section 5B(2) provides a limited exception to the restrictions imposed by Sections 5A(1) and 5D. Under Section 5B(2), candidates seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may apply for the appointment and seek appropriate support.

Although under Section 5B(2) non-judge candidates seeking appointment to judicial office are permitted during candidacy to retain office in a political organization or a political party, attend gatherings of political parties and political organizations and pay ordinary dues and assessments, they remain subject to other provisions of this Code during candidacy. See Sections 5A(1), 5B(1), 5B(2)(a), 5E and Application Section.

C. Judges and Candidates Subject to Public Election.

(1) A judge, or a candidate subject to public election may, except as prohibited by law:

(a) at any time

(i) purchase tickets for and attend gatherings of a political organization or a political party;

(ii) contribute to a political organization;

(iii) privately identify himself or herself as affiliated with a political party.

(b) when a candidate for election

(i) speak to gatherings on his or her own behalf and may speak at gatherings of political organizations or political parties where all opposing judicial candidates for the same office have the opportunity to speak;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

(iii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

Commentary:

Section 5C(1)(b)(iii) allows a judicial candidate to ask an individual to place a sign supporting the candidate in his or her yard.

(2) A candidate shall not personally solicit or accept campaign contributions. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support other than from political parties for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers.

A candidate's committee may solicit contributions and public support for the candidate's campaign no earlier than 180 days before an election and no later than 45 days after the last contested election in which the candidate participates during the election year. Funds received prior to the 180 day limitation or after the 45 day limitation shall be returned to the contributor. If funds are received personally by a judicial candidate, the candidate shall promptly turn them over to the campaign committee. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others. Any campaign fund surplus shall be returned to the contributors or turned over to the State Treasurer as provided by law.

Commentary:

Section 5C(2) permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and reasonable financial contributions. At the start of the campaign, the candidate must instruct his or her campaign committees to solicit or accept only contributions that are permitted by law and reasonable under the circumstances. Though not

prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.

Campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible.

Section 5C(2) does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.

(3) A candidate for judicial office in a public election may not directly or indirectly solicit or promote the candidate's name to appear in promotions on a political party's ticket or materials paid for by a political party. Except as prohibited by law, a candidate's name, picture or other identifying information may be listed in election material sponsored by a political organization.

Commentary:

Election material published by a political organization, such as the League of Women Voters or a bar association, is unobjectionable.

D. Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law, the legal system or the administration of justice, or (iii) as expressly authorized by law.

Commentary:

Neither Section 5D nor any other section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary.

E. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is

subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 8.2(b) of the Arkansas Rules of Professional Conduct.

APPLICATION OF THE CODE OF JUDICIAL CONDUCT

A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.

Commentary:

The three categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this Section, as long as a retired judge is subject to recall the judge is considered to "perform judicial functions." The determination of which category and, accordingly, which specific Code provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.

B. Continuing Part-time Judge. A continuing part-time judge:

(1) is not required to comply:

(a) except while serving as a judge, with Section 3B(9); and

(b) at any time with Sections 4C(2), 4D(3), 4E(1), 4F, 4G, and 4H.

(2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

Commentary:

When a person who has been a continuing part-time judge is no longer a continuing part-time judge, including a retired judge no longer subject to recall, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all

parties pursuant to Rule 1.12(a) of the Arkansas Rules of Professional Conduct.

C. Pro Tempore Part-time Judge or Periodic Part-time Judge.

A pro tempore part-time judge or periodic part-time judge:

(1) is not required to comply:

(a) except while serving as a judge, with Sections 2A, 2B, 3B(9) and 4C(1);

(b) at any time with Sections 2C, 4C(2), 4C(3)(a), 4C(3)(b), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, 4H, 5A(1), 5A(2), 5B(2) and 5D.

(2) A person who has been a pro tempore part-time judge or periodic part-time judge shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by Rule 1.12(a) of the Arkansas Rules of Professional Conduct.

Commentary:

A full time governmental official who has judicial powers which are exercised infrequently, such as a county judge, is a pro tempore part-time judge.

D. Time for Compliance. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(2), 4D(3) and 4E and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

Commentary:

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period but in no event longer than one year.

IN RE: PROCEDURES REGULATING PROFESSIONAL CONDUCT of ATTORNEYS at LAW — SURRENDER OF LICENSE — SECTION 20(A) REVISED

Supreme Court of Arkansas
Delivered December 20, 2001

PER CURIAM. By Per Curiam issued July 9, 2001, the Court substantially amended and renumbered the sections of the Supreme Court Procedures Regulating Professional Conduct of Attorneys at Law, with the changes to be effective January 1, 2002. After further review, the Court has concluded that an additional change is needed in newly numbered Section 20(A), dealing with Surrender of License, to allow an offer of voluntary surrender to be made without a pending proceeding. That change is incorporated into the revision of Section 20(A) set out below, which shall be effective January 1, 2002, in place of the Section 20(A) published July 9, 2001.

Section 20. Surrender of License, Discipline by Consent.

(A) Surrender of License. An attorney may surrender his or her license upon the conditions agreed to by the attorney, the Executive Director, and a panel of the Committee. An attorney may offer or consent to the voluntary surrender of his or her license at any time. No petition to the Supreme Court for voluntary surrender of license by an attorney shall be granted until referred to a panel of the Committee and the recommendations of the panel are received by the Supreme Court. (See Section 20 (E)(2), for the procedure where there is a disciplinary proceeding pending, if Supreme Court does not accept the voluntary offer of surrender.)

IN RE: PROCEDURES REGULATING PROFESSIONAL CONDUCT of ATTORNEYS at LAW — SECTION 22 — RESTRICTIONS on FORMER ATTORNEYS REVISED

Supreme Court of Arkansas
Delivered December 20, 2001

PER CURIAM. By Per Curiam issued July 9, 2001, the Court substantially amended and renumbered the sections of the Supreme Court Procedures Regulating Professional Conduct of Attorneys at Law, with the changes to be effective January 1, 2002. After further review, the Court has concluded that additional changes are needed in newly numbered Section 22, dealing with restrictions on former attorneys. These latest changes are incorporated into the revision of Section 22 set out below, which shall be effective January 1, 2002, in place of the Section 22 published July 9, 2001.

Section 22. Restrictions on Former Attorneys.

A. For the purposes of this Section, a "former attorney" is any attorney who is disbarred, has surrendered a law license, is on suspension, or is on inactive status.

B. (1) A former attorney providing services to an attorney or law firm under Subsection 22.C shall not occupy, share, or use office space in any location or building where the practice of law is conducted.

(2) A former attorney shall not engage in the practice of law, nor may a former attorney engage in any employment in or related to the practice of law, except as specifically permitted in this Section.

(3) For legal service provided to a client that was not completed prior to becoming a former attorney, a former attorney may receive compensation only on a quantum meruit basis.

(4) A former attorney shall promptly take such action as is necessary to cause the removal of any indicia of lawyer, counselor at law, attorney, legal assistant, law clerk, or similar title from any association with the name of the former attorney.

C. Consistent with the restrictions in Subsection 22.B, a former attorney may provide to attorneys and law firms, whether for

or without compensation, services involving legal research, and drafting of briefs and research memorandum, provided the former attorney:

(1) Shall have no contact with clients or prospective clients of any attorney or law firm in person, by telephone, in writing, e-mail, or by any other form of communication;

(2) Shall have no contact with client funds or property;

(3) Any former attorney providing permitted services may be compensated only for the reasonable value of the services provided and shall not be compensated on a contingency basis or share in any way in any fees for legal services provided by an attorney; and

(4) Such services are not provided to any attorney or law firm with whom the former attorney had any employment affiliation as an attorney at the time of the activities which resulted in the attorney becoming a former attorney or at the time of the final action which resulted in the attorney becoming a former attorney.

D. Any attorney or law firm utilizing the services of a former attorney as permitted in this Section shall be responsible for the actions and work product of the former attorney in the rendering of such services and to ensure that the restrictions on a former attorney set out herein are observed.

E. An attorney shall not aid a former attorney in the unauthorized practice of law or in a violation of the restrictions set out herein on former attorneys. An attorney shall have an obligation, as under Model Rule 8.3, to report any violation of this Section by a former attorney.

F. The maximum punishment for an attorney, or any former attorney on suspension or on inactive status, violating this Section may be disbarment. A former attorney previously disbarred or who has surrendered a law license and who violates this Section may be deemed to be in contempt of the Supreme Court and may be punished accordingly.

IN RE: AMENDMENT to the SUPREME COURT PROCEDURES REGULATING PROFESSIONAL CONDUCT of ATTORNEYS at LAW. PROPOSED NEW SECTION 28 on ATTORNEY TRUST ACCOUNT AUTOMATIC OVERDRAFT NOTIFICATION, and TEMPORARY SUSPENSION of AMENDMENT to MODEL RULE 1.15(d)(1)

Supreme Court of Arkansas
Delivered December 20, 2001

PER CURIAM. By Per Curiam issued July 9, 2001, the Court adopted amendments to the Procedures Regulating Professional Conduct of Attorneys at Law (the "Procedures") and to Model Rule of Professional Conduct 1.15(d)(1), all to be effective January 1, 2002. The amendment to Model Rule 1.15(d)(1) established an automatic overdraft notification reporting requirement for all attorney trust accounts. To implement this new provision in amended Model Rule 1.15(d), a new provision in the Procedures is being considered. Proposed new Section 28 to the Procedures is published today, for public comment. Also attached for comment is a copy of the proposed "Attorney Trust Account Overdraft Reporting Agreement" to be executed by financial institutions desiring to participate in the program and be approved as depositories for attorney trust accounts. The comment period will run through January 18, 2002. Comments on proposed Section 28 (below) should be made in writing and addressed to:

Clerk, Arkansas Supreme Court
Attn: Procedures Regulating Professional Conduct of Attorneys
Justice Building
625 Marshall Street
Little Rock, AR 72201

Because of this action, the effective date of that part of the amendment to Model Rule 1.15(d)(1) set out **in bold wording** immediately below, is hereby suspended until further order of the Court.

Rule 1.15 Safekeeping property.

(d)(1) Each trust account referred to in (a) above shall be an interest-bearing trust account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company, and the institution shall

be insured by an agency of the federal government. **Each such account shall provide overdraft notification to the Executive Director of the Office of Professional Conduct for the purpose of reporting whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The financial institution shall report simultaneously with its notice to the lawyer the following information:**

> **(A) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;**
>
> **(B) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.**

* * *

PROPOSED NEW SECTION 28 TO THE PROCEDURES

Section 28. Attorney trust account and automatic "overdraft" notification procedure.

A. Consent By Lawyers. Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the trust account overdraft reporting and production requirements mandated by this Section.

B. Overdraft Notification Agreement Required. A financial institution shall be approved as a depository for lawyer trust accounts only if it files with the Arkansas Supreme Court Office of Professional Conduct (the "Office") an agreement, in a form provided by the Office, to report to that Office whenever any properly payable instrument is presented against any lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Office may establish additional procedures, to be approved by the Supreme Court, governing approval and revocation of approved status for financial institutions. The

Office shall annually file with the Supreme Court Clerk and the Arkansas IOLTA Foundation, and post on the Court's website, not later than January 1, a current list of approved financial institutions. No attorney or law firm trust account shall be maintained in any financial institution that does not agree to so report and is not approved by the Office. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days written notice to the Office.

C. Overdraft Reports. The overdraft notification agreement shall provide that all reports made by the financial institution to the Office shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

D. Timing of Reports. Reports under subsection 28.C shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds.

E. Costs. Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this Section.

F. Lawyers who practice law in this state shall deposit all funds held in trust in this jurisdiction in accordance with Rule 1.15(a) of the Model Rules of Professional Conduct in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts," and shall take all steps necessary to inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Lawyer trust accounts shall be maintained only in financial institutions approved by the Office.

G. Every lawyer engaged in the practice of law in this state shall maintain and preserve for a period of at least five years, after final disposition of the underlying matter, the records of the accounts, including checkbooks, canceled checks, check stubs, vouchers, ledgers, journals, closing statements, accountings or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property of a client.

H. Definitions. For purposes of this Section:

(1) Financial institution" includes a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by lawyers.

(2) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(3) "Notice of dishonor" refers to the notice that a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

(4) "Office" means the Office of Professional Conduct of the Arkansas Supreme Court.

I. The form of the "Attorney Trust Account Overdraft Reporting Agreement" attached hereto, and as may be subsequently revised, is approved for use.

J. Disapproval or Revocation of Approval of Financial Institutions.

(1) Refusal of the Office to approve a financial institution due to failure of the financial institution to timely submit an initial properly executed written agreement on the form approved by the Court or the Office is not appealable or otherwise subject to challenge, including by civil action in any court.

(2) Approval of a financial institution shall be revoked and the financial institution removed from the list of approved financial institutions if it is found by the Executive Director to

have engaged in a pattern of neglect or to have acted in bad faith in not complying with its obligations under the written agreement.

(3) The Executive Director of the Office shall communicate any decision to revoke approval to the financial institution in writing by certified mail at the address given on the agreement. The revocation notice shall state the specific reasons for the revocation decision and advise of any right to reconsideration or review. The financial institution shall have thirty (30) days from the date of receipt of the written notice to file a written request with the Executive Director seeking reconsideration of the Executive Director's decision or a review of that decision by a panel of the Committee on Professional Conduct. The financial institution may request a review by either ballot vote of a panel or a public hearing before a panel, following the Procedures. The decision of the panel shall be final and not subject to any review. The approved status of the financial institution shall continue until such time as this review process is final.

(4) Once the approval of the financial institution has been finally revoked, the institution shall not thereafter be approved as a depository for attorney trust accounts until such time as the financial institution petitions the Office for new approval, including in the petition a plan for curing any deficiencies that caused its earlier revocation and for periodically reporting compliance with the plan in the future, and approval is granted.

(5) Within fifteen (15) days of receipt of the notice of revocation, or final order of revocation if reviewed by a panel, of its approved status, a financial institution shall give written notification of the revocation action to all holders of attorney trust accounts on deposit with the financial institution, and file a report with the Office of all such attorney notification contacts within thirty (30) days of the date of receipt by the financial institution of the notice or final order of revocation.

(6) Any attorney or law firm receiving notification from a financial institution that the institution's approval as a trust account depository has been revoked shall remove all trust accounts from the financial institution within thirty (30) days of receipt of such notice or by such later date as is required for the payment of all outstanding items payable from the trust account, and shall send written notice of compliance to the

Office, including the name and address of the new trust account depository institution.

(7) Failure of any financial institution, attorney, or law firm to comply with the provisions of Section 28 may be treated as contempt of the Arkansas Supreme Court upon petition by the Office, and punished as such upon a finding of contempt.

Commentary to Section 28:

1. This Section is generally based on Rule 29 of the Model Rules for Lawyer Disciplinary Enforcement (1996) of the American Bar Association's Standing Committee on Professional Discipline.

2. This Section establishes that consent to the reporting and production requirements mandated by amended Model Rule 1.15 is a condition of the privilege to practice law in Arkansas. This condition is intended to protect financial institutions from claims by lawyer-depositors based on disclosures made by financial institutions, provided that the disclosures are in accordance with this Section. Parties to an overdraft notification agreement are the Court, through its Office of Professional Conduct, and a financial institution. The consent provision in this Section avoids the necessity for financial institutions to draft separate agreements with lawyers to establish consent to overdraft notification or for the attorney disciplinary office to do so with each attorney.

3. The overdraft notification agreement requires that all overdrafts be reported, irrespective of whether the instrument is honored. In light of the purposes of this Section, and in view of ethical proscriptions concerning the preservation of client funds and commingling of client and lawyer funds, it would be improper for a lawyer to accept overdraft privileges or any other arrangement for a personal loan on a client trust account in exchange for the institution's promise to delay or not to report an overdraft.

4. Absence of discretion makes notification by a financial institution an administratively simple matter. An institution which receives an instrument for payment against insufficient funds need not evaluate whether circumstances require that notification be given; it merely provides notice.

5. It then becomes the responsibility of the disciplinary agency to determine whether further action is necessary. In cases where an

overdraft is a result of an accounting error (caused by either the lawyer or the institution), but notification has already been sent to the Office, the institution should provide the lawyer with a written explanation (preferably, an affidavit from an officer of the institution) that the lawyer can then submit to the Office to verify the error.

6. This Section provides the proper format for overdraft reports. In so doing, the Section distinguishes between dishonored instruments and instruments that are presented against insufficient funds but honored. Where instruments are presented against insufficient funds but paid, the Section specifies the information that the institution should provide.

7. Ordinarily, within 24 hours of dishonor an institution gives notice of an overdraft to a depositor whose account is charged. See Uniform Commercial Code, Section 3-508. This is the same time period in which overdraft notification is given to the Office. Where an instrument presented against insufficient funds is honored, the financial institution should send overdraft notification to the agency within five (5) days of the date of presentation.

8. Upon receipt of an overdraft notification, this Section contemplates that the Office will contact the lawyer or firm by telephone and request an explanation for the overdraft. A letter requesting a documented explanation may also be sent. If the overdraft is an accounting error, the lawyer or firm submits a written explanation, including any documents to substantiate the claim. Where the lawyer or firm cannot supply an adequate or complete explanation for the overdraft, other action may be generated, including an audit or a demand for production of the lawyer's books and records.

9. In addition to normal monthly maintenance fees on each account, a lawyer or firm can anticipate additional fees to be charged by the financial institutions for reporting overdrafts in accordance with this Section. However, because financial institutions already flag overdrafts and returned checks, it appears only slightly more burdensome for the institution to forward a copy to the Office. As a result, the additional cost to the lawyer should not be exorbitant.

10. This Section should not be interpreted to allow a lawyer to permit trust account funds to be reduced through deductions made by a financial institution to cover costs of overdraft notification. Such costs should not be borne by clients.

11. Under the laws of most jurisdictions, the definition of "properly payable" will be contained in section 4-104 of the Uniform Commercial Code.

12. This Section sets forth the requirements for deposit of trust funds in clearly identified trust accounts in approved financial institutions. Funds held not in connection with a representation, such as a trust fund for a lawyer's own spouse or minor child, do not fall under this Section. This Section also does not concern a lawyer's own funds properly held in a non-fiduciary capacity, such as funds in a business or personal account.

13. Under Rule 1.15(a) of the Model Rules of Professional Conduct, trust property may be held outside the lawyer's home jurisdiction upon consent of the client. The overdraft notification rule here governs funds held within the adopting state. A lawyer's obligation to deposit trust funds in an approved institution will arise upon adoption of the overdraft notification rule in a state where the lawyer deposits trust funds, whether that state is the state wherein the lawyer's office is situated or some other state.

14. Under the laws of most jurisdictions, the definition of "notice of dishonor" will be determined by reference to section 3-508 of the Uniform Commercial Code, under which notice must be given by a bank before its midnight deadline and by any other person or institution before midnight on the third business day after dishonor or receipt of notice of dishonor.

ATTORNEY TRUST ACCOUNT OVERDRAFT REPORTING AGREEMENT

To: Arkansas Supreme Court Office of Professional Conduct (the "Office")
Justice Building, Room 110
625 Marshall Street
Little Rock, AR 72201-1054

The undersigned, being a duly authorized officer of (name of institution)

_____,

a financial institution doing business in the State of Arkansas, and the agent of the named financial institution specifically authorized to enter into this agreement, hereby applies to receive attorney trust accounts in the State of Arkansas. In consideration of approval by the Office of this financial institution, the financial institution agrees

to comply with the overdraft reporting requirements for such financial institutions as set forth in Section 28 of the Supreme Court Procedures Regulating Professional Conduct of Attorneys at Law (Rev. 2002) (the "Procedures"), which is incorporated herein by reference, and any other rules or procedures for overdraft reporting promulgated by the Arkansas Supreme Court or the Office, and any later amendments to such rules or procedures.

Specifically, the named financial institution agrees to report to the Office all events involving trust account instruments, and to report in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

All reports shall be made within the following time periods:

(1) In the case of a dishonored instrument, simultaneously with, and within the time provided by law for, notice of dishonor;

(2) In the case of an instrument that is presented against insufficient funds but which instrument is honored, within five (5) banking days of the date of presentation for payment against insufficient funds.

This agreement shall apply to all branches of the named financial institution and shall not be cancelled except upon thirty (30) days written notice to the Executive Director of the Office at the address listed above.

Name and address of financial institution:

_____

_____

Date:_____ _____

Signature of Authorized Official

Corporate Seal

_____
Printed or Typed Name of Authorized Official

_____
Title or Position of Authorized Official

ACKNOWLEDGMENT

On this ____ day of _____, 2____, before me, a Notary Public for the State of Arkansas, appeared the above-named individual, known to me to the person executing this instrument, and acknowledged and executed this instrument as his/her free and voluntary act.

_____
Notary Public (signature)

My Commission Expires: _____

ACCEPTANCE

The above-named financial institution is hereby approved by the Arkansas Supreme Court Office of Professional Conduct as a depository for attorney trust accounts in the State of Arkansas until such time as this agreement is cancelled by the financial institution upon thirty (30) days written notice to the Office, or is revoked by action of the Executive Director of the Office.

Date _____

_____
Executive Director, Office of Professional Conduct

(01-01-2002 ed.)

IN RE: ARKANSAS RULES of CIVIL PROCEDURE; and RULES of the SUPREME COURT and COURT of APPEALS

Supreme Court of Arkansas
Delivered January 24, 2002

PER CURIAM. On November 8, 2001, we published for comment the Arkansas Supreme Court Committee on Civil Practice's proposals for changes in the Arkansas Rules of Civil Procedure, Inferior Court Rules, Rules of Appellate Procedure—Civil, and Rules of the Supreme Court and Court of Appeals. We thank everyone who reviewed the proposals and submitted comments.

The proposals with two exceptions[1] will be implemented. We encourage all judges and lawyers to review this *per curiam* order to familiarize themselves with the changes to the rules, but we want to emphasize the change in Rule 4-2 of the Rules of the Supreme Court and Court of Appeals. The Argument portion of a brief now requires the following: "For each issue, the applicable standard of review shall be concisely stated at the beginning of the discussion of the issue."

We again express our gratitude to the members of our Civil Practice Committee for the Committee's diligence in performing the important task of keeping our civil rules current, efficient, and fair.

The amendments to Ark. R. Civ. P. 4(d)(8)(C) and 5(b) are deemed to supersede Ark. Code Ann. § 1-2-122(b) with respect to the service of process and other papers.

We adopt the following amendments to be effective immediately and republish the rules and Reporter's Notes as set out below.

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[1] No action is being taken at this time with respect to the Inferior Court Rules, and the Civil Practice Committee is requested to review these rules in light of a comment which was received.

The proposed change to Rule 5 of the Rules of Appellate Procedure—Civil is not being adopted. Although the Committee's recommendation makes some good points, practitioners are familiar with the calculation of time under the existing rule, and any benefit in adopting the recommendation is offset by the learning curve which would be necessary to implement it.

Arkansas Rules of Civil Procedure

1. The Table of Contents preceding the Rules of Civil Procedure is revised by including ten headings, as follows:

I. Scope of Rules — One Form of Action

1. Scope of rules.
2. One form of action.

II. Commencement of Action; Service of Process, Pleadings, Motions, and Orders

3. Commencement of action — "Clerk" defined.
4. Summons.
5. Service and filing of pleadings and other papers.
6. Time.

III. Pleadings and Motions

7. Pleadings and motions.
8. General rules of pleading.
9. Pleading special matters.
10. Form of pleadings.
11. Signing of pleadings, motions, and other papers; sanctions.
12. Defenses and objections — When and how presented — By pleading or motion — Motion for judgment on the pleadings.
13. Counterclaim and cross-claim.
14. Third-party practice.
15. Amended and supplemental pleadings.
16. Pretrial procedure; formulated issues.

IV. Parties

17. Parties plaintiff and defendant.
18. Joinder of claims and remedies.
19. Joinder of persons needed for just adjudication.
20. Permissive joinder of parties.
21. Misjoinder and non-joinder of parties.
22. Interpleader.
23. Class actions.
23.1. Actions by shareholders.
23.2 Actions relating to unincorporated associations.
24. Intervention.

25. Substitution of parties.

V. Depositions and Discovery

26. General provisions governing discovery.
27. Depositions before action or pending appeal.
28. Persons before whom depositions may be taken.
29. Stipulations regarding discovery procedures.
30. Depositions upon oral examination.
31. Depositions upon written questions.
32. Use of depositions in court proceedings.
33. Interrogatories to parties.
34. Production of documents and things and entry upon land for inspection and other purposes.
35. Physical and mental examination of persons.
36. Requests for admission.
37. Failure to make discovery; sanctions.

VI. Trials

38. Jury trial of right.
39. Trial by jury or by the court.
40. Trial settings and continuances.
41. Dismissal of actions.
42. Consolidation; separate trials.
43. Taking of testimony.
44. Proof of official record.
44.1. Determination of foreign law.
45. Subpoena.
46. Exceptions unnecessary.
47. Jurors.
48. Number of jurors — Verdict.
49. Verdicts and interrogatories.
50. Motion for directed verdict and for judgment notwithstanding verdict.
51. Instructions to jury; objection.
52. Findings by the court.
53. Masters.

VII. Judgment

54. Judgments; costs.
55. Default.
56. Summary judgment.
57. Declaratory judgments.
58. Entry of judgment or decree.

59. New trials.
60. Relief from judgment, decree or order.
61. Harmless error.
62. Stay of proceedings to enforce a judgment.
63. Disability of a judge.

VIII. Counsel; Provisional and Final Remedies; Suits in Forma Pauperis.

64. Addition and withdrawal of counsel.
65. Injunctions and temporary restraining orders.
65.1. Security; proceedings against sureties.
66. Receivers.
67. Deposit in court.
68. Offer of judgment.
69. Execution discovery.
70. Judgment for specific acts; vesting title.
71. Process in behalf of and against persons not parties.
72. Suits in forma pauperis.
73-76. [Reserved.]

IX. Circuit Courts and Clerks.

77. Courts and clerks.
78. Motion day and hearings on motions.
79. [Abolished.]
80. Admissibility of testimony at prior trial.

X. General Provisions.

81. Applicability of rules.
82. Jurisdiction and venue unaffected.
83. [Abolished.]
84. Uniform paper size.
85. Title.
86. Effective date.

2. Subdivisions (c), (d), (f), and (g) of Rule 4 are amended to read as follows:

(c) *By Whom Served.* Service of summons shall be made by (1) a sheriff of the county where the service is to be made, or his or her deputy, unless the sheriff is a party to the action; (2) any person not less than eighteen years of age appointed for the purpose of serving summons by either the court in which the action is filed or a court in the county in which service is to be made; (3) any

person authorized to serve process under the law of the place outside this state where service is made; or (4) in the event of service by mail or commercial delivery company pursuant to subdivision (d)(8) of this rule, by the plaintiff or an attorney of record for the plaintiff.

(d) *Personal Service Inside the State.* A copy of the summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made upon any person designated by statute to receive service or as follows:

* * *

(4) Where the defendant is confined in a state or federal penitentiary or correctional facility, service must be upon the keeper or superintendent of the institution who shall deliver a copy of the summons and complaint to the defendant. A copy of the summons and complaint shall also be sent to the defendant by first class mail and marked as "legal mail" and, unless the court otherwise directs, to the defendant's spouse, if any.

(8)(A) * * *

(B) * * *

(C) Service of a summons and complaint upon a defendant of any class referred to in paragraphs (1) through (5) and (7) of this subdivision may also be made by the plaintiff or an attorney of record for the plaintiff using a commercial delivery company that (i) maintains permanent records of actual delivery, and (ii) has been approved by the circuit court in which the action is filed or in the county where service is to be made. The summons and complaint must be delivered to the defendant or an agent authorized to receive service of process on behalf of the defendant. The signature of the defendant or agent must be obtained. Service pursuant to this paragraph shall not be the basis for a judgment by default unless the record reflects actual delivery on and the signature of the defendant or agent, or an affidavit by an employee of an approved commercial delivery company reciting or showing refusal of the process by the defendant or agent. If delivery of process is refused, the plaintiff or attorney making such service, promptly upon receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default may be rendered against the defendant unless he or she

appears to defend the suit. A judgment by default may be set aside pursuant to Rule 55(c) if the court finds that someone other than the defendant or agent signed the receipt or refused the delivery or that the commercial delivery company had not been approved as required by this subdivision.

* * *

(f) *Service by Warning Order.* (1) If it appears by the affidavit of a party seeking judgment or his or her attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, or if a party seeks a judgment that affects or may affect the rights of persons who are not and who need not be subject personally to the jurisdiction of the court, service shall be by warning order issued by the clerk. This subdivision shall not apply to actions against unknown tortfeasors.

(2) The warning order shall state the caption of the pleadings; include, if applicable, a description of the property or other res to be affected by the judgment; and warn the defendant or interested person to appear within 30 days from the date of first publication of the warning order or face entry of judgment by default or be otherwise barred from asserting his or her interest. The party seeking judgment shall cause the warning order to be published weekly for two consecutive weeks in a newspaper having general circulation in the county where the action is filed and to be mailed, with a copy of the complaint, to the defendant or interested person at his or her last known address by any form of mail with delivery restricted to the addressee or the agent of the addressee.

(3) If the party seeking judgment has been granted leave to proceed as an indigent without prepayment of costs, the clerk shall conspicuously post the warning order for a continuous period of 30 days at the courthouse or courthouses of the county wherein the action is filed. The party seeking judgment shall cause the warning order to be mailed, with a copy of the complaint, to the defendant or interested person as provided in paragraph (2). Newspaper publication of the warning order is not required.

(4) No judgment by default shall be taken pursuant to this subdivision unless the party seeking the judgment or his or her attorney has filed with the court an affidavit stating that 30 days have elapsed since the warning order was first published as provided in paragraph (2) or posted at the courthouse pursuant to paragraph (3). If a defendant or other interested person is known to the party seeking judgment or to his or her attorney, the affidavit shall also

state that 30 days have elapsed since a letter enclosing a copy of the warning order and the complaint was mailed to the defendant or other interested person as provided in this subdivision.

(g) *Proof of Service.* The person effecting service shall make proof thereof to the clerk within the time during which the person served must respond to the summons. If service is made by a sheriff or his deputy, proof may be made by executing a certificate of service or return contained in the same document as the summons. If service is made by a person other than a sheriff or his deputy, the person shall make affidavit thereof, and if service has been by mail or commercial delivery company, shall attach to the affidavit a return receipt, envelope, affidavit or other writing required by Rule 4(d)(8). Proof of service in a foreign country, if effected pursuant to the provisions of a treaty or convention as provided in Rule 4(e)(4), shall be made in accordance with the applicable treaty or convention.

Rule 4 is amended further by deleting subdivision (j) and redesignating subdivision (k) as subdivision (j), as follows:

(j) *Service of Other Writs and Papers.* Whenever any rule or statute requires service upon any person, firm, corporation or other entity of notices, writs, or papers other than a summons and complaint, including without limitation writs of garnishment, such notices, writs or papers may be served in the manner prescribed in this rule for service of a summons and complaint. Provided, however, any writ, notice or paper requiring direct seizure of property, such as a writ of assistance, writ of execution, or order of delivery shall be made as otherwise provided by law.

The Reporter's Notes accompanying Rule 4 are amended by adding the following:

Addition to Reporter's Notes, 2002 Amendment: Subdivision (c)(4) has been amended to refer to service by a commercial company, an option authorized by new paragraph (C) of subdivision (d)(8) and discussed below. Over the years, lawyers have questioned the efficacy of service by mail under paragraph (A) of subdivision (d)(8), in part because the postal service does not always follow its own rules regarding restricted delivery mail.

Subdivision (d) has been revised to provide that service shall be made as provided in that subdivision or "upon any person

designated by statute to receive service." This provision incorporates statutes which, for example, provide for service on the registered agent of a corporation. *E.g.*, Ark. Code Ann. §§ 4-26-503, 4-27-1510. It was deemed advisable in light of case law suggesting that Rule 4 is exclusive as to the recipients of process, despite language in subdivisions (d)(1) & (5) permitting service on an "agent authorized . . . by law to receive service of summons." *See, e.g., May v. Bob Hankins Distributing Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990).

Subdivision (d)(4) has been amended to require the plaintiff not only to serve the superintendent of the correctional facility housing the defendant (as well as the defendant's spouse, if any, unless the court orders otherwise), but also to send a copy of the summons and complaint, marked as "legal mail," to the defendant by first class mail. This additional safeguard is similar to that found in substituted service statutes. *E.g.*, Ark. Code Ann. §§ 16-58-120(b)(2)(B) (in addition to serving Secretary of State, plaintiff must mail copy of summons and complaint to defendant at last known address).

New paragraph (C) of subdivision (d)(8) permits service by "a commercial delivery company that (i) maintains permanent records of actual delivery and (ii) has been approved by the circuit court in which the action is filed or in the county where service is to be made." Service of papers by commercial delivery companies under Rule 5 has been allowed for more than a decade with no apparent problem. *See* Rule 5(b)(2) & Addition to Reporter's Notes, 1989 Amendment. Rule 5(b)(2) has been amended to require court approval of the commercial delivery company, a requirement imposed by new paragraph (C) of this rule.

Paragraph (C) is more restrictive than Ark. Code Ann. §§ 1-2-122(b), which allows service by "an alternative mail carrier." The statute has thus been superseded with respect to service of process. Paragraph (C) contains additional safeguards similar to those found in paragraph (A) for service by mail and requires, as does subdivision (c)(2) with respect to service by a private person, that the commercial delivery company be approved by the circuit court of the county where the action is filed or where service is to be made. This approval may be in the form of a standing order or may be made on a case-by-case basis, as under subdivision (c)(2). *See* Addition to Reporter's Notes to Rule 4, 1999 Amendment.

The rule has also been amended to provide uniform requirements for warning orders. Those requirements are contained in

revised subdivision (f), which deals with both situations in which service by warning order is permissible, *i.e.*, "when the identity or whereabouts of a defendant remains unknown, or if a party seeks a judgment that affects or may affect the rights of persons who are not and who need not be subject personally to the jurisdiction of the court." Former subdivision (j) has been deleted and former subdivision (k) redesignated as subdivision (j).

3. Subdivision (b) of Rule 5 is amended to read as follows:

(b) *Service: How Made.* (1) * * *

(2) Except as provided in paragraph (3) of this subdivision, service upon the attorney or upon the party shall be made by delivering a copy to him or by sending it to him by regular mail or commercial delivery company at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy for purposes of this paragraph means handing it to the attorney or to the party; by leaving it at his office with his clerk or other person in charge thereof; or, if the office is closed or the person has no office, leaving it at his dwelling house or usual place of abode with some person residing therein who is at least 14 years of age. Service by mail is presumptively complete upon mailing, and service by commercial delivery company is presumptively complete upon depositing the papers with the company. When service is permitted upon an attorney, such service may be effected by electronic transmission, provided that the attorney being served has facilities within his office to receive and reproduce verbatim electronic transmissions. Service by a commercial delivery company shall not be valid unless the company: (A) maintains permanent records of actual delivery, and (B) has been approved by the circuit court in which the action is filed or in the county where service is to be made.

(3) If a final judgment or decree has been entered and the court has continuing jurisdiction, service upon a party by mail or commercial delivery company shall comply with the requirements of Rule 4(d)(8)(A) and (C), respectively.

The Reporter's Notes accompanying Rule 5 are amended by adding the following:

Addition to Reporter's Notes, 2002 Amendment: Since 1989, subdivision (b)(2) has allowed service of papers, other than the summons and complaint, on attorneys via commercial delivery companies. This subdivision has been amended to allow service by

this method on parties as well, but with the safeguard that the commercial delivery company be court-approved. Section 1-2-122(b) of the Arkansas Code, which allowed service by "an alternative mail carrier," has been deemed superseded.

Subdivision (b)(2) has also been revised to provide that "service by commercial delivery company is presumptively complete upon depositing the papers with the company." This provision parallels that for service by mail, which "is presumptively complete upon mailing." Subdivision (b)(3), which applies when the circuit court has continuing jurisdiction, has been amended to reflect the addition of new paragraph (C) of Rule 4(d)(8).

4. Subdivision (c) of Rule 6 is amended to read as follows:

(c) *For Motions, Responses, and Replies.* A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 20 days before the time specified for the hearing. Any party opposing a motion shall serve a response within 10 days after service of the motion. The movant shall then have 5 days after service of the response within which to serve a reply. The time periods set forth in this subdivision may be modified by order of the court and do not apply when a different period is fixed by these rules, including Rules 56(c) and 59(d).

The Reporter's Notes accompanying Rule 6 are amended by adding the following:

Addition to Reporter's Notes, 2002 Amendment: Rule 6(c) has been amended to clarify the timing of motions, responses, and replies. A related change with respect to motion practice has been made in Rule 7(b), which governs the form and content of motions, responses, and replies. Cross-references to Rules 6(c) and 7(b) have been added to Rule 12(i) and Rule 78(b).

Under the prior version of subdivision (c), a written motion and notice of hearing had to be served no later than ten days prior to the date set for hearing. At the same time, Rule 78(b) provided a ten-day period for a response and a five-day period for reply. As a result, there might be no time for a reply. To address this problem, the ten-day period in subdivision (c) has been expanded to twenty days. Also, the provisions governing the timing of responses and replies have been shifted from Rule 78(b) to subdivision (c). As was previously the case, the court may modify the time periods by order. These periods are inapplicable when a different time frame is

established by another rule, *e.g.*, Rule 56(c) (motions for summary judgment).

The provision in the former version of subdivision (c) as to supporting affidavits now appears in Rule 7(b)(2).

5. Rule 7 is amended by changing the title of the rule to "Pleadings and motions," and subdivision (b) is amended to read as follows:

(b) *Motions and Other Papers.*

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) All motions required to be in writing and any responses and replies shall include a brief supporting statement of the factual and legal basis for the motion, response, or reply and the citations relied upon. Any supporting affidavits shall be served with the motion, response, or reply. Failure to satisfy these requirements shall be ground for the court's striking the motion, response, or reply. The court is not required to grant a motion solely because no response or brief has been filed.

(3) The rules applicable to captions, signings, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

The Reporter's Notes accompanying Rule 7 are amended by adding the following:

Addition to Reporter's Notes, 2002 Amendment: New paragraph (2) of subdivision (b) addresses matters that previously appeared in Rule 6(c) (supporting affidavits) and Rule 78(b) (content of motions). With these changes, Rule 6(c) governs the timing of motions, responses, and replies, while Rule 7(b) governs their content. Rule 78(b) simply cross-references these provisions. Former paragraph (2) of subdivision (b) has been redesignated as paragraph (3), and minor changes have been made in the titles of subdivision (b) and the rule.

6. Subdivision (i) of Rule 12 is amended to read as follows:

(i) *Response to Motions; Reply.* Any response in opposition to a motion under this rule and any reply to such a response shall be made as provided in Rules 6(c) and 7(b).

The Reporter's Notes accompanying Rule 12 are amended by adding the following:

Addition to Reporter's Notes, 2002 Amendment: Subdivision (i) of the rule previously included time periods for serving responses to motions and replies to responses. These matters are now governed by Rule 6(c), and subdivision (i) has been amended to provide a cross-reference to that provision. There has also been added a cross-reference to Rule 7(b), which governs the content of motions, responses, and replies.

7. Subdivision (f) of Rule 45 is amended to read as follows:

(f) *Depositions for Use in Out-of-State Proceedings.* Any party to a proceeding pending in a court of record outside this state may take the deposition of any person who may be found within this state. A party who has filed a notice of deposition upon oral examination in an out-of-state proceeding, which complies with Rule 30(b), may file a certified copy thereof with the circuit clerk of the county in which the deposition is to be taken; whereupon, the clerk shall issue a subpoena in accordance with the notice. A deposition, including any subpoenas issued therefor, shall be subject to these rules as well as to any rule or statute creating a privilege or immunity from discovery. Any objection or motion for protective order with respect to the deposition shall be heard by a circuit judge of the county in which the deposition is to be taken.

The Reporter's Notes accompanying Rule 45 are amended by adding the following:

Addition to Reporter's Notes, 2002 Amendment: The third sentence of subdivision (f) has been amended to expressly provide that a deposition taken for use in an out-of-state proceeding is subject to the Rules of Civil Procedure, as well as to any rule or statute "creating a privilege or immunity from discovery." Previously, this sentence stated only that the Rules applied to subpoenas issued for such depositions. Also, the last sentence of subdivision (f) has been revised to include a specific reference to motions for protective orders made with respect to the deposition pursuant to Rule 26(c). The former version of this sentence mentioned only objections.

8. The following Reporter's Note is adopted to accompany the subpoena form promulgated by the Court in connection with Rule 45:

Reporter's Notes Regarding Subpoena Form

This form was designed for civil cases, including probate and juvenile matters, and should not be used in criminal proceedings. It is based on the form used in the federal courts. *See* Form AO 88, Subpoena in a Civil Case (Rev. 1994), reprinted in 1B Federal Procedural Forms §§ 1:1270 (1999). However, it departs from the federal model as necessary to accommodate differences between the Arkansas Rules of Civil Procedure and the federal rules.

Rule 45 does not mention the form, but the Supreme Court's order of adoption describes it as "official." *In re Arkansas Rules of Civil Procedure*, 340 Ark. 731, 733 (2000). Although use of an exact reproduction of the form is not mandatory, a subpoena must include all information called for by the form. For example, the second page of the form contains a "notice to persons subject to subpoenas" intended to advise those persons of their rights and duties under Rule 45. A subpoena without this information would be subject to challenge. However, so long as the necessary information is included, use of a "home-grown" document should not be fatal.

Additional information may be included if it is not inconsistent with Rule 45 or the form itself. For instance, a subpoena issued by the clerk might contain the name, address and phone number of the attorney who requested its issuance. Other information can be added in certain spaces on the form. The division in which the case is pending may also be included along with the street address in the box labeled "place of testimony."

On the other hand, modification of the form in such a way that distorts the controlling law or misleads the recipient is impermissible. Under Rule 45(b), for example, a subpoena *duces tecum* directed to a non-party is permissible only in connection with a deposition, hearing, or trial. Consequently, adding to the form a box to be checked and an accompanying statement to the effect that the recipient is commanded to permit inspection of specified documents at counsel's office on a given date, is not permissible. By contrast, the federal form offers this option, which is available under the federal rules. *See* Rules 34(c) & 45(a)(1)(C), Fed. R. Civ. P.

Unless a statute provides a procedure different from that specified in Rule 45, the rule and the form are applicable in probate and juvenile cases. Certain probate matters — such as will contests and adoptions — are "special proceedings" within the meaning of Rule 81(a) and thus excepted from the Rules of Civil Procedure if a statute sets out a different procedure. *E.g., Brantley v. Davis*, 305 Ark. 68, 805 S.W.2d 75 (1991). Some juvenile matters may also be special proceedings. *See Kelley v. State*, 191 Ark. 848, 88 S.W.2d 65 (1935). If there is no such statute, then the rules apply. *Norton v. Hinson*, 337 Ark. 487, 989 S.W.2d 535 (1999).

There appears to be only one statute that uses the word "subpoena" in connection with probate cases, and it does not conflict with Rule 45. *See* Ark. Code Ann. §§ 5-2-317(b)(3). By statute, the Rules of Civil Procedure apply to "all proceedings" in juvenile cases "until rules of procedure for juvenile court are developed and in effect," except as otherwise provided by the juvenile code. Ark. Code Ann. §§ 9-27-325(f). No such rules have been promulgated, and the only statute dealing with subpoenas in juvenile cases is not inconsistent with Rule 45. *See* Ark. Code Ann. §§ 9-27-310(e). Accordingly, the rule and the subpoena form apply in probate and juvenile proceedings.

9. Subdivision (b), (c), and (d) of Rule 78 are amended to read as follows:

(b) *Motions, Responses, and Replies.* The form and content of motions, responses, and replies are governed by Rule 7(b). The timing of motions, responses, and replies is governed by Rule 6(c).

(c) *Hearing; Waiver.* The court, upon notice to all parties, may hold a hearing on a motion only after the time for reply has expired; however, the court may hear a proper ex parte motion at any time. Unless a hearing is requested by counsel or is ordered by the court, a hearing will be deemed waived and the court may act upon the matter without further notice after the time for reply has expired.

(d) *Mandamus and Prohibition.* Upon the filing of petitions for writs of mandamus or prohibition in election matters, it shall be the mandatory duty of the circuit court having jurisdiction to fix and announce a day of court to be held no sooner than 2 and no longer than 7 days thereafter to hear and determine the cause.

The Reporter's Notes accompanying Rule 78 are amended by adding the following:

Addition to Reporter's Notes, 2002 Amendment: The provisions of subdivision (b) have been deleted and replaced with cross-references to Rule 6(c), which now governs the timing of motions, responses, and replies, and to Rule 7(b), which now governs their content. Under the new first sentence of subdivision (c), the court may not hold a hearing on a motion, except one that may properly be heard ex parte, until the time for reply has expired. A similar provision was added to Rule 56(c), which applies to motions for summary judgment, in 2001. The title of subdivision (c) has been revised to make plain that it does not refer simply to waiver of hearings, and stylistic changes have been made in subdivision (d).

Rules of the Arkansas Supreme Court and Court of Appeals

1. Rule 4-2 (a)(7) is amended to read as follows:

Rule 4-2. Contents of briefs.

(a) *Contents.* * * *

(7) *Argument.* Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon. For each issue, the applicable standard of review shall be concisely stated at the beginning of the discussion of the issue. Citations of decisions of the Court which are officially reported must be from the official reports. All citations of decisions of any court must state the style of the case and the book and page in which the case is found. If the case is also reported by one or more unofficial publishers, these should also be cited, if possible. Reference in the argument portion of the parties' briefs to material found in the abstract and Addendum shall be followed by a reference to the page number of the abstract or Addendum at which such material may be found. The number of pages for argument shall comply with Rule 4-1(b).

2. New Rule 6-8 is adopted as follows:

Rule 6-8. Certification of Questions of Law.

(a) *Power to Answer.* (1) The Supreme Court may, in its discretion, answer questions of law certified to it by order of a federal court of the United States if there are involved in any proceeding before it questions of Arkansas law which may be determinative of the cause then pending in the certifying court and as to which it

appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

(2) The Supreme Court shall decide whether to answer the question so certified within 30 days of the filing of the certification order. The Clerk shall mail notice of this decision to the certifying court, counsel of record, and parties appearing without counsel. The notice shall also state whether portions of the record, if any, are to be filed pursuant to subdivision (d) of this rule, as well as the briefing schedule and the approximate date the question certified will come before the Supreme Court for consideration.

(3) If the Supreme Court takes no action within 30 days of the filing of the certification order, the Court shall be deemed to have declined to answer the question unless it has by order extended the time.

(4) If the certification order is filed when the Supreme Court is formally in recess, the 30-day time period shall commence when the Court returns from the recess.

(5) In its discretion, the Supreme Court may at any time rescind its decision to answer a certified question. The Clerk shall promptly mail notice to the certifying court, counsel of record, and parties appearing without counsel.

(b) *Method of Invoking.* This rule may be invoked upon motion of a federal court of the United States or upon motion of any party to the cause pending before the court.

(c) *Contents of Certification Order.* (1) A certification order shall contain: (A) the question of law to be answered; (B) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose; (C) a statement acknowledging that the Supreme Court, acting as the receiving court, may reformulate the question; and (D) the names and addresses of counsel of record and parties appearing without counsel.

(2) If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.

(d) *Preparation of Certification Order.* The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the clerk of the Supreme Court by the clerk of the certifying court under its official seal.

The Supreme Court may require the original or copies of all or any portion of the record before the certifying court to be filed if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(e) *Costs of Certification.* Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its certification order.

(f) *Briefs and Argument.* Proceedings in the Supreme Court shall be those provided in these rules.

(g) *Opinion.* The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

(h) *Power to Certify; Procedure.* The Supreme Court or the Court of Appeals, on their own motion or the motion of any party, may order certification of questions of law to the highest court of any other state when it appears to the Supreme Court or the Court of Appeals that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending and that there are no controlling precedents in the decisions of the highest court of the receiving state. The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

IN RE: ADMINISTRATIVE ORDER NUMBER 10: ARKANSAS CHILD SUPPORT GUIDELINES

Supreme Court of Arkansas
Opinion delivered January 31, 2002

PER CURIAM. On February 5, 1990, this Court first adopted guidelines for child support in response to P.L. 100-485 and Ark. Code Ann. § 9-12-312(a). Effective October, 1989, P.L.

100-485 required the following: that all states adopt guidelines for setting child support; that it be a rebuttable presumption that the amount of support calculated from the child-support chart is correct; and that each state's guidelines be reviewed and revised, as necessary, at least every four years. In response to the federal law, the Arkansas General Assembly enacted Ark. Code Ann. § 9-12-312, which included the federal provisions and authorized the Arkansas Supreme Court to develop guidelines based on recommendations submitted to the Court by a committee appointed by the Chief Justice.

The Committee on Child Support initially made recommendations to the Court which formed the substance of the 1990 Per Curiam Order. On May 13, 1991, pursuant to the Committee's recommendations, the Court issued a new Per Curiam Order which supplemented the original. Then, in compliance with the four-year requirement of P.L. 100-485, the Committee submitted recommendations to the Court in October, 1993, and the Court issued a Per Curiam Order on October 23, 1993, adopting the guidelines which subsequently were published in the *Court Rules* volume of the *Arkansas Code Annotated.*

On September 25, 1997, again pursuant to the four-year requirement of P.L. 100-485, the Court issued a Per Curiam Order, adopting recommendations of the Child Support Committee. In addition, the Court adopted and published *Administrative Order Number 10 — Arkansas Child Support Guidelines*, effective October 1, 1997. The Administrative Order incorporated by reference the weekly and monthly family-support charts and the Affidavit of Financial Means. The Court republished *Administrative Order Number 10* with a Per Curiam Order of January 22, 1998, making minor corrections to the child-support charts and to the Affidavit of Financial Means.

In the ensuing four years, the Committee has continued to study the existing guidelines, pursuant to federal and state law, and once again has submitted its recommendations to the Court. Having carefully considered these most recent recommendations, the Court adopts and publishes *Administrative Order Number 10 — Arkansas Child Support Guidelines*, effective February 11, 2002. This Administrative Order includes and incorporates by reference the revised weekly and monthly family-support charts and the revised Affidavit of Financial Means which are attached to Administrative Order No. 10.

The Court thanks the Committee for its service, and as it has done in the past, directs the Committee and the Chief Justice, as its liaison, to continue its charge pursuant to law and the rules of this Court.

GLAZE and CORBIN, JJ., dissent.

* * *

ADMINISTRATIVE ORDER NUMBER 10 — CHILD SUPPORT GUIDELINES

SECTION I. AUTHORITY AND SCOPE.

Pursuant to Act 948 of 1989, as amended, codified at Ark. Code Ann. § 9-12-312(a) and the Family Support Act of 1988, Pub. L. No. 100-485 (1988), the Court adopts and publishes Administrative Order Number 10 — Child Support Guidelines. This Administrative Order includes and incorporates by reference the attached weekly and monthly family-support charts and the attached Affidavit of Financial Means.

It is a rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the Family Support Chart is the amount of child support to be awarded in any judicial proceeding for divorce, separation, paternity, or child support. The court may grant less or more support if the evidence shows that the needs of the dependents require a different level of support.

All orders granting or modifying child support (including agreed orders) shall contain the court's determination of the payor's income, recite the amount of support required under the guidelines, and recite whether the court deviated from the Family Support Chart. If the order varies from the guidelines, it shall include a justification of why the order varies as may be permitted under Section V hereinafter. It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support Chart is correct, if the court enters in the case a specific written finding within the Order that the amount so calculated, after consideration of all relevant factors, including the best interests of the child, is unjust or inappropriate.

SECTION II. DEFINITION OF INCOME.

Income means any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest less proper deductions for:

1. Federal and state income tax;

2. Withholding for Social Security (FICA), Medicare, and railroad retirement;

3. Medical insurance paid for dependent children; and

4. Presently paid support for other dependents by court order.

SECTION III. CALCULATION OF SUPPORT.

a. Basic Considerations.

The most recent revision of the family support charts is based on the weekly and monthly income of the payor parent as defined in Section II.

For purposes of computing child support payments, a month consists of 4.334 weeks. Biweekly means a payor is paid once every two weeks or 26 times during a calendar year. Bimonthly means a payor is paid twice a month or 24 times during a calendar year.

Use the lower figure on the chart for income to determine support. Do not interpolate (i.e., use the $200.00 amount for all income pay between $200.00 and $210.00 per week.)

The amount paid to the Clerk of the Court or to the Arkansas Clearinghouse for administrative costs pursuant to Ark. Code Ann. § 9-12-312(e)(1)(A), § 9-10-109(b)(1)(A), and § 9-14-804(b) is not to be included as support.

b. Income Which Exceeds Chart.

When the payor's income exceeds that shown on the chart, use the following percentages of the payor's weekly or monthly income as defined in SECTION II to set and establish a sum certain dollar amount of support:

One dependent: 15%
Two dependents: 21%

Three dependents: 25%
Four dependents: 28%
Five dependents: 30%
Six dependents: 32%

c. Nonsalaried Payors.

For Social Security Disability recipients, the court should consider the amount of any separate awards made to the disability recipient's spouse and children on account of the payor's disability. SSI benefits shall not be considered as income.

For Veteran's Administration disability recipients, Workers' Compensation disability recipients, and Unemployment Compensation recipients, the court shall consider those benefits as income.

For military personnel, see the latest military pay allocation chart and benefits. BAQ (quarters allowance) should be added to other income to reach total income. Military personnel are entitled to draw BAQ at a "with dependents" rate if they are providing support pursuant to a court order. However, there may be circumstances in which the payor is unable to draw BAQ or may draw BAQ only at the "without dependents" rate. Use the BAQ for which the payor is actually eligible. In some areas, military personnel receive a variable allowance. It may not be appropriate to include this allowance in calculation of income since it is awarded to offset living expenses which exceed those normally incurred.

For commission workers, support shall be calculated based on minimum draw plus additional commissions.

For self-employed payors, support shall be calculated based on the last two years' federal and state income tax returns and the quarterly estimates for the current year. A self-employed payor's income should include contributions made to retirement plans, alimony paid, and self-employed health insurance paid; this figure appears on line 22 of the current federal income tax form. Depreciation should be allowed as a deduction only to the extent that it reflects actual decrease in value of an asset. Also, the court shall consider the amount the payor is capable of earning or a net worth approach based on property, life-style, etc.

d. Imputed Income.

If a payor is unemployed or working below full earning capacity, the court may consider the reasons therefor. If earnings are

reduced as a matter of choice and not for reasonable cause, the court may attribute income to a payor up to his or her earning capacity, including consideration of the payor's life-style. Income of at least minimum wage shall be attributed to a payor ordered to pay child support.

e. Spousal Support.

The chart assumes that the custodian of dependent children is employed and is not a dependent. For the purposes of calculating temporary support only, a dependent custodian may be awarded 20% of the net take-home pay for his or her support in addition to any child support awarded. For final hearings, the court should consider all relevant factors, including the chart, in determining the amount of any spousal support to be paid.

f. Allocation of Dependents for Tax Purposes.

Allocation of dependents for tax purposes belongs to the custodial parent pursuant to the Internal Revenue Code. However, the Court shall have the discretion to grant dependency allocation, or any part of it, to the noncustodial parent if the benefit of the allocation to the noncustodial parent substantially outweighs the benefit to the custodial parent.

g. Health Insurance.

In addition to the award of child support, the court order shall provide for the child's health care needs, which normally would include health insurance if available to either parent at a reasonable cost.

SECTION IV. AFFIDAVIT OF FINANCIAL MEANS.

The Affidavit of Financial Means shall be used in all family support matters. The trial court shall require each party to complete and exchange the Affidavit of Financial Means prior to a hearing to establish or modify a support order.

SECTION V. DEVIATION CONSIDERATIONS.

a. Relevant Factors.

Relevant factors to be considered by the court in determining appropriate amounts of child support shall include:

1. Food;

2. Shelter and utilities;

3. Clothing;

4. Medical expenses;

5. Educational expenses;

6. Dental expenses;

7. Child care (includes nursery, baby sitting, daycare or other expenses for supervision of children necessary for the custodial parent to work);

8. Accustomed standard of living;

9. Recreation;

10. Insurance;

11. Transportation expenses; and

12. Other income or assets available to support the child from whatever source.

b. Additional Factors.

Additional factors may warrant adjustments to the child support obligations and shall include:

1. The procurement and maintenance of life insurance, health insurance, dental insurance for the children's benefit;

2. The provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children (e.g., orthopedic shoes, glasses, braces, etc.);

3. The creation or maintenance of a trust fund for the children;

4. The provision or payment of special education needs or expenses of the child;

5. The provision or payment of day care for a child;

6. The extraordinary time spent with the noncustodial parent, or shared or joint custody arrangements;

7. The support required and given by a payor for dependent children, even in the absence of a court order; and

8. Where the amount of child support indicated by the chart is less than the normal costs of child care, the court shall consider whether a deviation is appropriate.

SECTION VI. ABATEMENT OF SUPPORT DURING EXTENDED VISITATION.

The guidelines assume that the noncustodial parent will have visitation every other weekend and for several weeks during the summer. Excluding weekend visitation with the custodial parent, in those situations in which a child spends in excess of 14 consecutive days with the noncustodial parent, the court should consider whether an adjustment in child support is appropriate, giving consideration to the fixed obligations of the custodial parent which are attributable to the child, to the increased costs of the noncustodial parent associated with the child's visit, and to the relative incomes of both parents. Any partial abatement or reduction of child support should not exceed 50% of the child-support obligation during the extended visitation period of more than 14 consecutive days.

In situations in which the noncustodial parent has been granted annual visitation in excess of 14 consecutive days, the court may prorate annually the reduction in order to maintain the same amount of monthly child-support payments. However, if the noncustodial parent does not exercise said extended visitations during a particular year, the noncustodial parent shall be required to pay the abated amount of child support to the custodial parent.

SECTION VII. PROVISIONS FOR PAYMENT.

All orders of child support shall fix the dates on which payments shall be made. All support orders issued shall include a provision for immediate implementation of income withholding, absent a finding of good cause not to require immediate income withholding or a written agreement of the parties incorporated in the order setting forth an alternative agreement as required by Ark. Code Ann. § 9-14-218(a). Payment shall be made through the Arkansas Clearinghouse pursuant to Ark. Code Ann. § 9-14-805. Times for payment should ordinarily coincide with the payor's receipt of salary, wages, or other income.

* * *

IN THE CIRCUIT COURT OF _____ COUNTY, ARKANSAS
_____ DIVISION

STATE OF ARKANSAS

AFFIDAVIT OF FINANCIAL MEANS

COUNTY OF _____

Revised 02-02

_____ PLAINTIFF

Vs. Case No. _____

_____ DEFENDANT

BOTH PARTIES MUST COMPLETE AND EXCHANGE THIS AFFIDAVIT PRIOR TO ANY HEARING. BOTH PARTIES MUST SUPPLY THE ORIGINAL NOTARIZED AFFIDAVIT TO THE COURT. THE COURT WILL PUNISH PERJURY BY APPROPRIATE ACTION.

The affiant, being duly sworn, says under penalty of perjury that affiant is the [Plaintiff/Defendant/Party] (*circle one*) to this support action herein, has prepared this financial statement, knows the contents thereof, and that it is true and correct.

Attach additional pages as needed.

INCOME

Complete Item 29.

1. My weekly take-home pay [from Item 29(i)] is $_____.

2. I claim ____ dependents for the purpose of determining my State of Arkansas withholding. I claim ____ dependents for the purpose of determining my federal withholding. I [did/did not] (*circle one*) claim myself as a dependent. I [do/do not] (*circle one*) have an additional amount withheld from my payroll checks for tax purposes and, if so, that amount is $_____ per [week/pay period] (*circle one*) and itemized below. All other deductions taken from my payroll check before I receive it total $_____ [from Item 29(j)(8)].

3. I receive total payments, periodic, or otherwise, from the following sources: _____ in the following amount(s) of $_____.

4. I have cash on hand in the amount of $_____ from the following sources: _____.

5. I have on deposit in banks and savings institutions the amount of $_____ from the following source(s): _____.

6. I have stocks and bonds in the amount of $_____ and their source was _____.

CREDITORS

Complete Items 30, 31 and 32.

7. Debts in the name of plaintiff only: ALL CREDITORS LISTED UNDER ITEM 30:
   (a) TOTAL UNPAID BALANCES: $_____
   (b) TOTAL MONTHLY PAYMENTS: _____

8. Debts in the name of defendant only: ALL CREDITORS LISTED UNDER ITEM 31:
   (a) TOTAL UNPAID BALANCES: $_____
   (b) TOTAL MONTHLY PAYMENTS: _____

9. Debts in our JOINT NAMES are: ALL CREDITORS LISTED UNDER ITEM 32:
   (a) TOTAL UNPAID BALANCES: $_____
   (b) TOTAL MONTHLY PAYMENTS: _____

AVERAGE MONTHLY EXPENSES

10. My present average monthly expenses to support myself and ___ children are:

HOUSEHOLD

Mortgage or rent payments	$_____
Property taxes and insurance	$_____
Electricity	$_____
Water, garbage & sewer	$_____
Telephone (including cell)	$_____
Fuel, oil or natural gas	$_____
Repairs & Maintenance	$_____
Lawn (and pool) care	$_____
Pest Control	$_____
Housewares	$_____
Food & Grocery items	$_____
Meals outside home	$_____
Other	$_____
_____	$_____
_____	$_____
_____	$_____

AUTOMOBILE EXPENSE

Car/lease payment	$_____
Gasoline and Oil	$_____
Repairs	$_____
Auto Tag and Title	$_____
Insurance	$_____
Other_____	$_____
_____	$_____

CHILDREN'S EXPENSES

Nursery or babysitting	$_____
School tuition	$_____
School supplies	$_____
Lunch money	$_____
Allowance	$_____
Clothing	$_____
Medical, Dental, Drugs	$_____
Vitamins	$_____
Barber/Beauty parlor	$_____
Cosmetics/Toiletries	$_____
Gifts for Holidays/Birthdays	$_____
Other _____	$_____
_____	$_____
_____	$_____

INSURANCES

Health	$_____
Life	$_____
Other Insurance	$_____
_____	$_____
_____	$_____

OTHER EXPENSES NOT LISTED

Household help	$_____
Dry Cleaning	$_____
My Clothing	$_____
My Hair Care	$_____
My Cosmetics	$_____
Newspaper, etc	$_____
_____	$_____
_____	$_____

PETS

Food	$_____
Grooming	$_____
Veterinarian	$_____

PERSONAL

Membership dues	$_____
Professional dues	$_____
Social Dues	$_____
Entertainment	$_____
Vacations	$_____
Publications	$_____
Church/Charity	$_____
Miscellaneous	$_____
Other	$_____

MEDICAL EXPENSES

Physician	$_____
Dental	$_____
Medicines	$_____
Hospital	$_____
Glasses	$_____
Other _____	$_____

TOTAL MONTHLY EXPENSES $_____

Place a check mark next to those not being paid currently.

GENERAL INFORMATION

11. My full name is _____.

12. My social security number is _____.
My military I.D. number is _____.

13. My Arkansas driver's license number is _____.

14. My date of birth is _____.
My place of birth is _____.

15. My father's full name is_____.
My mother's full name is _____.
[They/He/She] reside(s) at _____.
My [father and/or mother] [is/are] deceased.

16. My present resident address is _____.

17a The full names, birth dates and social security numbers of children born (or legally adopted) of this marriage are:

	Name	Birth Date	Soc. Sec. Number
(a)			
(b)			
(c)			
(d)			
(e)			
(f)			

17b The full names, birth dates and social security numbers of Children born out of wedlock to the parties are:

	Name	Birth Date	Soc. Sec. Number
(a)			
(b)			
(c)			

Paternity has _____ has not _____ been established for these children.

17c I also have the obligation to support the following additional children born to me and _____:

	Name	Birth Date	Soc. Sec. Number
(a)	_____	_____	_____
(b)	_____	_____	_____
(c)	_____	_____	_____

Please attach any court orders establishing paternity and establishing a child support obligation.

18. My employer is _____.

19. My employer's full address is _____.

20. My home telephone number is _____.
My work telephone number is _____.

INFORMATION ABOUT OPPOSING PARTY, IF KNOWN (DO NOT GUESS)

21. The opposing party's full name is _____.

22. The opposing party's social security number is _____.
The opposing party's military I.D. number is _____.

23. The opposing party's Arkansas driver's license number is _____.

24. (a) The opposing party's father's full name is _____.
(b) The opposing party's mother's full name is _____.
(c) [They/He/She] reside(s) at _____.
(d) Opposing party's [father and/or mother] [is/are] deceased.

25. The opposing party's present residence address is _____.

26. The opposing party's employer is _____.

27. The opposing party's employer's address is _____.

28. The opposing party's home telephone number is _____.
The opposing party's work telephone number is _____.

INCOME

29. How often are you paid and what are your gross wages, salary or commission due each time? *(Check one)*

_____ Weekly (52 times a year)
_____ Bi-Weekly (26 times a year)
_____ Semi-Monthly (24 times a year)
_____ Monthly (12 times a year)
_____ Other (Explain)

PAYROLL DEDUCTIONS

(a) GROSS WAGES		$_____
(b) Federal income tax withheld	$_____	
(c) Arkansas income tax withheld	$_____	
(d) FICA (social security) or railroad retirement	$_____	
(e) Health insurance (children only)	$_____	
(f) Court-ordered child support for dependents of previous marriage or previously legally determined adopted or illegitimate children	$_____	
(g) TOTAL WITHHELD ((b) through (f) above)		$_____
(h) NET TAKE-HOME PAY PER PAY PERIOD (Subtract (g) from (a) above)		$_____
(i) CONVERT TO WEEKLY TAKE-HOME PAY AND CARRY TO ITEM 1 ABOVE		$_____

Example: If (h) above is $300.00 and is received bi-weekly, multiply $300.00 by 26 (26x3OO=$7,800), divide $7,800 by 52 ($150.00); carry $150.00 to Item 1

(j) OTHER ITEMS WITHHELD FROM MY CHECK ARE:

(1) Union dues	$_____
(2) Credit union, thrift plans	$_____
(3) Pension benefits, stock purchase plans	$_____
(4) Charitable contributions	$_____
(5) Debt payments, garnishments	$_____
(6) Life insurance payments	$_____
(7) other (identify)	$_____

Items (1) through (7) above are not allowed in computing take-home pay.

(8) TOTAL WITHHELD (sum of items (1) through (7) above) $_____

If self-employed, attach copies of your past two years' state and federal income tax returns and a list of all disbursements made to you during the current calendar year.

CREDITORS AND DEBTS

30. Debts in the name of PLAINTIFF only are:

Creditors	Total Unpaid Balance	Monthly Payment
(a)_____	$_____	$_____
(b)_____	_____	_____
(c)_____	_____	_____
(d)_____	_____	_____
(e)_____	_____	_____
(f) TOTAL:	*$_____	**$_____
	***Carry forward to Item 7(a)**	****Carry forward to Item 7(b)**

31. Debts in the name of DEFENDANT only are:

Creditors	Total Unpaid Balance	Monthly Payment
(a)_____	$_____	$_____
(b)_____	_____	_____
(c)_____	_____	_____
(d)_____	_____	_____
(e)_____	_____	_____
(f) TOTAL:	*$_____	**$_____
	***Carry forward to Item 8(a)**	****Carry forward to Item 8(b)**

32. Debts in JOINT names:

Creditors	Total Unpaid Balance	Monthly Payment
(a)_____	$_____	$_____
(b)_____	_____	_____
(c)_____	_____	_____
(d)_____	_____	_____
(e)_____	_____	_____
(f) TOTAL:	*$_____	**$_____
	***Carry forward to Item 9(a)**	****Carry forward to Item 9(b)**

33. The weekly take-home pay of opposing party is $_____.

34. All other income of the opposing party is $_____.

_____
Affiant

STATE OF _____

COUNTY OF _____

Subscribed and sworn to before me, a Notary Public, on this ___ day of _____, _____.
(month) (year)

_____
Notary Public

My Commission Expires:

_____.

(SEAL)

ARKANSAS

Monthly Family Support Chart

PAYOR NET MONTHLY INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN
500	121	176	209	230	250
550	133	193	229	253	274
600	145	211	249	275	298
650	156	228	269	297	322
700	168	245	289	320	347
750	180	262	309	342	370
800	191	278	328	362	393
850	202	294	347	383	415
900	214	310	366	404	438
950	225	326	384	425	460
1000	236	342	403	445	483
1050	247	359	422	467	506
1100	259	375	442	488	529
1150	271	392	462	510	553
1200	282	409	481	532	576
1250	294	425	501	553	600
1300	305	442	520	575	623
1350	314	454	534	591	640
1400	319	462	544	601	652
1450	325	470	554	612	663
1500	331	479	563	622	675
1550	337	487	573	633	686
1600	342	495	582	643	697
1650	348	503	591	653	708
1700	354	511	600	663	719
1750	359	518	609	672	729
1800	364	526	617	682	739
1850	370	533	626	692	750
1900	375	541	635	701	760
1950	383	551	647	714	774
2000	391	563	659	729	790
2050	398	574	672	743	805
2100	406	585	685	757	821

2150	414	596	698	771	836
2200	422	607	711	785	851
2250	429	618	723	799	866
2300	437	628	736	813	881
2350	444	639	748	827	896
2400	451	649	761	841	911
2450	458	660	773	854	926
2500	466	671	786	868	941
2550	473	681	797	881	955
2600	480	691	809	894	969
2650	487	701	820	906	982
2700	494	711	832	919	996
2750	501	721	843	932	1010
2800	508	731	855	945	1024
2850	515	741	867	958	1038
2900	522	751	879	971	1052
2950	529	761	890	984	1067
3000	536	771	902	997	1081
3050	542	780	914	1010	1095
3100	549	790	926	1023	1109
3150	556	800	938	1036	1123
3200	563	810	950	1049	1137
3250	569	819	960	1061	1150
3300	574	827	970	1071	1161
3350	579	834	979	1081	1172
3400	584	842	988	1092	1183
3450	589	849	997	1102	1194
3500	594	857	1006	1112	1205
3550	599	864	1015	1122	1216
3600	604	872	1024	1132	1227
3650	609	879	1034	1142	1238
3700	614	887	1043	1152	1249
3750	619	895	1052	1162	1260
3800	624	902	1061	1172	1271
3850	630	910	1071	1184	1283
3900	636	919	1082	1195	1295
3950	642	928	1092	1207	1308
4000	648	937	1102	1218	1321
4050	654	946	1113	1230	1333
4100	660	954	1123	1241	1346
4150	666	963	1134	1253	1358
4200	672	972	1144	1264	1371
4250	678	981	1155	1276	1383
4300	684	989	1165	1288	1396
4350	690	998	1176	1299	1408

4400	696	1007	1186	1311	1421
4450	702	1015	1195	1321	1432
4500	707	1023	1205	1331	1443
4550	713	1031	1214	1341	1454
4600	718	1039	1223	1352	1465
4650	724	1047	1232	1362	1476
4700	729	1054	1242	1372	1487
4750	735	1062	1251	1382	1498
4800	740	1070	1260	1392	1509
4850	746	1078	1269	1403	1520
4900	751	1086	1278	1413	1531
4950	757	1094	1288	1423	1542
5000	762	1102	1297	1433	1553

ARKANSAS

Weekly Family Support Chart

PAYOR NET WEEKLY INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN
100	24	35	42	46	50
110	27	39	46	51	55
120	29	42	50	55	60
130	31	46	54	60	65
140	34	49	58	64	69
150	36	52	62	69	74
160	38	56	66	73	79
170	41	59	70	77	84
180	43	63	74	82	88
190	45	66	78	86	93
200	47	69	81	90	97
210	50	72	85	94	102
220	52	75	89	98	106
230	54	79	93	102	111
240	56	82	96	107	115
250	59	85	100	111	120
260	61	89	104	115	125
270	63	92	108	120	130
280	66	95	112	124	134
290	68	99	116	128	139
300	70	102	120	133	144
310	72	104	123	136	147
320	73	106	125	138	149
330	74	108	127	140	152
340	76	109	129	142	154
350	77	111	131	144	156
360	78	113	132	146	159
370	79	114	134	148	161
380	80	116	136	150	163

390	81	117	138	152	165
400	82	119	140	154	167
410	83	120	141	156	169
420	84	122	143	158	171
430	86	123	145	160	173
440	87	125	147	162	176
450	88	127	149	165	178
460	90	129	152	167	182
470	91	132	154	170	185
480	93	134	157	173	188
490	94	136	159	176	191
500	96	138	162	179	194
510	98	140	164	182	197
520	99	143	167	184	200
530	100	145	169	187	203
540	102	147	172	190	206
550	103	149	174	193	209
560	105	151	177	195	212
570	106	153	179	198	215
580	108	155	182	201	218
590	109	157	184	203	220
600	111	159	186	206	223
610	112	161	189	208	226
620	113	163	191	211	229
630	115	165	193	214	232
640	116	167	196	216	234
650	118	169	198	219	237
660	119	171	200	221	240
670	120	173	203	224	243
680	122	175	205	227	246
690	123	177	207	229	248
700	124	179	210	232	251
710	126	181	212	234	254
720	127	183	214	237	257
730	129	185	217	240	260
740	130	187	219	242	263
750	131	189	221	245	265
760	132	190	223	247	267
770	133	192	225	249	270
780	134	193	227	251	272
790	135	195	229	253	274
800	136	196	230	255	276

810	137	198	232	257	278
820	138	199	234	259	280
830	139	201	236	261	283
840	140	202	238	263	285
850	141	204	240	265	287
860	142	205	241	267	289
870	143	207	243	269	291
880	144	208	245	271	294
890	145	210	247	273	296
900	147	212	249	275	299
910	148	214	251	278	301
920	149	215	253	280	304
930	150	217	256	282	306
940	151	219	258	285	309
950	153	221	260	287	311
960	154	222	262	289	314
970	155	224	264	292	316
980	156	226	266	294	319
990	157	228	268	296	321
1000	159	229	270	298	324

IN RE: SECTION 28 to the SUPREME COURT PROCEDURES REGULATING PROFESSIONAL CONDUCT of ATTORNEYS at LAW and MODEL RULE of PROFESSIONAL CONDUCT 1.15(d)(1)

Supreme Court of Arkansas
Delivered February 21, 2002

PER CURIAM. In a *Per Curiam* released December 20, 2001, the Court solicited comments on a proposed new Section 28 to the Supreme Court Procedures Regulating Professional Conduct of Attorneys at Law, regarding automatic overdraft reporting for attorney IOLTA trust accounts. The proposed new Section 28, and Model Rule 1.15(d)(1) mentioned below, can be found on the Court's website at *http://courts.state.ar.us/courts/cpc.html*. One public comment was received and reviewed.

The Court now makes the proposed new Section 28 final. To allow adequate time for implementation of the new Procedure, which involves attorneys,. financial institutions and the Office of Professional Conduct, Section 28 shall be effective July 1, 2002.

Model Rule of Professional Conduct 1.15(d)(1), as revised to have been effective January 1, 2002, but temporarily suspended December 20, 2001, pending public comment on Section 28, is hereby made effective with Section 28 of the Procedures on July 1, 2002.

It is so ordered.

IN RE: ARKANSAS STATE BOARD of LAW EXAMINERS

Supreme Court of Arkansas
Delivered December 6, 2001

PER CURIAM. The Court is informed that Audrey Evans, Second Congressional District representative on the Arkansas State Board of Law Examiners (Board), has tendered her resignation from the Board effective December 31, 2001. We regret the early departure of Ms. Evans from the Board but recognize her appointment as a United States Bankruptcy Judge precludes further participation on the Board.

We hereby appoint the Honorable Wiley A. Branton, Jr., of the Second Congressional District, to replace Ms. Evans effective January 1, 2002. Judge Branton will serve the remainder of Ms. Evans' term which concludes September 30, 2002.

By previous order of the Court dated October 25, 2001, we appointed an individual for the sole purpose of grading the February 2002 examination on behalf of Ms. Evans. That per curiam order remains intact. Judge Branton will be serving as the appointed Board member for the noted period of time, and will be grading the results of the July 2002 Arkansas bar examination.

The Court thanks Judge Branton for his willingness to accept appointment to the Board. The Court conveys its deep gratitude to Ms. Evans for her years of service as a member and Chair of the Board.

IN RE: SUPREME COURT COMMITTEE on PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Delivered January 14, 2002

PER CURIAM. The amended Procedures Regulating Professional Conduct of Attorneys at Law ("Procedures")

became effective January 1, 2002. *See In Re Amendments to the Procedures Regulating Professional Conduct of Attorneys at Law* (July 9, 2001). At that time the Committee on Professional Conduct was expanded from seven to fourteen voting members, in two hearing panels (Panel A and Panel B), and a new group of seven "reserve" members (Panel C) was added. Member terms are reduced from seven to six years under the amended Procedures, and necessary adjustments have been made here. The following appointments are made, commencing January 1, 2002, to the expanded Committee, with the terms indicated for each.

COMMITTEE PANEL A:

Member:	*Position*:	*Term expires*:
Dr. Patricia Youngdahl Little Rock	Non-Attorney At Large	12-31-2002
Richard A. Reid Blytheville	Attorney — 1st CD	12-31-2003
Ken R. Reeves Harrison	Attorney — 3rd CD	12-31-2004
Bart F. Virden Morrilton	Attorney — 2nd CD	12-31-2005
Win A. Trafford Pine Bluff	Attorney — 4th CD	12-31-2006
Gwendolyn D. Hodge Little Rock	Attorney — At Large	12-31-2007
Helen Herr Little Rock	Non-Attorney At Large	12-31-2007

COMMITTEE PANEL B:

John L. Rush Pine Bluff	Attorney — 4th CD	12-31-2002
J. Michael Cogbill Fort Smith	Attorney — 3rd CD	12-31-2003
Rita M. Harvey Little Rock	Non-Attorney At Large	12-31-2004
Richard F. Hatfield Little Rock	Attorney — 2nd CD	12-31-2005
Vacancy (to be filled)	Attorney At Large	12-31-2006
Harry Truman Moore Paragould	Attorney — 1st CD	12-31-2007
Dr. Rose Marie Word Pine Bluff	Non-Attorney At Large	12-31-2007

COMMITTEE RESERVE — PANEL C:

Searcy W. Harrell, Jr. Camden	Attorney — 4th CD	12-31-2002
Sylvia Orton Little Rock	Non-Attorney At Large	12-31-2003
Robert D. Trammell Little Rock	Attorney — 2nd CD	12-31-2004
David Newbern Little Rock	Attorney At Large	12-31-2005
Kenneth R. Mourton Fayetteville	Attorney — 3rd CD	12-31-2006
Beverly Morrow Pine Bluff	Non-Attorney At Large	12-31-2007
Phillip D. Hout Newport	Attorney — 1st CD	12-31-2007

For their willingness to serve in this most important Court activity, the Court expresses its appreciation to the present members of the Committee on Professional Conduct and the Alternate Committee on Professional Conduct, and to the new members of the Reserve Panel of the Committee.

The Court expresses its appreciation to Jacqueline Johnston-Cravens for her service on the former Alternate Committee until her resignation in November 2001.

IN RE: CHILD SUPPORT COMMITTEE

Supreme Court of Arkansas
Opinion delivered January 17, 2002

PER CURIAM. By *per curiam* order of December 20, 1993, *In re Child Support Committee*, 315 Ark. 760 (1993), we reconstituted the Child Support Committee to consist of one Arkansas Court of Appeals Judge, three chancellors, one juvenile division circuit/chancery judge, one legal services attorney, one Office of Child Support Enforcement attorney, two attorneys of the private bar, and one attorney member of the Arkansas General Assembly. As a result of Amendment 80 to the Arkansas Constitution, we hereby modify these designations to change the "chancellors" and "circuit/chancery" designations to four "circuit judges."

The terms of two longtime members of the Committee have expired. The Court expresses its gratitude to the Honorable Judith Rogers of Little Rock and the Honorable Ellen Brantley of Little Rock for their tireless and dedicated service to the Committee.

We hereby appoint Judge John Robbins of the Arkansas Court of Appeals and Judge Mary McGowan, Pulaski County Circuit Judge, to the Child Support Committee for four-year terms to expire on November 30, 2005. The Court thanks the appointees for agreeing to serve on this most important Committee.

IN RE: APPOINTMENTS to ARKANSAS CONTINUING LEGAL EDUCATION BOARD

Supreme Court of Arkansas
Delivered January 24, 2002

PER CURIAM. Cindy Grace Thyer of the First Court of Appeals District is reappointed to a three-year term to conclude on December 5, 2004. Tony L. Yocom of the Fourth Court of Appeals District is reappointed to a three-year term concluding on December 5, 2004. The Court conveys its appreciation to Ms. Thyer and Mr. Yocom for their willingness to continue their service on this Board.

Julie M. Cabe of Little Rock is appointed as an at-large member to replace the Honorable Carol Anthony, who has concluded her service. The Court thanks Judge Anthony for her years of service as a member and Chair of this Board, and appreciates Ms. Cabe's acceptance of this appointment. Ms. Cabe's appointment is for a three-year initial term concluding on December 5, 2004.

IN RE: APPOINTMENT of SPECIAL CONSULTANT to ASSIST the COURT in REVIEWEING PROCEDURES to CERTIFY LAWYERS as SPECIALISTS

Supreme Court of Arkansas
Delivered February 14, 2002

PER CURIAM. The Supreme Court has undertaken an assessment of its procedures to certify lawyers as specialists. To assist the Court in this task, we are pleased to appoint Judith Kilpatrick, an Associate Professor of Law at the University of Arkansas Law School in Fayetteville, as a special consultant to the Court. Professor Kilpatrick is a member of the American Bar Association Standing Committee on Specialization and is familiar with the American Bar Association sponsored certification process, as well as programs of other states.

We ask Professor Kilpatrick to examine the structure, operations, and procedures of our specialist certification system and to report her findings and recommendations to us. We thank Professor Kilpatrick for her willingness to assist the Court in this endeavor and look forward to working with her.

IN RE: SUPREME COURT AMENDMENT 80 COMMITTEE

Supreme Court of Arkansas
Delivered February 28, 2002

PER CURIAM. On November 30, 2000, we established the Amendment 80 Committee to oversee the implementation of Amendment 80 to the State Constitution. *See In re: Appointment of Special Supreme Court Committee to be known as "Amendment 80 Committee,"* 343 Ark. 877 (2000). Much has been accomplished to that end, but more remains to be done. At this time, it is necessary to make additional appointments to the Committee. We hereby appoint Justice Jim Hannah, the Honorable Jim Gunter, Circuit Judge of Hope, the Honorable Stephen Routon, District Judge of Forrest City, and the Honorable David Stewart, District Judge of Little Rock, to the Amendment 80 Committee.

Judge Gunter is the current president of the Arkansas Judicial Council, and he replaces his predecessor in that position, the Honorable David Bogard of Little Rock. We thank Judge Bogard for his service and extend our appreciation to the new appointees for their willingness to serve on this important Committee. The current composition of the Committee is as follows:

Chief Justice W. H. "Dub" Arnold, Chair
Justice Robert L. Brown
Judge Robert J. Gladwin
Judge Jim Gunter
Justice Jim Hannah
Ronald D. Harrison
Justice Annabelle Clinton Imber
Jim L. Julian

Judge Andree L. Roaf
Judge Stephen Routon
Judge David Stewart
Chief Judge John F. Stroud, Jr.

IN RE: SUPREME COURT ALTERNATE COMMITTEE on PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Delivered March 14, 2002

PER CURIAM. Valerie L. Kelly of Jacksonville, Arkansas, is appointed to fill the unexpired term of Jacqueline J. Cravens on Panel B of the Supreme Court Committee on Professional Conduct. The term expires on December 31, 2006. It is an at-large attorney position.

The court thanks Ms. Kelly for accepting appointment to this most important committee, and expresses its appreciation to Jacqueline J. Cravens for her dedicated service to the Committee.

IN RE: SUPREME COURT COMMITTEE on CRIMINAL PRACTICE

Supreme Court of Arkansas
Delivered March 14, 2002

PER CURIAM. Hon. Charles Yeargan, Circuit Judge of the Ninth Circuit West Judicial Circuit, Hon. Thomas Deen, Prosecuting Attorney of the Tenth Judicial Circuit; and Colette Honorable, Esq., Assistant Attorney General, are hereby appointed to our Committee on Criminal Practice for three-year terms to expire on January 31, 2005. Judge David Burnett is designated the

Chair of the Committee. Additionally, we are designating Frank Newell, Esq., as an *ex-officio*, non-voting, Advisor to the Committee, and Professor Scott Stafford of the University of Arkansas Law School at Little Rock as the Reporter for the Committee.

The Court thanks Judge Yeargan, Mr. Deen, and Ms. Honorable for accepting appointment to this important Committee.

The Court expresses its gratitude to Judge Tom Keith, Raymond Abramson, and Gordon Webb, whose terms have expired, for their years of service on the Committee.

IN RE: Lesa Gail Bridges JACKSON,
Arkansas Bar ID # 87007

68 S.W.3d 294

Supreme Court of Arkansas
Delivered March 7, 2002

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the law license of Lesa Gail Bridges Jackson, Arkansas Bar No. 87007, of Pulaski County, Arkansas, to practice law in the State of Arkansas. Her name shall be removed from the registry of licensed attorneys and she is barred and enjoined from engaging in the practice of law in this state.

It is so ordered.

[redacted]