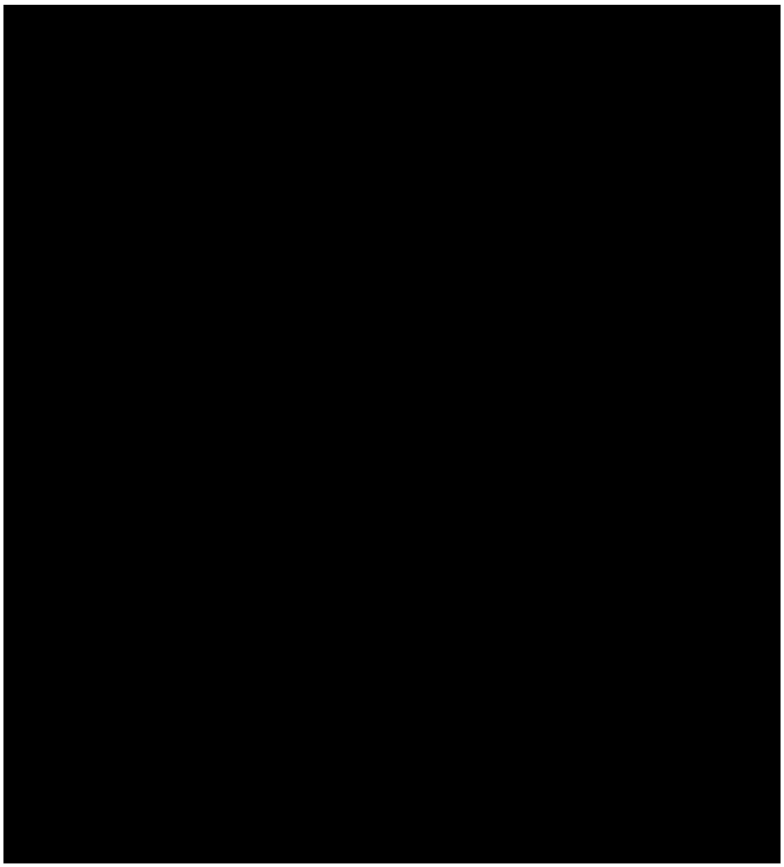
[redacted]



ARKANSAS PHARMACIST'S ASSOCIATION, INC., Sunnymede Pharmacy, Inc., Bryant's Investments and Holding, Inc., Sims Drug, Inc., Gary Fancher, P.D., d/b/a Flippin Pharmacy *v.* ARKANSAS STATE and PUBLIC SCHOOL LIFE and HEALTH INSURANCE BOARD, Arkansas Department of Finance and Administration — Employee Benefits Division, and Advance PCS, Inc.

02-929 98 S.W.3d 27

Supreme Court of Arkansas
Opinion delivered February 13, 2003

[redacted]

[redacted]

The Health Law Firm, by: *Harold H. Simpson* and *Seth Ward III*, for appellants.

Barber, McCaskill, Jones & Hale, P.A., by: *Robert L. Henry III*, *Michael Emerson*, and *D. Keith Fortner*; and *Steptoe & Johnson, LLP*, by: *Martin Schneiderman*; and *Mark Pryor*, Att'y Gen., by: *Patricia Van Ausdall Bell*, Ass't Att'y Gen., for appellees.

TOM GLAZE, Justice. This case requires us to determine whether certain actions of the Arkansas State and Public School Life and Health Insurance Board constituted rule-making and whether those actions had to be taken in accordance with the

Arkansas Administrative Procedures Act, Ark. Code Ann. § 25-15-201 *et seq.* (Repl. 2002).

Appellee State and Public School Life and Health Insurance Board (Board) is a statutorily created board that sets policy and selects plans and coverages for the state employee and public school personnel health and life insurance and self-funded medical programs. Ark. Code Ann. § 21-5-401 (Supp. 2001). Appellee AdvancePCS Health, L.P. (APCS) provides pharmacy benefits management services for health-benefit plans. The Employee Benefits Division of the Arkansas Department of Finance & Administration (the Division) contracts for health and life insurance coverage on behalf of state and public school employees; the Division also provides state and public school employees with prescription benefits through APCS.

On March 1, 2001, APCS's predecessor, Advance Paradigm, entered into a contract with the Division to provide pharmacy benefits management services for State and public school employees. Under this benefit services contract, prescription drug purchases by state and public school employees are covered under the plan if the purchases are made at APCS network pharmacies. The network is a group of pharmacies that have contracted with APCS to provide pharmacy services to state and public school employees covered by the plans and to receive reimbursements according to a specific formula. The appellants in this case — the Arkansas Pharmacist's Association, Sunnymede Pharmacy, Bryant's Investments and Holding, Sims Drug, Inc., and Gary Fancher, P.D., d/b/a Flippin Pharmacy — alleged they were participating pharmacies in the APCS pharmacy network.

After reviewing various proposals regarding changes to the pharmacy benefit services agreement, the Board recommended two changes to the Division's and APCS's agreement at an October 17, 2001, board meeting. First, the Board passed a motion to recommend the implementation of an optional mail service to state and public school employees, whereby certain prescriptions could be filled through the mail. Second, the Board moved to recommend a change in the rate at which pharmacists were reimbursed. Discussions at the board meeting indicated that changing

the reimbursement rate could save the State about $5 million annually. On January 17, 2002, the Division and APCS executed an amended agreement incorporating the Board's recommended changes to the reimbursement rates and the mail-order service; the amended agreement also extended the term of the agreement until December 31, 2002.

The Arkansas Pharmacist's Association, Inc.,[1] and the pharmacies named above (collectively referred to as the Association) filed a declaratory judgment action against the Board and, by way of an amended complaint, included the Division and APCS as defendants. The complaint alleged that, in making the recommendations at the October 17 meeting, the Board engaged in rule-making within the meaning of the Arkansas Administrative Procedures Act, Ark. Code Ann. § 25-15-201 (Repl. 2002) (APA). Further, the complaint alleged that the Board failed to comply with the notice and hearing provisions of the APA, and as a result, the "rules" should be declared invalid.

The opposing parties filed cross-motions for summary judgment. After a hearing on May 16, 2002, the trial court granted the summary-judgment motion filed by the Board, the Division, and APCS, and denied the Association's motion. The trial court held that the Board's actions at its October 17 meeting, recommending the mail order provision and lower reimbursement rates, were not "rules" or "rule making" under the APA; it also determined the Division's and APCS's conduct in adopting these two recommendations by amending their contract did not constitute "rules" or "rule making." From the trial court's order granting summary judgment in favor of the Board, the Division, and APCS, the Association brings this appeal.

For its first point on appeal, the Association argues that the trial court erred in finding that the Board's action did not constitute rule-making. Under the Administrative Procedures Act, a "rule" is defined as "any agency statement of general applicability and future effect that implements, interprets, or prescribes

[1] The Arkansas Pharmacist's Association is a non-profit corporation that represents pharmacists throughout the State. Initially, a fifth pharmacy, Yellville Drug Store, Inc. d/b/a Clinic Pharmacy, had joined in this litigation.

law or policy, or describes the organization, procedure, or practice of any agency and includes, but is not limited to, the amendment or repeal of a prior rule." Ark. Code Ann. § 25-15-202(8)(A) (Repl. 2002). Moreover, the APA defines "rule making" as meaning an "agency process for the formulation, amendment, or repeal of a rule." § 25-15-202(9). The Association asserts that the Board's decision to amend the pharmacy benefit services agreement between the Division and APCS amounted to "rule making."

In support of its argument, the Association asserts that the Board's actions were indisputably of "future effect" and amounted to a prescribing of policy; the "only dispute," according to the Association, is whether the Board's actions were "of general applicability." The Association insists that the Board's decision was of general applicability, because the amendment 1) changed the reimbursement formula for all current and future pharmacies that provide services to plan members, and 2) offered the mail order benefit to all current and future members.

The Association is in error on this point. The only Arkansas case that discusses the meaning and import of "general applicability" within the framework of the APA is *Eldridge v. Board of Correction*, 298 Ark. 467, 768 S.W.2d 534 (1989). In that case, Steve Eldridge brought suit for declaratory and injunctive relief challenging the site selection for an adult detention facility by the Department of Correction; Eldridge claimed that the Department failed to comply with the notice and hearing provisions of the APA. The trial court granted summary judgment in favor of the Department, finding that the site-selection decision did not constitute the adoption of a rule. In affirming the trial court, this court held as follows:

> Eldridge strongly argues that the decision by the Department of Correction to establish an adult detention facility is a statement of general applicability that implements the law authorizing the Department to establish such facilities. While this construction perhaps involves an interesting argument in semantics, *the action of the Department was no more than the carrying out of legislatively mandated administrative duties* under section 12-27-103 and

> not the adoption of a rule within the meaning of section 25-15-202(4) and (5).
>
> Here, the term "rule" has been defined for us, and subsections (4) and (5) of section 25-15-202 were obviously drafted to address those instances in which an agency subject to the Act either formulates, amends, or repeals statements of general applicability and future effect which implement, interpret, or set out provisions having legal consequences, or which describe departmental policies, or explain the organization, procedure, or practice of an agency. Our first rule of construction as to the language of any piece of legislation is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Bolden v. Watt*, 290 Ark. 343, 719 S.W.2d 428 (1986). Site selection for the construction of an adult detention facility does not fall anywhere within the definition of the term "rule" as contained in the Act, if for no other reason than that it does not constitute an agency statement of general applicability.

Eldridge, 298 Ark. at 470-71 (emphasis added).

It is clear from *Eldridge* that a state agency can carry out its statutorily appointed day-to-day tasks without every action being considered an exercise in "rule making." In *Eldridge*, this court noted that the Department of Correction had the "function, power, and duty . . . to establish and operate regional adult detention facilities." *Id.* at 470. Similarly, in the instant case, the Board is statutorily charged with the following powers, functions, and duties:

> (1) *To explore various cost containment measures and funding options*;
>
> * * * *
>
> (6) To evaluate responses to requests for proposals, select contractors for all services, approve the award of contracts resulting from bids for all health and life insurance offerings for participants of the various plans;
>
> * * * *
>
> (8) *To promote increased access to various health plan options and models*;

> (9) *May, at the discretion of the board, direct the Office of State Purchasing to contract with all qualified vendors,* as defined by the board, *offering the health benefit plans* prescribed by the board without regard to § 19-11-228 or other statutes requiring competitive bidding.

§ 21-5-404 (emphasis added).

In making its recommendations, the Board was exploring various cost-containment measures, in that it determined that changing the reimbursement rate would save up to $5 million annually. In addition, it was promoting increased access to various health-plan options and models, by deciding to offer the mail-service option to its members.

As to the question of whether the Board's actions were of "general applicability," the Association attempts to distinguish *Eldridge* on the basis that the issue in that case "only concerned the specific location in which the agency decided to build a single, specific adult detention facility." Because the decision in *Eldridge* was of "particular applicability," to use the Association's phrase, it did not constitute rule making. Here, however, the Association asserts that the Board's decisions are of future effect, and act on unnamed and unspecified pharmacies and plan members, and are therefore of "general applicability."

However, it is difficult to conclude that the Board's recommendations to the Division were of "general applicability," because these recommendations were of no effect until the Division and APCS negotiated and executed the terms of their amended contract. Moreover, the record reveals that the Board's recommendations impacted only the Division's contract with APCS for a limited time, ending on December 31, 2002. Obviously, as in *Eldridge*, the action of the Board was "no more than the carrying out of legislatively mandated administrative duties under section [21-5-404,] and not the adoption of a rule within the meaning of [the APA]." *See Eldridge*, 298 Ark. at 471.

Bearing on this point, Ark. Code Ann. § 21-5-406 (Supp. 2001) sets out that the Board must choose an executive director with the approval of the executive director of the Department of Finance & Administration (DF&A), and the selected director is

located in the Employment Benefits Division of DF&A. The Board's executive director is charged with the duty to administer the Board's day-to-day functions, and this includes having the authority to supervise the implementation and day-to-day management of the health insurance programs and other employee benefit programs and plans.

In the present case, due to information provided to the Board, the Board approved motions that led its executive director to renegotiate the Division's contract with APCS, so state and public school employees had an option for mail-order pharmacy services, in addition to overall plan savings by lowering the rate of reimbursement to network pharmacists. This action falls entirely within the statutorily mandated duties of the Board, and the trial court did not err in concluding that the Board's conduct did not amount to rule-making within the meaning of the APA.

We note that the Association refers to four cases from other jurisdictions, but we believe the *Eldridge* decision and our court's interpretation of Arkansas's APA rule and rule-making provisions are sufficient to decide the situation before us. We also conclude those decisions relied on by the Association are inapposite or distinguishable. For instance, the Association cites *National Association of Psychiatric Treatment Centers for Children v. Weinberger*, 658 F. Supp. 48 (D. Colo. 1987), wherein the federal district court addressed the failure of the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) to provide notice about proposed changes in participation agreements that affected every participating treatment center within the CHAMPUS plan. There, the court noted that the challenge was not to the implementation of a single participation agreement, but instead was directed at CHAMPUS's creation of a policy applicable to all participation agreements. *Weinberger*, 658 F. Supp. at 54. Here, on the other hand, there is only one agreement, and the Board's proposed changes were negotiated and agreed upon by the parties to that contract; there was no unilateral imposition of the changes, as there was in *Weinberger*.

Next, the Association cites *Failor's Pharmacy v. Department of Social & Health Services*, 886 P.2d 147 (Wash. 1994). There,

the issue was whether a decision by the Washington State Department of Social and Health Services to unilaterally alter the state's Medicaid reimbursement payment schedules to prescription drugs constituted rule-making under that State's APA. The Washington Supreme Court held that it did, because the reimbursement schedules "constituted an order, directive, or regulation of general applicability relating to a benefit conferred by law." *Failor's Pharmacy*, 886 P.2d at 494. Because the reimbursement schedules were uniformly applied to all members of the class of Medicaid prescription providers, it was generally applicable. Unlike the *Failor's Pharmacy* decision, the case before us involved the Board's recommendations to amend a single pharmacy benefit services contract.

The Association also cites *Senn Park Nursing Center v. Miller*, 470 N.E.2d 1029 (Ill. 1984), for its statement that an amended "inflation-update procedure" was an agency statement of general applicability because it "does implement a policy of the agency and is not a statement dealing only with the internal management of the agency. The rule does affect the rights and procedures available to people outside the agency." *Senn Park*, 470 N.E.2d at 178. But again, as in *Failor's Pharmacy*, the amended procedure was a unilateral alteration to a state Medicaid plan that affected every nursing home facility that participated in the Medicaid program. *See also, NME Hospitals, Inc. v. Department of Social Services*, 850 S.W.2d 71 (Mo. 1993) (wherein the Missouri Supreme Court held that a change to the formula used to reimburse Medicaid mental health provides was of "general applicability," and that court held that the amended formula was a rule of general applicability because the Medicaid reimbursement policy applied generally to all participants in the Medicaid program, and because "[d]efinition of the reasonable costs, manner, extent, quantity, quality, charges, and fees of medical assistance under the program *must be made by rule and regulation*" under Rev. Stat. Mo. § 208.153.1). *NME Hospitals*, 850 S.W.2d at 74.[2]

Before leaving this point, we would be remiss to fail to mention APCS's out-of-state cases that can be said to sup-

[2] Because the changes were required to be made by rule, the concerns presented in the Missouri case are different from the instant situation.

port its position that the amended agreement APCS entered into with the Division did not constitute a rule. For example, in *Alabama Department of Transp. v. Blue Ridge Sand & Gravel, Inc.*, 718 So.2d 27 (Ala. 1998), the court held that certain amended standard specifications were not "rules" within the context of Alabama's APA, but were rather only specifications for engineering details and materials that may be incorporated by reference into a request for bids for highway construction contracts. The *Blue Ridge* court further stated that the specifications did not describe the organization, procedure, or practice requirements of the Department of Transportation or constitute a regulation of general applicability, but were simply terms that could be incorporated into a contract between the Department and some other party. APCS also referred to *Alca Industries, Inc. v. Delaney*, 686 N.Y.S.2d 356 (1999), where that court declined to hold that bid-withdrawal procedures were rules, because "[c]hoosing to take an action or write a contract based on individual circumstances is significantly different from implementing a standard or procedure that directs what action should be taken regardless of individual circumstances; rule making, in other words, sets standards that substantially alter or, in fact, can determine the result of future agency adjudications"; *see also Dep't of Health & Mental Hygiene v. Chimes, Inc.*, 681 A.2d 484 (Md. Ct. App. 1996) (institution of cost containment measures did not constitute a rule because it did not change existing law, formulate new rules of widespread application, or apply new standards retroactively to the detriment of an entity that had relied upon the agency's past pronouncements; rather, the "growth cap" applied only to a limited number of providers in their capacity as contractors with a state agency pursuant to contracts between the parties subject to termination by either side, and applied only in a particular program), and *Dep't of Transp. v. Blackhawk Quarry Co. of Florida, Inc.*, 528 So.2d 447 (Fla. Dist. Ct. App. 1988) (standard contract specifications for building materials did not qualify as rules because they were "more in the nature of a contract term between the contractor and the [Department of Transportation] as opposed to a rule"). In sum, we hold that the trial court was correct in ruling that the Board's actions in this matter did not constitute rule making.

For its second point on appeal, the Association contends that Paragraph 4 of the trial court's order is erroneous "in that the amendment of the contract between the Division and APCS does not establish the terms and conditions of the plan." That paragraph reads as follows:

> The conduct of defendants in establishing the mail order provisions and lower reimbursement rates by amending the [pharmacy benefit management] contract between the Division and APCS do not constitute "rules" or "rule making" under the [APA].

Although the court's order does not mention the word "plan," the Association argues in its brief that this statement is in error because it "assumes that the terms and conditions of the *Plan* are governed by the contract between the Division and APCS." The Association asserts that the Board, as a policy-making body, modified the "Plan" when it made its recommendations on October 17, 2001, and this action constituted the adoption of a new policy to amend the health benefits plan offered to employees. The Association further contends that, since the APA rule-making procedures were not followed, the amendment to the "Plan" was invalid. In support of its argument, the Association cites § 21-5-401, which provides for the Board's creation and states that the Board is to "set policy and select plans and coverages for the state employee and public school personnel health and life insurance and self-funded medical programs."

The Board responds that it did not adopt a new policy or amend any "Plan" because there was no "Plan" to amend. Instead, as previously discussed, the Board merely recommended an amendment to an existing contract between the Division and APCS, and there was no independent or separate "Plan," as now alleged by the Association. The evidence clearly supports the Board's position.

It should be noted that the Association does not refer to any document it claims to be a "Plan," and, while the Association refers to certain testimony in support of its suggestion that such a "Plan" exists, the Association never makes clear exactly what the "Plan" contains, where it is located, or what it sets out. Further, although the Association points to snippets of testimony from the

current and immediate past executive directors of the Division and from the chairman of the Board, this testimony, taken as a whole, does not support the Association's conclusions.

For example, John Greer, the former executive director of the Division, was asked whether there is "a written plan providing for prescription drug benefits for state employees and public school teachers"; he responded, "I would answer no, and I don't know of any plan existing anywhere that has a written plan for pharmacy and health or life benefits." Similarly, Sharon Dickerson, the current executive director of the Division, testified that "[t]here is not a document, *per se*, not one document." Rather, she stated, "[t]he plan consists of the drugs that are on the formulary. . . . The plan consists of the relationship between the — APCS and [the Division] as related to the performance guarantees. The plan is the pre-op, the quality versus time, the step therapy, you know, the reimbursement, the claims payment. You know, it's — the whole thing is the plan."

The Association also refers to the testimony of John Hartnedy, the chairman of the Board, who said that it was Board policy to determine the benefits of the plan. Hartnedy also averred that DF&A required action by the Board before the reductions in pharmacy reimbursement rates could take place and before the mail-order program could be implemented. However, Hartley's testimony never revealed what the plan was or where it was set out.

In sum, no independent, overarching "Plan" was developed by Hartnedy's, Greer's, or Dickerson's testimony. Instead, the testimony and evidence clearly supports a conclusion that the prescription drug benefits plan offered to Arkansas state and public school employees consists of the terms and conditions of the pharmacy benefits management contract, not some independent "Plan" developed and ordered by the Board. The trial court did not err in granting summary judgment in favor of the Board, the Division, and APCS. Therefore, we affirm.

Raymond C. SANDERS Jr. *v.* STATE of Arkansas

CR 01-95 98 S.W.3d 35

Supreme Court of Arkansas
Opinion delivered February 13, 2003

[redacted]

Jeff Rosenzweig, for appellant.

Mark Pryor, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Raymond C. Sanders Jr. was convicted of two counts of capital murder in the Grant County Circuit Court and was sentenced to death. On appeal, this court affirmed his conviction, but reversed

his death sentence and remanded the case for resentencing. *See Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992) ("*Sanders I*"). Upon remand, Appellant was again sentenced to death, and this court affirmed. *See Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994), *cert. denied*, 513 U.S. 1162 (1995) ("*Sanders II*"). Subsequent to this court's decision, Appellant timely filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37. The trial court denied the petition without holding a hearing. We now reverse and remand for an evidentiary hearing pursuant to Rule 37.

In light of the fact that there have been two previous direct appeals in this matter, it is not necessary to go into a lengthy recitation of the underlying facts. *See Sanders I* and *Sanders II*. Suffice it to say, Appellant was convicted of the murders of Nancy and Charles Brannon on February 28, 1991. Following his conviction, Appellant filed two petitions under Rule 37. The first petition was eleven pages long, with the eleventh page containing only the certificate of service. The second petition was a sixteen page "enlarged" version of the first petition.[1] In support of his petition, Appellant alleged that: (1) venue was changed without Appellant's consent and out of his presence; (2) several conflicts of interests precluded Appellant from receiving a fair trial; (3) Appellant's counsel was ineffective in both the guilt and penalty phases of his trial; and (4) the State improperly admitted a subsequent homicide as an aggravator during sentencing. Along with these petitions, Appellant also filed a motion seeking the court's permission to file the enlarged Rule 37 petition. He also filed a motion to supplement his petition on the basis that he had obtained newly discovered evidence regarding a criminal association between Dan Harmon, the prosecutor in his case, and William Murphy, one of his attorneys in this case.

The trial court concluded that both motions exceeded the ten-page limit set forth in Rule 37.1(e) and summarily dismissed both petitions. The trial court then denied Appellant's motion to

[1] The "enlarged" petition did not raise any additional claims supporting Appellant's entitlement to Rule 37 relief; rather, the longer petition simply expands on those claims raised by Appellant in the first petition.

file the enlarged petition. The court also denied Appellant's motion requesting permission to supplement his original Rule 37 petition. The trial court then went on to state, however, that even if he were to consider Appellant's substantive arguments, he still would not prevail under Rule 37. According to the trial court, there was no genuine issue as to any material fact in Appellant's petition; thus, the State's motion for summary judgment under Ark. R. Civ. P. 56 was proper. The trial court based this finding on his conclusion that the Arkansas Rules of Civil Procedure are applicable to Rule 37 proceedings.

The trial court also determined that Appellant's petition failed under Rule 37.3(a), because it contained only conclusory allegations that lacked any factual support and did not warrant an evidentiary hearing. The trial court acknowledged that Appellant attempted to set forth additional facts in support of his petition regarding the criminal association between Harmon and Murphy that led to their indictments and ultimate convictions in federal court. The trial court concluded, however, that these facts were irrelevant to Appellant's petition, because Appellant failed to tie the crimes of Murphy and Harmon to his prosecution for the Brannon murders. This appeal followed.

Appellant raises several arguments on appeal. First, Appellant contends that it was error for the trial court to dismiss his original Rule 37 petition on the basis that it exceeded the page limits of Rule 37.1(e). Next, Appellant argues that the trial court erred in denying his motion to file an enlarged Rule 37 petition and his motion to supplement the petition. Appellant also contends that the trial court erred in applying the principles of Rule 56 to a Rule 37 proceeding. Finally, Appellant contends that his Rule 37 petition demonstrates that he is entitled to a hearing. We agree that Appellant has set forth sufficient facts in support of his petition for postconviction relief to warrant an evidentiary hearing. Having so concluded, it is unnecessary for us to consider the merits of Appellant's remaining arguments on appeal. For purposes of clarity, however, we will address each of the points raised by Appellant.

For his first point on appeal, Appellant argues that the trial court erred in denying his Rule 37 motion on the basis that the motion was eleven pages long. According to Appellant, the petition's eleventh page contained nothing but the certificate of service, which is not even required under any provision of Rule 37. Thus, Appellant argues the trial court erred in dismissing his petition on this procedural basis.

Under Ark. R. Crim. P. 37.1(e), petitions for postconviction relief shall not exceed ten pages in length. This court has held that the rule limiting petitions to ten pages is an entirely reasonable restriction on petitioners seeking postconviction relief. *See Washington v. State*, 308 Ark. 322, 823 S.W.2d 900 (1992); *Maulding v. State*, 299 Ark. 570, 776 S.W.2d 339 (1989). In fact, this court has stated that due process does not require courts to provide an unlimited opportunity to present postconviction claims or prevent a court from establishing limits on the number of pages in a petition. *Id.* Moreover, this court has held that any exhibits attached to a petition filed under Rule 37 are counted for purposes of determining whether the petition conforms to the ten-page limitation. *Washington*, 308 Ark. 322, 823 S.W.2d 900. This court has not, however, considered the issue of whether a page containing only a certificate of service should count towards that page limitation. We think that it should not.

This court has repeatedly stated that, in death cases where a Rule 37 petition is denied on procedural grounds, great care should be exercised to assure the denial rests on solid footing. *Echols v. State*, 344 Ark. 513, 42 S.W.3d 467 (2001); *Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999). In this case, the substance of Appellant's petition was concluded half-way through the tenth page. Appellant's counsel's signature followed on the remainder of the tenth page, with the certificate of service carried over to the next page. It is, therefore, unreasonable to dismiss a petition as too long under these circumstances. Accordingly, the trial court abused its discretion in summarily dismissing Appellant's original Rule 37 petition because it exceeded ten pages.

With regard to Appellant's contention that the trial court erred in denying his motion to file an enlarged petition, we

disagree. This court's Rules of Criminal Procedure do allow for the amendment of Rule 37 petitions, but only with leave of the court. Ark. R. Crim. P. 37.2(e). In *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000), the trial court found that the appellant failed to set forth any legitimate ground or justification for filing the enlarged petition. This court affirmed on appeal. Likewise, in the present matter, Appellant fails to establish that the trial court abused its discretion in denying the motion to file an enlarged petition. As the trial court pointed out, Appellant spent the majority of his motion attacking the page restrictions of Rule 37.1(e), rather than establishing a need to exceed that limitation. Accordingly, the trial court did not err on this point.

Appellant also argues that the trial court erred in denying his motion to supplement his Rule 37 petition so that he could raise the allegations regarding the criminal relationship between the prosecutor, Harmon, and his own defense counsel, Murphy. The trial court denied this motion on the ground that it was facially meritless. Specifically, the trial court stated that the motion failed to demonstrate any nexus between the criminal activities of Murphy and Harmon with the prosecution of Appellant for the Brannon murders. While we agree that there is a lack of proof of any such nexus, we think the trial court abused its discretion in denying the motion to supplement on this basis.

The motion at issue here set forth in detail the offenses that Harmon and Murphy were accused of, as well as the time periods in which these offenses allegedly occurred. The offenses included attempts to extort money from criminal defendants that occurred around the time that Appellant was represented by Murphy and prosecuted by Harmon. While it is not clear whether there is any nexus between the two, the facts alleged by Appellant in his petition raise more than the mere specter of an improper relationship between the prosecutor and defense counsel that may have prejudiced Appellant in his trial. Accordingly, the trial court abused its discretion in refusing to allow Appellant to supplement his petition with this newly obtained information.

Appellant's next argument is that the trial court erred in granting the State's motion for summary judgment under Ark.

R. Civ. P. 56, as that rule is not applicable in Rule 37 proceedings. The State counters that even if Rule 56 is not applicable, the trial court still based his denial of Appellant's claims under both Rule 56 and Rule 37.3; thus, Appellant's argument on this point is without merit. We agree with the State that the trial court's application of Rule 56 did not prejudice Appellant, because the trial court alternatively relied on Rule 37.3. Again, though, we address this issue in order to prevent any future confusion.

This court has long recognized that Rule 37 proceedings are civil in nature. *See State v. Hardin*, 347 Ark. 62, 60 S.W.3d 397 (2001); *Brady v. State*, 346 Ark. 298, 57 S.W.3d 691 (2001); *Arkansas Pub. Defender Comm'n v. Greene County Cir. Court*, 343 Ark. 49, 32 S.W.3d 470 (2000). Moreover, this court has referred to and applied the Rules of Appellate Procedure—Civil when necessary in criminal appeals. *Id*; *Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001). Usually, this court's discussion of the civil nature of Rule 37 proceedings is in the context of a petitioner seeking the appointment of counsel for the pursuit of his Rule 37 petition. *See, e.g., Greene County*, 343 Ark. 49, 32 S.W.3d 470. This court has also applied a civil appellate rule in a Rule 37 proceeding where the State seeks to appeal from the grant of postconviction relief. *See, e.g., State v. Dillard*, 338 Ark. 571, 998 S.W.2d 750 (1999). We have not, however, applied the Rules of Civil Procedure to a Rule 37 action.

Here, the State attempts to rely on this court's decision in *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999), in support of its argument that Rule 56 is applicable. *Nance* is of no help to the State. That case involved an appeal from the denial of a Rule 37 petition, following a motion by the State for summary judgment on the pleadings. The trial court determined that the pleadings were conclusory and insufficient to warrant postconviction relief. This court affirmed the trial court's denial of the petition, but analyzed the denial of the claim under Rule 37.3(a). Nothing in the opinion indicates that Rule 56 is applicable to Rule 37 proceedings.

The very provisions of Rule 56 demonstrate its inapplicability to the present matter. Rule 56(c)(2) states in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows 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 on the issues specifically set forth in the motion.

There are no depositions, interrogatories, or other pleadings at issue in Rule 37 proceedings. In determining whether a petitioner has established grounds entitling him to Rule 37 relief, the trial court relies on the Rule 37 petition itself. Rule 37.3(a) provides its own mechanism for dealing with conclusory petitions. It states in relevant part:

> If the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any part of the files, or records that are relied upon to sustain the court's findings.

Accordingly, it was error for the trial court to apply the summary-judgment principles of Rule 56 to this case.

For his final point on appeal, Appellant argues that he was entitled to a hearing on his Rule 37 petition, as he set forth numerous grounds entitling him to relief. The State counters that Appellant's allegations are either procedurally barred or amount to nothing more than mere conclusory allegations. The trial court agreed with the State that Appellant's petition contained only conclusory allegations and adopted the assertions set forth by the State in its Rule 56 motion as its findings of fact. This was error.

It is undisputed that the trial court has discretion pursuant to Rule 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *See Bilyeu v. State*, 337 Ark. 304, 987 S.W.2d 277 (1999); *Luna-Holbird v. State*, 315 Ark. 735, 871 S.W.2d 328 (1994). This court has previously interpreted Rule 37.3 to "provide that an *evidentiary hearing should be held* in a postconviction proceeding *unless* the files

and record of the case conclusively show that the prisoner is entitled to no relief." *Wooten*, 338 Ark. 691, 694, 1 S.W.3d 8, 10 (emphasis added) (quoting *Bohanan v. State*, 327 Ark. 507, 510, 939 S.W.2d 832, 833 (1997) (*per curiam*)). Where the trial court concludes, without a hearing, that the petitioner is not entitled to relief, Rule 37.3(a) requires the trial court to make written findings specifying the parts of the record that form the basis of the trial court's decision. *Id.*; *Smith v. State*, 300 Ark. 291, 778 S.W.2d 924 (1989). If the trial court fails to make such findings, it is reversible error, unless the record before this court conclusively shows that the petition is without merit. *Bohanan*, 327 Ark. 507, 939 S.W.2d 832.

[redacted] In the present case, we are confronted with two problems. First, even if we were to accept the trial court's adoption of the State's assertions as sufficient findings of fact, the trial court's order still fails to comply with the requirements of Rule 37.3(a), because the order does not specify those parts of the record relied on to form the basis of the order. As we stated in *Stewart v. State*, 295 Ark. 48, 746 S.W.2d 58 (1988), such a failure constitutes reversible error, unless this court can determine from the record as a whole that the petition has no merit. Upon reviewing this record, we cannot say that it conclusively shows that Appellant's petition is without merit.

Appellant has submitted a petition that states facts sufficient to render his allegations more than conclusory. In addition, he attempted to supplement his petition with facts regarding the relationship between Harmon and Murphy that call into question the fairness of his capital-murder trial. We believe the instant case is analogous to the United States Supreme Court's decision in *Bracy v. Gramley*, 520 U.S. 899 (1997). There, the defendant was convicted of armed robbery, aggravated kidnapping, and murder and was sentenced to death. Following a denial of his request for postconviction relief, the defendant sought federal habeas corpus relief. The federal district court denied his petition, and he appealed to the United States Supreme Court. At issue was whether the defendant had shown good cause to prove his claim that he was denied a fair trial, because the judge who presided at

his trial was later convicted of taking bribes from criminal defendants.

On appeal, the Supreme Court reversed and remanded the matter to the federal district court with instructions that the defendant be allowed to conduct discovery into his allegation. The Court recognized that there was no allegation that the trial judge tried to obtain a bribe from this particular defendant, but expressed concern over evidence that the trial judge "fixed" other murder cases around the same time as this defendant's case was pending. The Court determined that the defendant had shown good cause for conducting discovery into his allegation that the trial judge was biased in favor of the prosecution in order to cover up the fact that the judge accepted bribes from other defendants.

We find *Bracy* to be more persuasive than *Lovell v. State*, 984 P.2d 382 (Utah 1999), a case relied on by the State in support of its contention that Appellant is not entitled to an evidentiary hearing. That case involved an attorney who had an extensive, but legal, relationship with the prosecutor. The Utah Supreme Court determined that there was no conflict of interest, because the defendant failed to demonstrate that other counsel would have approached the case differently. The State ignores, however, the fact that the defendant had previously been granted an evidentiary hearing into his allegation that he was prejudiced by the conflict of interest between his counsel and the prosecutor.

Finally, we note that in *Sanchez v. State*, 290 Ark. 39, 716 S.W.2d 747 (1986), this court allowed the appellant to proceed with an evidentiary hearing pursuant to Rule 37, despite the conclusion that the majority of the appellant's claims were not cognizable under Rule 37 or failed to demonstrate that he was entitled to relief under the rule. Nonetheless, this court determined that a hearing was warranted on the allegation of ineffective assistance of counsel, because the appellant discovered after his trial that his attorney was under indictment at the time of this trial in the same court as the appellant was being tried. Recognizing that this may have created a conflict of interest, this court granted the appellant a hearing on this issue.

. In summary, this court cannot ignore the fact that Appellant was represented in a capital-murder case by someone who was later indicted on charges of racketeering and conspiracy along with the man who prosecuted Appellant. Appellant has set forth sufficient facts in his petition demonstrating that he is entitled to pursue these claims in the course of an evidentiary hearing. We are mindful of our previous acknowledgment 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); *Echols*, 344 Ark. 513, 42 S.W.3d 467; *ACLU, Inc. 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). With that said, we remind Appellant that this evidentiary hearing is strictly limited to those issues already raised by Appellant in his petition. This is not an opportunity to raise new issues.

Appellant also urges this court to remand this matter for a hearing before a different judge. He contends that the trial judge in this case has already expressed his opinion regarding the merits of his petition and, thus, is biased against Appellant. We disagree. It is well settled that there is a presumption of impartiality on the part of judges. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001); *Black v. Van Steenwyk*, 333 Ark. 629, 970 S.W.2d 280 (1998). The question of bias is usually confined to the conscience of the judge. *Id.*; *Dolphin v. Wilson*, 328 Ark. 1, 942 S.W.2d 815 (1997). Appellant has failed to overcome the presumption of impartiality. Accordingly, we decline to remand this case to a different trial judge.

As a final note, Appellant asks this court to make a determination of whether the protections of Rule 37.5 should be applied to him in this case. Rule 37.5, which became effective on August 1, 1997, provides the method for pursuing postconviction relief in death-penalty cases. The rule evolved from Act 925 of 1997, now codified at Ark. Code Ann. §§ 16-91-201 to -206 (Supp. 1999), where the 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.* Appellant recognizes that the rule is inapplicable to his case, because he became eligible to file his Rule 37 petition prior to the effective date of Rule 37.5. *See* Rule 37.5(k). He argues, though, remanding his case without providing him counsel under Rule 37.5 amounts to a denial of equal protection in violation of the Fourteenth Amendment and Article 2, § 18, of the Arkansas Constitution. Although this court in *Wooten*, 338 Ark. 691, 1 S.W.3d 8, addressed the application of the principles of Rule 37.5 to a petition filed before the rule's effective date, we are unaware of such a need in the instant case. It is apparent from the record before us that Appellant is already represented by qualified counsel; thus, any discussion of appointing counsel pursuant to Rule 37.5 is moot.

Reversed and remanded.

Donna SUMMERS *v.* Richard David GARLAND

02-462 98 S.W.3d 23

Supreme Court of Arkansas
Opinion delivered February 13, 2003

[Petition for rehearing denied March 13, 2003.]

Kennard K. Helton, for appellant.

Richard David Garland, for appellee.

RAY THORNTON, Justice. On October 1, 1992, the Richard David Garland Trust was established. The trust was created pursuant to the terms of William Otis Garland, Jr.'s will. Appellant, Donna Summers, was the executrix of Mr. Garland's estate. First Commercial Bank was appointed the trustee of the Richard David Garland Trust.[1] The trust consisted of a certificate of deposit worth $100,000.

The terms of the trust provided that appellee, Richard Garland, could use the interest generated by the trust property until he was thirty years old. The trust agreement further provided that if appellee died or was convicted of a felony prior to becoming thirty years old, the corpus of the trust would be divided equally between appellant and Ruby Jo Garland Warren.

On December 3, 1993, prior to appellee turning thirty, he pleaded guilty to a class C felony in Johnson County Circuit Court. Appellee was placed on probation for five years, ordered to pay a fine of $1,000, and ordered to pay court costs in the amount of $397.25. Appellee turned thirty on August 9, 2000.

On August 16, 2000, appellee filed a petition in the Johnson County Circuit Court requesting that the previous charges filed against him be dismissed and that the records involved in his case be sealed. On August 23, 2000, the Johnson County Circuit Judge entered an order finding that appellee had satisfactorily complied with the terms of his probation. The circuit judge also dismissed appellee's class C felony offense, and sealed all records involved in appellee's case.

Appellant and appellee each made demands upon the trustee for the trust property. On October 3, 2000, the trustee filed an interpleader complaint in the Pope County Chancery Court. On October 19, 2000, appellant filed a cross-claim stating that appellee had been convicted of a felony, and requesting that the court award her one-half of the trust property pursuant to the trust agreement. On January 10, 2001, an order was entered authorizing the trustee to retain possession of the trust property until the trial court determined the rightful owner of the property.

---

[1] First Commercial Bank is now Regions Bank.

On February 13, 2001, appellee filed a motion for summary judgment. In his motion, appellee argued that he was entitled to the trust property. Specifically, he argued that because he was placed on probation, had his charges dismissed, and had his record expunged, he was not "convicted" of a felony. He further argued that the sealed documents were privileged from introduction into evidence. Finally, he argued that because "by law" he was not convicted of a felony prior to his thirtieth birthday, he was entitled to the trust property.

On March 26, 2001, appellant responded to appellee's motion for summary judgment. She argued that it was William Garland's intent that appellee not receive the trust property if he was convicted of a felony. She argued that the term "convicted" in Mr. Garland's will and the trust agreement was to have a layman's definition. Appellant further explained that Mr. Garland requested that this provision be included in the trust agreement as an incentive to his son, who had previously demonstrated irresponsible behavior.

On October 2, 2001, a hearing was held on appellee's motion for summary judgment. At the hearing, the trial court found that appellee was convicted of a felony prior to his thirtieth birthday. However, the trial court also found that because the charges against appellee had been dismissed and the records sealed, the conduct was deemed not to have occurred. The trial court further concluded that because the records were sealed, appellant would not be able to prove that appellee was convicted of a felony.

On November 9, 2001, an order granting appellee's request for summary judgment was entered. It is from this order that appellant appeals. We reverse the trial court, and remand this matter for distribution of the trust funds in accordance with this opinion.

On appeal, appellant argues that the trial court erred when it granted appellee's motion for summary judgment. In *Norton v. Hinson*, 337 Ark. 487, 989 S.W.2d 535 (1999), we summarized our standard of review of a summary-judgment order. We explained:

> 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.

Id. (citing *Hall v. Tucker*, 336 Ark. 112, 983 S.W.2d 432 (1999)).

Appellant argues that summary judgment was not proper because there was an unresolved fact question. Specifically, she argues that whether William Garland intended the word "convicted," as used in his will and the trust agreement, to be given a layman's definition or whether he intended the word to be given a legal definition is unresolved. The language to which appellant refers appears in paragraph five of the trust agreement. It states:

> Principal and income of this trust shall be administered according to the terms of the last will and testament of William Otis Garland, Jr., which was probated in Johnson County, Arkansas, in Johnson County Probate Court case number 91-13. Specifically, the trust property shall be held for the benefit of and ultimately distributed unto Richard David Garland upon his attaining 30 years of age; provided,
>
> (a) that until Richard David Garland attains thirty (30) years of age, he shall be entitled to the use of the interest only generated by the trust property;
>
> (b) that should Richard David Garland die before obtaining thirty (30) years of age or should he be convicted of a felony prior to attaining thirty (30) years of age, then upon the happening of either of these events, then the trust property shall be divided equally between Ruby Jo Garland Warren and Donna Garland Summers.

At the hearing on the motion for summary judgment, the trial court found:

> Mr. Garland did plead guilty to a felony and an order of probation was entered finding him guilty of that. In my opinion, therefore, he was convicted of a felony prior to the time he was thirty years old.

The trial court's determination that appellee was convicted of a felony is correct. We have explained that a plea of guilty, coupled with a fine and probation, constitutes a conviction. *Carter v. State,* 350 Ark. 229, 85 S.W.3d 914 (2002); *David v. State,* 286 Ark. 205, 691 S.W.2d 133 (1985). Appellee pleaded guilty to manufacturing a controlled substance in violation of Ark. Code Ann. § 5-64-401. This offense is a class C felony. After pleading guilty, appellee was ordered to pay a $1,000 fine and placed on probation for five years. Based on our holding in *Carter, supra,* we conclude that the trial court correctly determined that appellee was convicted of a felony.

Having made this determination, we must now consider whether the trial court erred when it found that appellant was prohibited by an order entered after appellee attained thirty years of age from introducing evidence of appellee's conviction for the purpose of establishing that appellee was not entitled to collect the trust property. The trial court found that because the charges against appellee had been dismissed and the record of appellee's criminal case was sealed, appellant was prohibited from introducing evidence concerning appellee's conviction to establish that appellee had violated the terms of the trust. We conclude that the trial court erred.

The facts presented in this case require consideration of a future interest problem. To determine what, if any, effect appellee's expungement may have on the rights of the parties to collect the trust property, we must first determine what interest each person may have had. Looking to the language of the trust, we conclude that Mr. Garland gave appellee and appellant alternative contingent remainder interests in the trust property. "Alternative contingent remainders occur when two contingent remainders follow an estate and the condition precedent for one is the opposite of the condition precedent for the other." John Makdisi, *Estates in Land and Future Interest,* 2d ed. (1995). "A contingent remainder is a remainder that is subject to a condition pre-

cedent." *Id.* A "condition precedent is a condition that must occur before the remainder will be allowed to take following the termination of the preceding life estate(s) and/or fee tail(s)." *Id.*

In the case now on review, the conditions precedent to appellee's possession vesting in the trust property were: (1) attainment of age thirty, and (2) not being convicted of a felony prior to turning thirty. The conditions precedent to appellant's remainder interest were: (1) appellee's death before attainment of age thirty, or (2) appellee being convicted of a felony prior to turning thirty.

Appellee failed to meet one of the conditions precedent. Specifically, appellee was convicted of a felony prior to turning thirty. When appellee's conviction occurred, appellant's remainder interest immediately vested and appellee's remainder interest was simultaneously destroyed. The law desires property to vest as soon as possible. *Pickens v. Black*, 318 Ark. 474, 885 S.W.2d 872 (1994). *See also* Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* 2d ed. (1984) (writing that a contingent remainder becomes a present estate immediately upon the expiration of the prior estate). Because appellant's interest in the trust property vested in 1993, when appellee was convicted of a felony, the dismissal of the charges and the sealing of the record that occurred in 2000 were of no consequence. Accordingly, we conclude that one-half of the trust property vested in appellant on December 3, 1993.

Appellant raises one additional point in which she contends that the Johnson County Circuit Court was without jurisdiction to dismiss appellee's conviction and seal the records from his criminal case. Because we have determined that the dismissal of appellee's conviction and the sealing of his criminal records did not interfere with appellant's right to the trust property, we decline to consider this point on appeal.

Reversed and remanded.

James Ken ANDERSON *v.* STATE of Arkansas

CR 02-1175 98 S.W.3d 403

Supreme Court of Arkansas
Opinion delivered February 13, 2003

Appellant, pro se.

No response.

PER CURIAM. In 1992, James Ken Anderson entered a plea of guilty to murder in the second degree and was sentenced to eleven years' imprisonment. On July 23, 2001, Anderson filed a *pro se* petition for writ of error *coram nobis* in the trial court. He later amended the petition to allege that he was entitled to a writ of *habeas corpus* on the ground that he was actually innocent of the offense. The petition was denied after a hearing, and petitioner Anderson has appealed to this court. Now before us are a series of motions filed by appellant.

The appeal is dismissed as it is clear that the appellant could not prevail on appeal. The motions are moot. This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994); *see Chambers v. State*, 304 Ark. 663, 803 S.W.2d 932 (1991); *Johnson v. State*, 303 Ark. 560, 798 S.W.2d 108 (1990); *Williams v. State*, 293 Ark. 73, 732 S.W.2d 456 (1987).

It was adduced at the hearing on appellant's petition that he was released from custody in 1997, having completed his sentence.[1] (He was subsequently convicted in Miller County of second-degree murder and sentenced to a term of forty years' imprisonment.) Thus, when appellant filed his petition in 2001 challenging the 1992 conviction, he was not in custody as a result of that judgment of conviction even though that judgment was used to enhance the later sentence. When a court finds cause to grant a writ of error *coram nobis*, the remedy is a new trial. *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984). Inasmuch as appellant had already served the sentence imposed, his petition is moot and a new trial would not have been an appropriate remedy even if there were cause to grant the writ with respect to his 1992 conviction.

---

[1] The eleven-year sentence was considered completed in 1997 as a result of the accumulation by appellant of credits against the sentence such as "good time."

Likewise, appellant's request that a writ of *habeas corpus* be issued on the basis that he was actually innocent of the offense of which he was convicted in 1992 was also moot. As stated, appellant was not incarcerated as a result of the 1992 judgment; therefore, a writ of *habeas corpus* could not be issued to obtain his release from custody arising from that judgment. An issue is moot when any judgment rendered would have no practical legal effect upon an existing legal controversy. *Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999).

Appeal dismissed; motions moot.

IMBER, J., not participating.

Jason J. GULLEY *v.* STATE of Arkansas

CR 03-83 98 S.W.3d 403

Supreme Court of Arkansas
Opinion delivered February 13, 2003

Don Gillespie, for appellant.

No response.

PER CURIAM. Appellant Jason J. Gulley, by and through his attorney, has filed a motion for belated appeal. Attorney, Ron Gillespie, states in the motion that the notice of appeal was filed 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.

Robbie R. JONES *v.* DOUBLE "D" PROPERTIES, INC., an Arkansas Corporation and Charlie Daniels, Commissioner of State Lands, State of Arkansas *v.* Buck D. JONES

02-717 98 S.W.3d 405

Supreme Court of Arkansas
Opinion delivered February 20, 2003

[Petition for rehearing denied April 3, 2003.]

[redacted]

James R. Filyaw, for appellant Robbie Jones.

Oscar Stilley, for appellant Buck Jones.

David Charles Gean, for appellee Double "D" Properties.

Mark Pryor, Att'y Gen., by: *Anthony W. Black* and *Carol A. Lincoln*, Ass't Att'ys Gen., for appellee Charlie Daniels.

TOM GLAZE, Justice. This case involves a married couple, Robbie and Buck Jones, who reside in Ft. Smith. Robbie Jones was the record owner of their resident property since 1963, and, over the ensuing years, she handled the payment of the couple's taxes and bills. However, beginning in 1996, Mrs. Jones stopped paying her real estate taxes. As a result, she became delinquent on her real property taxes, which led to the sale of the land to Double "D" Properties, Inc. After the sale and the State Land Commissioner's issuance of a limited warranty deed to Double "D", Mrs. Jones brought suit against Double "D" and the Commissioner. She alleged the Commissioner had failed to comply with the notice provisions of Act 626 of 1983, as amended, and, therefore, the sale was void and the Commis-

sioner's deed should be cancelled. Double "D" and the Land Commissioner answered, denying Mrs. Jones's allegation, and, in addition, Double "D" counterclaimed, seeking an order directing Mrs. Jones to vacate. Double "D" subsequently filed a third-party complaint against Buck Jones, seeking the same relief as previously requested against Robbie. Robbie's attorney filed an answer on Mr. Jones's behalf, reasserting the Joneses' claims that the sale of their residence was not in compliance with Act 626.

This dispute was tried on November 2, 2001. The trial judge, by letter opinion entered on January 2, 2002, held that the Commissioner's sale of the Joneses' delinquent property complied with Act 626, and the Commissioner's deed issued to Double "D" was valid. Following the judge's ruling, Buck Jones's new attorney filed a counterclaim, alleging that the Joneses' property had been illegally assessed, that an unlawful, unconstitutional amount of taxes had been imposed, and, therefore, the Commissioner's deed should be set aside. In addition, Mrs. Jones tried to question Act 626's notice requirements as being unconstitutional and depriving the Joneses of their rights of due process. The trial court considered these new arguments at a hearing on March 1, 2001, and it entered two orders on April 12, 2002, holding again that the Commissioner had strictly complied with the notice of provisions of Act 626, and further deciding that the Joneses had failed to raise their constitutional arguments in a timely manner. The Joneses challenge the trial court's decisions in this appeal.

We first address whether the State Land Commissioner complied with the notice requirements of Act 626. The pertinent provision is codified at Ark. Code Ann. § 26-37-301 (Repl. 1997), which provides as follows:

> (a)(1) Subsequent to receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem by paying all taxes, penalties, interest, and costs, including the cost of the notice.
>
> (2) All interested parties known to the Commissioner of State Lands shall receive notice of the sale from the Commissioner of State Lands in the same manner.

> (b) The notice to the owner or interested party shall also indicate that the tax-delinquent land will be sold if not redeemed prior to the date of sale. The notice shall also indicate the sale date, and that date shall be no earlier than two (2) years after the land is certified to the Commissioner of State Lands.

In cases involving redemption of tax-delinquent lands, this court has stated that strict compliance with the requirement of notice of the tax sales themselves is required before an owner can be deprived of his or her property. *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993); *Trustees of First Baptist Church v. Ward*, 286 Ark. 238, 691 S.W.2d 151 (1985).

In *Wilson v. Daniels*, 64 Ark. App. 181, 980 S.W.2d 274 (1998), a case much like the one before us, our court of appeals construed § 26-37-301. There, appellant lived in El Dorado Hills, California, but owned property in Pine Bluff. Taxes on the Pine Bluff property had not been paid since 1990, and the property was certified delinquent in July of 1994. On September 15, 1994, the Land Commissioner mailed a certified letter to Wilson's last known address in the tax records notifying her that the taxes on the Pine Bluff property were delinquent, that she could redeem the property, and that the property would be offered for sale on September 17, 1996. The letter was addressed to Wilson in Folsom, California; it was returned marked "attempted not known." Upon learning of Wilson's correct address, a second certified letter was mailed to her on June 25, 1996, in El Dorado Hills, California, notifying her that the property was delinquent, that she could redeem the property, and that the property would be offered for sale on September 17, 1996. This letter was returned "unclaimed or refused."

Wilson denied ever receiving either of the letters mailed by the Land Commissioner, and she testified that she had called the county and state offices to inquire why she had not received her tax statements; she also gave that office her correct address. The trial court found that there was a problem with the address and tax billings from the tax office; however, the court concluded that the first notice that was mailed to the wrong address was cured by the second letter that was mailed to the correct address. The court

ruled that the Commissioner had fully complied with the applicable statutes.

On appeal, the *Wilson* court affirmed, stating that Ark. Code Ann. § 26-37-301 "provides that after receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner of his/her right to redeem, notify that the land will be sold, and notify the owner of the sale date." *Wilson*, 64 Ark. App. at 184. The court continued as follows:

> Under this section, the Commissioner is required to notify the owner, at the owner's last known address by certified mail. After reviewing the evidence, it is clear that the Commissioner, subsequent to receiving the tax-delinquent land, sent certified notice to [Wilson's] last known address. Even though the first notice mailed by the Commissioner was mailed to the wrong address, the Commissioner sent a second notice to the correct address of [Wilson] where she had resided since 1980. We cannot say that the chancellor's decision that the second notice satisfied the statutory requirement was clearly erroneous.

Id.

The *Wilson* case is factually analogous to the present case. In both instances, the certified letter was returned marked "unclaimed." Nevertheless, in *Wilson*, the court of appeals held that the Commissioner had complied with the requirements of the statute. In the instant case, the testimony was undisputed that the Commissioner mailed a certified letter, as required, and that the post office made the appropriate attempts to deliver it. The statute does not require the Land Commissioner to take every step possible to see that the letter arrives in the property owner's hand; it only requires that the Commissioner "shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem [the property.]"

Jones concedes that this case is factually similar to *Wilson*, but asserts that the court of appeals nevertheless "expressed reservations about deficiencies in the notice." The "reservations," however, consisted of the court's concern about the *timing* of the notice — i.e., that it could be sent relatively close in time to the time of the sale. That precise question was never an issue in this

case, as it was undisputed that the notice was sent a full two years before the scheduled sale date.

Further, Jones argues in her brief that strict compliance with the statute is required, and that, because the Legislature required the notice to be sent via certified mail, that was a clear indication that the legislature intended that the taxpayer be given actual notice of the jeopardy to his property. However, in construing a statute, it is the court's duty to construe it just as it reads. *St. Paul Fire & Marine Ins. v. Griffin Const.*, 338 Ark. 289, 993 S.W.2d 485 (1999); *Heard v. Payne*, 281 Ark. 485, 665 S.W.2d 865 (1984); *City of North Little Rock v. Montgomery*, 261 Ark. 16, 546 S.W.2d 154 (1977). When we construe a statute, we look first at the plain language of the statute and give the words their plain and ordinary meaning. *See ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998). If the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, there is no need to resort to rules of statutory construction. *Griffin Constr., supra.* Here, the statute requires notice "by certified mail." The Land Commissioner sent notice to Jones by certified mail. Therefore, the trial court did not err in concluding that the Commissioner had strictly complied with the statute.

Next, the Joneses argues that the trial court erred in concluding that Mrs. Jones's constitutional arguments were not timely. In its April 12, 2002, order, dealing with the issues raised in Mrs. Jones's "post trial brief," the trial court noted first that the matter was tried to the court on November 2, 2001. After receiving post-trial briefs, the court entered a letter opinion on January 2, 2002, and requested that counsel for Double "D" prepare a precedent and present copies to the other attorneys; if no objections were received within five days, the precedent would be signed and entered. The April 12 order then noted that Mrs. Jones "filed [a] post-trial brief [on January 16, 2002], which the court consider[ed] a motion for new trial, within the five days. The judgment has not been signed and entered pending resolution of the issues presented in [Mrs. Jones's] motion and the responses filed by [Double "D" and the Land Commissioner]."

The January 16 motion filed by Mrs. Jones alleged that Act 626 of 1983 was constitutionally defective as to its notice requirements with respect to the right of redemption, and that it was therefore a deprivation of her right of due process. In her brief, Jones argued that she and her husband had a vested interest in the property in question that entitled them to actual notice of the proceedings, and that mere compliance with the statutory scheme did not satisfy the requirements of due process. Further, Jones asserted that the fact that no notice whatsoever is required for the second redemption period under the statute, which runs for a period of thirty days from the time that the land commissioner issues the tax deed; the omission of any notice requirement about the second redemption period also rendered the statute unconstitutional.

In its order denying Jones's motion, the trial court found that the constitutional issues were never raised at trial by Mrs. Jones, and that she had not properly objected to the alleged error of law, as is required by Ark. R. Civ. P. 59(a)(8). The court submitted that the only possible ground for a new trial was Rule 59(a)(8), which provides that a new trial may be granted when there has been an error of law occurring at the trial and objected to by the party making the application. Therefore, the court wrote, "since the aggrieved party has failed to establish grounds, pursuant to Rule 59(a), for granting a new trial, the court does not have the authority to open the record to amend its findings of fact and conclusions of law."

On appeal, Mrs. Jones asserts that the trial court erred in concluding that her constitutional issues were not properly raised. She maintains that Rule 59 was inapplicable, because no judgment had yet been entered as of the date she filed her motion, and, for the first time, she asserts that "it would have been more proper that the motion . . . be treated by the court as being governed by Rule 52(b)(1)." Rule 52 pertains to requests for findings by the trial court, and permits a party to move the trial court to amend its findings of fact within ten days after entry of judgment. Here, however, Jones never suggested to the trial court that it should consider her motion as a request for findings under Rule 52.

In any event, the trial court did not err in concluding that Jones's raising of the constitutional issue was untimely. Ark. R. Civ. P. 59 governs the granting of new trials, and provides that a new trial may be granted for any a number of grounds materially affecting the substantial rights of a party, including, as noted above, an error of law occurring at the trial and objected to by the party making the application. Ark. R. Civ. P. 59(a)(8). The Rule further states that, "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

Rule 59(b) establishes when a new trial motion shall be filed, and reads as follows:

> (b) Time for Motion. A motion for a new trial shall be filed not later than 10 days after the entry of judgment. *A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered.* If the court neither grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day.

(Emphasis added.)

Our case law is well-settled that a motion for new trial is addressed to the sound discretion of the trial court, and the trial court's refusal to grant it will not be reversed on appeal unless an abuse of discretion is shown. *Sharp Co. v. Northeast Ark. Planning & Consulting Co.*, 269 Ark. 336, 602 S.W.2d 627 (1980). An abuse of discretion means a discretion improvidently exercised, *i.e.*, exercised thoughtlessly and without due consideration. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995); *Nazarenko v. CTI Trucking Co.*, 313 Ark. 570, 856 S.W.2d 869 (1993).

The trial court here found that the issues raised in Mrs. Jones's motion for new trial were not timely raised, and therefore, the court denied her motion. This decision was correct. This court has repeatedly held that an objection first made in a motion for new trial is not timely. *Lee v. Daniel*, 350 Ark. 466, 91 S.W.3d 464 (2002). Stated another way, an issue must be

presented to the trial court at the earliest opportunity in order to preserve it for appeal, and even a constitutional issue must be raised at trial in order to preserve it for appeal. *Foundation Telecom., Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000). A party may not wait until the outcome of a case to bring an error to the trial court's attention. *Id.* The court in *Lee, supra,* stated further on this issue as follows:

> In *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978), this court noted that the reason for requiring an objection before the trial court is to discourage "sandbagging" on the part of lawyers who might otherwise take a chance on a favorable result, and subsequently raise a constitutional claim if the gamble did not pay off. *Selph*, 264 Ark. at 204. *See also Wilson v. Wilson*, 270 Ark. 485, 606 S.W.2d 56 (1980); *Hodges v. State*, 27 Ark. App. 154, 767 S.W.2d 541 (1989) (allowing a party to raise an objection for the first time in a motion for new trial would give them "license to lie behind the log," waiting to see if they obtain an adverse verdict before complaining about any alleged irregularities). Because Fowler failed to raise her constitutional claim until her motion for new trial, the question is not preserved for our review.

Lee, 350 Ark. at 476-77.

Clearly, then, a party may not raise a constitutional objection for the first time in a motion for new trial. The problem here, as has been discussed, is that, at the time Mrs. Jones filed her "motion for new trial," the trial court had not entered a final order; instead, it had only issued its letter opinion dated December 27, 2001, informing the parties how the court was going to rule. However, Rule 59(b) provides that a "motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered." Here, the judgment was entered on April 12, 2002, which would cause the motion to become effective and be treated as filed on April 13, 2002. Applying the rules in this manner leads to the same conclusion — i.e., that the constitutional issues were not raised timely. This result serves the purpose of the rule, discussed in *Lee, supra*: a party should not be permitted to wait until he or she knows how the trial court is going to rule, and then "subsequently raise a constitutional claim if the gamble [does] not pay off." Therefore, we

conclude that the trial court did not err in finding that Jones's constitutional arguments were not timely.

As previously discussed, Buck Jones was initially brought into this case as a third-party defendant by Double "D" when it was discovered that Mrs. Robbie Jones was married.[1] At that time, Mr. Jones was represented by Mrs. Jones's attorney, James Filyaw. After the November 2001 trial, however, Buck Jones had a new attorney appear on his behalf. On January 16, 2002, Buck Jones filed a pleading captioned "Cross Claim Complaint,"[2] (hereafter termed the "counterclaim") wherein he alleged for the first time that the taxes, claimed by the State to be delinquent, were assessed as the result of an illegal reappraisal, and as such, the taxes constituted an illegal exaction.

On January 24, 2002, Double "D" filed a motion to dismiss the "counterclaim," arguing that the pleading filed by Mr. Jones should be considered a compulsory counterclaim that should have been filed before the trial on the merits of the case. The Commissioner also filed a motion to dismiss, asserting that the issues raised in the "counterclaim" were not presented to the trial court during the November 2, 2001, hearing and pointing out that the court had not given leave to "cross claimant" to raise the issues now.[3]

The trial court dismissed Mr. Jones's "counterclaim" on the basis of Ark. R. Civ. P. 13(a), which provides as follows with respect to compulsory counterclaims:

---

[1] According to her testimony, when the Fort Smith property was purchased in 1963, Mr. Jones was unavailable, and Mrs. Jones signed the papers on the house herself; the deed was only issued in her name.

[2] Such a creature does not exist in the Rules of Civil Procedure, which provide that "[t]here shall be a complaint and an answer; a counterclaim; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleadings shall be allowed." Ark. R. Civ. P. 7(a).

[3] The Commissioner also argued that the issues raised in the "counterclaim" related to the actions of the Sebastian County Assessor, who, although necessary, had not been named as a party.

> A pleading shall state as a counterclaim any claim which, at the time of filing the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The trial court found that Mr. Jones's claims arose out of the same transaction or occurrence that was the subject matter of Double "D"'s claim and Robbie Jones's claim, and that Mr. Jones's claim was a compulsory counterclaim. The court continued by noting that, under cases such as *Foundation Telecommunications, Inc. v. Moe Studios, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000), an issue must be presented to the trial court at the earliest opportunity in order to preserve it for appeal, and a party may not wait until the outcome of a case to bring an error to the trial court's attention. Because Mr. Jones's earliest opportunity to present his claim occurred when, on August 10, 2001, an answer was filed on behalf of Mr. Jones by his first attorney, and because Mr. Jones never presented his claim prior to or at the trial on November 2, 2001, the court concluded that this pleading failed to comply with Rule 13(a), and dismissed the "counterclaim."

On appeal, Buck Jones argues that the trial court erred in its conclusion. In support of his argument, he cites *Allison v. Long*, 336 Ark. 432, 985 S.W.2d 314 (1999), and in particular, he notes that case's statement that, under Rule 13(e), a pleader may assert his counterclaim by amended or supplemental pleading subject to the requirements of Rule 15. Rule 15, in turn, provides as follows:

> With the exception of pleading the defense mentioned in Rule 12(h)(1), a party may amend his pleadings at any time without leave of the court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding.

Ark. R. Civ. P. 15(a). Thus, Mr. Jones argues, to strike a counterclaim without a finding of prejudice or delay amounts to reversible error.

First, Mr. Jones ignores the fact that the trial court did find prejudice. In its findings, the court expressly found the following:

> Mr. Jones's earliest opportunity to present his claim occurred when, on August 10, 2001, an answer was filed on behalf of Mr. Jones by Mr. Filyaw. Mr. Jones never presented his claim prior to or at the trial on November 2, 2001. However, Mr. Jones waited until after he had notice of the outcome of the case, the court's letter opinion of December 27, 2001, before he raised his claim on January 16, 2002.

We further point out that the "counterclaim" to which Jones refers was not an "amended" pleading; rather, it amounts to a counterclaim that raises a bevy of new issues.[4] The court in *Allison* stated that the purpose of the compulsory counterclaim rule is the "avoidance of multiple lawsuits on the same facts with the same parties." *Allison*, 336 Ark. at 434. This is exactly what the trial court was accomplishing by dismissing Mr. Jones's "counterclaim," which, under a plain reading of Rule 13(a), was truly a compulsory counterclaim and should have been brought before or during the trial of this matter.

Even assuming that Rule 15(b) is applicable, and that Jones's "counterclaim" should be considered an amended pleading under Rule 15(b), that rule still only permits amendments to conform to the pleadings "when issues not raised by the pleadings are tried by express or implied consent of the parties." In such a situation, those issues "shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment[.]" However, this Rule presupposes that these issues were "tried by express or implied consent of the parties." *See, e.g., Shinn v. First Nat'l Bank of Hope*, 270 Ark. 774, 606 S.W.2d 154 (Ark. App. 1980) (noting that the rule has been interpreted as permitting a defendant to raise a counterclaim, even

[4] The so-called "cross claim complaint" is certainly not a "supplemental pleading," in the sense of Rule 15(d), which permits a party "at any time without leave of court [to] file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

after judgment, so long as it was clear that all the relevant evidence was in the record or the issue was clearly one the parties contemplated as being before the court).

Here, the issues raised by Mr. Jones's "counterclaim" were never tried, whether by express or implied consent of the parties, and there was no evidence whatsoever on these issues in the record. The trial court was correct to conclude that these issues raised by Mr. Jones were not timely presented to the court, and the dismissal of his "counterclaim" is affirmed.

BROWN and IMBER, JJ., concur.

ROBERT L. BROWN, Justice, concurring. I concur with the result, but I am troubled by one aspect of the majority's reasoning. The issue raised by Buck Jones is whether he could file a compulsory counterclaim raising new issues after the circuit court had issued his letter opinion resolving the case. Clearly, he could not, because he was simply too late.

The majority's analysis, in part, deals with whether Buck Jones could amend his answer to include a counterclaim, using as a vehicle Arkansas Rule of Civil Procedure 15(a). Rule 15(a) permits amendments to pleadings "at any time without leave of the court." Rule 15(a) further states that if the circuit court determines prejudice would result to the opposing party by the amendment and the case would be unduly delayed, it may strike the amended pleading. Despite Rule 15(a), Arkansas Rule of Civil Procedure 13(a) mandates that compulsory counterclaims be filed at the time of a responsive pleading, and this is the rule that the circuit court relied on in dismissing the counterclaim. The circuit court did not even address or rule on Jones's Rule 15(a) argument. Moreover, a new pleading raising a new claim after the case is decided and a letter opinion issued is simply too late, either under Rule 13(a) regarding compulsory counterclaims or under Rule 15(a) regarding amended pleadings. Accordingly, I would not engage in a Rule 15(a) analysis, because I conclude the rule has no relevance to the facts at hand.

In addition, I would hold that amendments to pleadings raising new issues after the judge has made his decision should not

occur under any circumstances. Policy considerations do not support any other conclusion. No party should be permitted to wait for a decision and then bring, in effect, a new lawsuit after losing on the merits of his initial claim. This flies in the face of the whole notion of compulsory counterclaims and runs directly counter to an orderly resolution of litigant issues.

In short, I would not analyze whether prejudice accrued to Double D Properties under Rule 15(a), because I determine Rule 15(a) is simply inapplicable to the facts of this case. That essentially is what the circuit court decided.

For these reasons, I respectfully concur.

ANNABELLE CLINTON IMBER, Justice, concurring. I agree with the majority that the State Land Commissioner complied with the notice requirements of Act 626 and that the issues raised in Mrs. Jones's motion for new trial were not timely raised. The majority also concludes that the trial court's dismissal of Mr. Jones's counterclaim should be affirmed. A consistent and harmonious interpretation of our rules of civil procedure governing counterclaims, amended pleadings, and motions for new trial, supports the conclusion reached by the majority. *See* Ark. R. Civ. P. 13, 15, 59 (2002).

Rule 15(a) requires the trial court to determine "that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment . . . ." By requiring a determination of prejudice or undue delay, Rule 15(a) necessarily contemplates the filing of an amendment prior to or at trial. Once the trial is over and the outcome is known, as in the instant case, prejudice is inherent and undue delay is obvious and unavoidable. On the other hand, Rule 15(b) contemplates an amendment asserted even after judgment "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties . . . ." As such, Rule 15(b) only permits amendments after trial "as may be necessary to cause [the pleadings] to conform to the evidence . . . ."

To the extent that the majority opinion might imply that a counterclaim may not be an amended pleading, I would disagree.

We have held that a counterclaim, compulsory or otherwise, may be asserted by amended or supplemental pleading subject to the requirements of Rule 15. *Allison v. Long*, 336 Ark. 432, 985 S.W.2d 314 (1999). A counterclaim asserted in the form of an amended pleading pursuant to Rule 15(a) must be filed prior to or at the trial and before the outcome is known. To hold otherwise would allow a party to file, by way of a counterclaim, what in essence is a motion for new trial and, thereby, circumvent the requirements of our rule governing the granting of new trials — Ark. R. Civ. P. 59. Likewise, Rule 15(b), which sets forth the limited circumstances under which pleadings may be amended to conform to the evidence, would be unnecessary — mere surplusage.

For the above stated reasons, I concur with the majority that the trial court's dismissal of Mr. Jones's counterclaim should be affirmed.

Arnell WILLIS, *et al. v.* Barbara KING, *et al.*

02-988 98 S.W.3d 427

Supreme Court of Arkansas
Opinion delivered February 20, 2003

[redacted]

John W. Walker, P.A., by: *John W. Walker*; and *Terrence Cain*, for appellants.

Rieves, Rubens & Mayton, by: *Kent J. Rubens*; and *Roscopf & Roscopf, P.A.*, by: *Charles B. Roscopf*, for appellee Barbara King.

Mark Pryor, Att'y Gen., by: *Jeff R. Priebe*, Ass't Att'y Gen., for appellee Arkansas State Board of Election Commissioners: Earnest Brown, Robert Louis Carruthers, Ernest E. Edwards, Toni Phillips, and Sharon Priest.

L. Ashley Higgins, P.A., by: *L. Ashley Higgins*, for appellee Phillips County Election Commissioners Joann Smith, Maxine Miller, and Joe White, and Phillips County Clerk Linda White.

ROBERT L. BROWN, Justice. Appellant Arnell Willis opposed Appellee Barbara King in the race for District 13 Representative to the Arkansas House of Representatives. The Phillips County Election Commissioners certified that Ms. King won the Democratic Preferential Primary for that position by a vote of 2,667 to 2,576. According to a complaint filed by Mr. Willis contesting the election, Ms. King's margin of victory was secured by serious violations of the Election Code, including persons voting more than once, forged ballots, and manipulation of absentee ballots in Ms. King's favor. Mr. Willis filed his complaint in timely fashion, but he failed to attach a verification of the facts contained in the complaint within the statutory time limit.

The relevant dates are these: On May 31, 2002, the Phillips County Election Commissioners certified the election returns in the preferential primary, including the results of the King/Willis race. Twenty days later, on June 20, 2002, Mr. Willis filed his complaint contesting the election. Four days after that, on June 24, 2002, Mr. Willis filed an affidavit, verifying the truth of the allegations made in his complaint.

The defendants, now appellees, in the case — Ms. King, the Phillips County Election Commissioners, the Phillips County Circuit Clerk, and the Arkansas State Election Commissioners — uniformly moved to dismiss Mr. Willis's complaint for lack of subject-matter jurisdiction.[1] They asserted that the Election Code required an affidavit verifying the allegations of the complaint be filed within twenty days of the election's certification and that Mr. Willis was four days late with his verification. The circuit court agreed and dismissed the complaint for lack of subject-matter jurisdiction.

[redacted] In his appeal from the circuit court's dismissal order, Mr. Willis contends that he substantially complied with the statutory mandate and that this should suffice. We disagree. Because it

[1] Mr. Willis also sued the Phillips County Circuit Clerk, the Phillips County Election Commissioners, and the members of the Arkansas State Board of Election Commissioners individually by name, but he voluntarily dismissed those claims. The State in its brief correctly points out that the name of the state board is "Arkansas State Board of Election Commissioners."

lies within the province of this court to interpret a statute, we review a circuit court's construction of the law *de novo*. *E.g., Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). A circuit court's interpretation of the law will be accepted on appeal, however, unless it is demonstrated to be erroneous. *Id.*

This case involves statutory construction of Ark. Code Ann. § 7-5-801 (Repl. 2000), the relevant subsections of which read as follows:

> (a) A right of action is conferred on any candidate to contest the certification of nomination or the certificate of vote as made by the appropriate officials in any election.
>
> . . . .
>
> (d) The complaint shall be verified by the affidavit of the contestant to the effect that he believes the statements to be true and shall be filed within twenty (20) days of the certification complained of.

The cardinal rule of statutory construction is to give effect to the legislative will. *E.g., Ozark Gas Pipeline Corp. v. Arkansas Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000). When a statute is unambiguous on its face, the court will look to the plain and ordinary meaning of the text, and in such cases, there is no need to resort to the canons of statutory construction. *E.g., R.N. v. J.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001).

A losing candidate in an election has no common-law right or constitutional right to contest the outcome of an election, since the right is purely statutory. *See e.g., Brewer v. Fergus* 348 Ark. 577, 79 S.W.3d 831 (2002). The deadlines set out in § 7-5-801 quoted above have long been held to be both mandatory and jurisdictional. *See, e.g., McCastlain v. Elmore*, 340 Ark. 365, 10 S.W.3d 835 (2000) (citing *Jenkins v. Bogard*, 335 Ark. 334, 980 S.W.2d 270 (1998); *Gay v. Brooks*, 251 Ark. 565, 473 S.W.2d 441 (1971); *Moore v. Childers*, 186 Ark. 563, 54 S.W.2d 409 (1932); *Gower v. Johnson*, 173 Ark. 120, 292 S.W. 382) (1927)). This court strictly construes jurisdictional requirements in election contests. *McCastlain v. Elmore, supra.*

Mr. Willis urges this court to hold that a candidate substantially complies with § 7-5-801, when the affidavit is filed within a

reasonable time after the twenty-day deadline and when no party is prejudiced by the tardy filing. Mr. Willis asserts in his brief that "[i]t is an open question what degree of compliance satisfies the affidavit requirement of Section 7-5-801(d)" and argues all cases of this court before 1969 (the effective date of the present § 7-5-801) are not apposite.

Next, Mr. Willis argues that the trial court in *McCastlain v. Elmore, supra*, upheld the sufficiency of the contestant's timely-filed *jurat*, which read "Subscribed and sworn to before me this 2nd day of December, 1998," and that this supports his contention that substantial compliance is the appropriate standard of review. He offers that this court, on appeal, upheld that *jurat sub silentio* and that, because the trial court "refused to exalt form over substance" in that case, we should do the same in the case before us. He further claims that the Election Code is designed to discourage frivolous filings, protect the continuity of the administration of government, and uphold the integrity of elected offices. As a final point, he contends that the purpose of the verification is to prevent frivolous contests, not to defeat meritorious contests on hypertechnical grounds.

We turn then to our analysis of § 7-5-801 and its legislative history. Section 7-5-801 is a codification of Act 465 of 1969, but the statutory mandate for timeliness has a significant history in Arkansas. The precursor to § 7-5-801 first took the form of an initiative act in 1917. *See* Initiative Act No. 1, 1917 Ark. Acts 2287. Initiative Act No. 1 was codified in the Crawford and Moses Digest and read in pertinent part as follows:

> A right of action is hereby conferred on any candidate to contest the certification of nomination or the certification of vote as made by the county central committee. The action shall be brought in civil court. . . . The complaint shall be supported by the affidavit of at least ten reputable citizens and shall be filed within ten days of the certification complained of, if the complaint is against the certification in one county, and within twenty days if against the certification in more than one county. The complaint shall be answered within ten days.

Crawford & Moses Digest § 3772 (1921). A statute containing the same language is reported in Pope's Digest of 1937 at § 4738.

That statute was amended by Act 386 of 1947. *See* Act 386, 1947 Ark. Acts 884 (codified at Ark. Stat. Ann. § 3-245 (1947)). The new act provided that an affidavit of the contestant in lieu of ten reputable citizens be filed and that the deadline be changed from ten days to twenty days. *See id.* In 1969, the deadline provision was reenacted as part of a reorganization of the Election Code. *See* Act 465 of 1969, 1969 Ark. Acts 1195. The substance of the deadline provision was unchanged. *See id.* art. 10 § 1 (codified at Ark. Stat. Ann. § 3-1001 (Supp. 1969)). The statute was later codified in its present form as § 7-5-801. This legislative history is persuasive proof of the fact that the timeliness of election-contest complaints has been an ongoing concern of the General Assembly since at least 1917 and that the verification of the alleged facts has been a mandated component of election-contest complaints.

The General Assembly has also made it abundantly clear that the concern for timely resolution of election contests is not unique to the filing of the complaint but that expedited deadlines and consideration of election contests permeate the Election Code. *See* Ark. Code Ann. § 7-5-801(e) (Repl. 2000) (response due within twenty days of the complaint being filed); Ark. Code Ann. § 7-5-810 (Repl. 2000) (seven-day time period for filing an appeal); Ark. Code Ann. § 7-5-802 (Repl. 2000) (requiring the circuit court to "proceed at once" with election cases); Ark. Code Ann. § 7-5-804 (Repl. 2000) (stating it is the duty of the Supreme Court to advance election cases). Nothing in the record or abstract indicates that Mr. Willis ever moved this court to expedite this appeal, which explains why this appeal is being considered in February of 2003 rather than in a more expedited manner. While it is the duty of this court to advance appeals of election contests, it is incumbent on the contestants to bring the matter to this court's attention by motion. *See* Ark. Sup. Ct. R. 6-1(b) ("[T]hat the pleader shall inform the Clerk's office of the need for an emergency or accelerated hearing by the Court."). *Cf. Dean v. Williams*, 339 Ark. 263, 264, 5 S.W.3d 37, 38 (1999) (per curiam) ("[I]n expediting this case we can promptly decide the . . . pressing issues *that have been brought to our attention.*") (emphasis supplied). That was not done.

In interpreting § 7-5-801, this court has written that the purpose of the statute is to "furnish a summary remedy and to secure a speedy trial." *McCastlain*, 340 Ark. at 368, 10 S.W.3d at 836 (quoting *Gower*, 173 Ark. at 122, 292 S.W. at 383). We have further emphasized that the Election Code was designed to resolve election disputes expeditiously and to avoid election-contest "fishing expeditions." *McCastlain*, 340 Ark. at 369, 10 S.W.3d at 837 (quoting *Cartwright v. Carney*, 286 Ark. 121, 690 S.W.2d 716 (1985)).

It is patently clear to this court that Mr. Willis failed to comply with the plain terms of § 7-5-801(d). The unambiguous text of the statute, the legislative history, and our common law foreclose any construction of § 7-5-801(d) that would allow "substantial compliance" to be our standard of review.

Mr Willis relies on his theory of public policy, but, in point of fact, Mr. Willis's standard of substantial compliance would create movable deadlines based on the inexact criterion of lack of prejudice. This runs directly contrary to our announced goal and the legislature's enacted public policy of resolving election contests expeditiously and summarily.

We also observe that Mr. Willis's cited authority, *McCastlain v. Elmore, supra*, has no pertinence to the proposition he advances. The question presented in *McCastlain* was whether the savings statute applied to election cases. The *McCastlain* court held that it did not, and we specifically declined to address the sufficiency of the plaintiff's *jurat*. *See McCastlain*, 340 Ark. at 368, 10 S.W.3d at 836 ("Because we find merit in Ms. McCastlain's first assertion of error [the savings statute question], we need not address her second argument [sufficiency of the *jurat*]."). Mr. Willis argues that the trial court in *McCastlain* concluded that the language of the *jurat* was specific enough to satisfy the verification requirement and contends that the language of his verification is much more specific than that of the *McCastlain* plaintiffs. But a decision on the language of the *jurat* by a *trial court* in another case has no precedential value for this court's decision on timeliness.

As a final point, we turn to the venerable case of *Logan v. Russell*, 136 Ark. 217, 206 S.W. 131 (1918). In *Logan*, the parties were rival candidates for the Democratic nomination to

the position of county clerk. Logan lost and filed a complaint contesting the election. We said in our rendition of the facts: "The complaint and the accompanying statement of the ten citizens were filed in the office of the clerk of the court within ten days after the result of the primary election was duly certified, but the statement of said citizens was not sworn to until after the expiration of that time." *Logan*, 136 Ark. at 219, 206 S.W. at 131. The defendant demurred, and the trial court granted the demurrer. We upheld the trial court's decision:

> "There is, we think, no escape from the conclusion that the language of the statute with reference to time of filing the complaint is mandatory, and not merely directory, and that the same requirement applies to the accompanying affidavits. The plain purpose of the framers of the statute was to require expedition in the commencement and preparation of contests of primary elections, and we do not feel at liberty to disregard the language of the statute or lessen its binding effect by declaring it to be merely directory."

Id. at 221-222, 206 S.W. at 132-133. The *Logan* decision is on all fours with the case at hand. We decline the invitation by Mr. Willis to adopt a new standard and to depart from our abundant case law on this point. The circuit court was without subject-matter jurisdiction to hear Mr. Willis's complaint.

Affirmed.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. The majority opinion has correctly followed this court's precedent in affirming the trial court's dismissal of Mr. Arnell Willis's election-contest complaint. The majority opinion reviews election-contest cases that emphasize that the Election Code was designed to resolve election disputes expeditiously. For these reasons, I am compelled to join the majority's decision.

What disturbs me are the serious allegations made by Mr. Willis, but, as the result of a procedural bar, he will be unable to offer proof as to their validity. Mr. Willis has alleged that illegal and fraudulent votes were cast for his opponent, Barbara King. He specified the names of persons who voted twice, persons who

voted, although they were not registered, and persons who were involved in fraudulent absentee voting. Mr. Willis will not be able to prove these charges in this election-contest proceeding. However, I point out that, while Mr. Willis may not now present his case, the Phillips County Clerk, Linda White, in her answer to Willis's complaint, admitted that, according to her records, the persons listed in paragraph 6 of the complaint may have voted twice.[1] She also admitted that the ten persons listed in the complaint had voted without being registered. The three Phillips County Board of Election Commissioners made the same admissions. When there are serious allegations of election irregularities and fraud, there should be a remedy available (in addition to a candidate's election-contest procedures) to investigate and determine if such charges are valid. Too often election contests by candidates are lost due to expedited, complex rules that make up our Election Code. While the Code contains penalties for misdemeanor and felony election offenses, Ark. Code Ann. §§ 7-1-103 and 7-1-104 (Supp. 2001), respectively, such violations are commonly not investigated or charged. The General Assembly should address this problem and provide a remedy that is not burdened with time constraints almost impossible to meet.

The Election Code does provide a remedy set out in Ark. Code Ann. § 7-5-807(a) (Repl. 2000), whereby ten reputable citizens of any county may file a complaint in circuit court within twenty days after the election, alleging that illegal or fraudulent votes were cast. The circuit court judge, if in his opinion there is good ground to believe the charges to be true, shall convene a grand jury. Although the time limitation of twenty days after the election may be too short, the General Assembly could rectify that problem by lengthening the filing deadline and making other revisions which would make the law more effective and available to the voters. Allegations such as the ones being sworn to here should be resolved so that Arkansas voters can be assured that their elections are honest, but, when not, the voters are availed a remedy by which they can root out illegal and fraudulent voting practices.

---

[1] Ms. White denied that she did not determine whether the persons voted twice.

Reggie CHAVERS, Mark Chavers, and
Chavers Welding & Construction *v.* EPSCO, INC.

02-866 98 S.W.3d 421

Supreme Court of Arkansas
Opinion delivered February 20, 2003

Lyons, Emerson & Cone, P.L.C., by: *Scott Emerson*, for appellants Reggie and Mark Chavers.

W. Scott Davidson, for appellee.

JIM HANNAH, Justice. Appellants Reggie Chavers and Mark Chavers appeal a judgment entered against them by the Craighead County Circuit Court. Reggie and Mark argue that the trial court erred in holding them liable for a company debt based upon partnership by estoppel because the proof was vague and insufficient and there was no detrimental reliance on the part of a creditor. We hold that the trial court was not clearly erroneous in finding liability based upon partnership by estoppel. Accordingly, we affirm.

Facts

Gary Chavers operated Chavers Welding and Construction ("CWC"), a construction and welding business, in Jonesboro. Gary's sons Reggie Chavers and Mark Chavers joined their father in the business after graduating from high school. Gary, Mark, and Reggie maintain that CWC was a sole proprietorship owned by Gary, and that Reggie and Mark served only as CWC employees, not as CWC partners.

In February 1999, CWC entered into an agreement with Epsco, Inc. ("Epsco"), a staffing service, to provide payroll and employee services for CWC. Initially, Epsco collected payments for its services on a weekly basis, but later, Epsco extended credit to CWC. Melton Clegg, President of Epsco, stated that his decision to extend credit to CWC was based, in part, on his belief that CWC was a partnership.

CWC's account with Epsco became delinquent, and Epsco filed a complaint against Gary, Reggie, and Mark, individually, and doing business as CWC, to recover payment for the past due account. Gary discharged a portion of his obligation to Epsco due to his filing for bankruptcy. Epsco sought to recover CWC's remaining debt from Reggie and Mark. After a hearing on March 7, 2002, the trial court issued a letter opinion, finding that Reggie and Mark "represented themselves to [Epsco] as partners in an existing partnership and operated in such a fashion to give creditors in general, and Epsco in particular, the impression that such creditors/potential creditors were doing business with a partnership. . . ." On May 21, 2002, the trial court entered an order stating that Reggie and Mark were partners by estoppel as relates to Epsco. The trial court found that Reggie and Mark were jointly and severally liable for the debt of CWC in the amount of $80,360.92. In addition, the trial court awarded Epsco pre-judgment interest at the rate of six percent, post-judgment interest at the rate of ten percent, and attorney's fees in the amount of $8,036.92.

Standard of Review

[redacted] In bench trials, the standard of review on appeal is not whether there is 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. Ark. R. Civ. P. 52(a) (2002); *Reding v. Wagner*, 350 Ark. 322, 86 S.W.3d 386 (2002); *Shelter Mut. Ins. Co. v. Kennedy*, 347 Ark. 184, 60 S.W.3d 458 (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 firm conviction that a mistake has been committed. *Sharp v. State*, 350 Ark. 529, 88 S.W.3d 348

(2002). Disputed facts and determinations of credibility are within the province of the fact-finder. *Sharp, supra; Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 34 S.W.3d 360 (2001).

Partnership by Estoppel

Arkansas Code Annotated § 4-42-308 (Repl. 2001) [repealed January 1, 2005][1] provides, in pertinent part:

> (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one (1) or more persons not actual partners, he is liable to any person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to that person, whether the representation has or has not been made or communicated to that person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to it being made.
>
> (a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

[redacted] We have long recognized the doctrine of partnership by estoppel. In *Olmstead v. Hill*, 2 Ark. 346 (1840), the court stated that

> they who hold themselves out to the world as partners in business or trade, are to be so regarded *quoad* creditors and third persons; and the partnership may be established by any evidence showing that they so hold themselves out to the public, and were so regarded by the trading community.

2 Ark. at 354. Further, we have stated that "[p]artnerships may be proved by circumstantial evidence; and evidence will some times fix a joint liability, where persons are charged as partners, in

[1] Pursuant to Acts 1999, No. 1518, § 1205, beginning January 1, 2005, the Uniform Partnership Act (1996), codified at Ark. Code Ann. § 4-46-101 *et seq.* governs all partnerships.

a suit by a third person, when they are not, in fact, partners as between themselves." *Humphries v. McCraw*, 5 Ark. 61, 64-65 (1843).

In *Herman Kahn Co. v. Bowden*, 80 Ark. 23, 96 S.W. 126 (1906), the court noted that

> [a] person who holds himself out as a partner of a firm is estopped to deny such representation, not only as to those as to whom the representation was directly made, but as to all others who had knowledge of such holding out and in reliance thereon sold goods to the firm. . . .

80 Ark. at 30. In addition, "if the party himself puts out the report that he is a partner, he will be liable to all those selling goods to the firm on the faith and credit of such report." *Id.*

When a person holds himself out as a member of partnership, any one dealing with the firm on the faith of such representation is entitled to assume the relation continues until notice of some kind is given of its discontinuance. *Watkins v. Moore*, 178 Ark. 350, 10 S.W.2d 850 (1928); *Gershner v. Scott-Mayer Comm'n* Co., 93 Ark. 301, 124 S.W. 722 (1910); *Bowden, supra; Brugman v. McGuire*, 32 Ark. 733 (1878).

In *Firestone Tire & Rubber Co. v. Webb*, 207 Ark. 820, 182 S.W.2d 941 (1944), the court wrote:

> It is a thoroughly well-settled rule that persons who are not as between themselves partners, or as between whom there is in fact no legal partnership, may nevertheless become subject to the liabilities of partners, either by holding themselves out as partners to the public and the world generally or to particular individuals, or by knowingly or negligently permitting another person to do so. All persons who hold themselves out, or knowingly permit others to hold them out, to the public as partners, although they are not in partnership, become bound as partners to all who deal with them in their apparent relation.
>
> The liability as a partner of a person who holds himself out as a partner, or permits others to do so, is predicated on the doctrine of estoppel and on the policy of the law seeking to prevent frauds on those who lend their money on the apparent credit of those who are held out as partners. One holding himself out as a part-

> ner or knowingly permitting himself to be so held out is estopped from denying liability as a partner to one who has extended credit in reliance thereon, although no partnership has in fact existed.

Webb, 207 Ark. at 825 (quoting 40 AM. JUR. 179-80). In *Webb*, the court held that the appellee was estopped from denying that he was a partner when the "appellant showed that it relied on the truth of the financial statement . . . signed by [the appellee] as a partner, and made shipments on the truth of the statement." *Id.* at 824.

In the present case, the trial court cited specific examples of representations made by Reggie and Mark indicating that they were partners of CWC, including correspondence to Epsco, checks written to Epsco, business cards distributed to the public, and credit applications. We will discuss each in turn.

The Faxed Credit References

Epsco argues that Plaintiff's Exhibit #1, a faxed list of credit references, clearly indicates that Gary was the owner and that Reggie and Mark were partners in the business. The fax lists four credit references, and it includes CWC's contact information. The contact information lists CWC's telephone number, fax number, and federal tax number. The last two lines of the contact information state: "Gary Chavers Owner" and "Reggie Chavers and Mark Chavers Partners."

Kim Baker Adams, an office manager at Epsco, testified that in the beginning of Epsco's relationship with CWC, she told Gary that he needed to fill out a credit application. Adams testified that Gary told her that CWC had its own company credit application already typed up, and that he would fax it to her. Adams testified that Plaintiff's Exhibit #1 was the fax she received from Gary.

Gary testified that he did not know that the list of credit references was faxed to Epsco. In addition, he testified that his signature was not at the bottom of the fax. He testified that his former secretary might have signed his name to the fax; however, he stated that he did not authorize his secretary to sign or fax a list of

credit references to Epsco. Moreover, Gary testified that the first time he saw the list of credit references was at the bench trial.

This court gives deference to the superior position of the trial judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Lee v. Daniel*, 350 Ark. 466, 91 S.W.3d 464 (2002); *Pyle v. Sayers*, 344 Ark. 354, 39 S.W.3d 774 (2001). Further, it is within the province of the trier of fact to resolve conflicting testimony. *Lee, supra; Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999). Though there was a dispute concerning whether Gary faxed the list to Epsco, the trial court found that Epsco received the faxed credit references from CWC and relied on CWC's statement that Reggie and Mark were partners. The trial court's finding is not clearly erroneous.

The Fax Cover Sheet

At trial, Epsco introduced Plaintiff's Exhibit #2, a fax cover sheet from "Chavers Construction" to Epsco. The fax cover sheet was dated July 19, 2000. The fax cover sheet contained the address, telephone number, and fax number of the business. Listed under this information was "Gary, Reggie, or Mark Chavers." Epsco argues that Gary, Reggie, and Mark are all listed on the fax cover sheet, and that this indicates that they were holding themselves out to the public as partners of the business. The trial court's finding that the fax cover sheet indicated that Reggie and Mark were holding themselves out as partners of CWC is not clearly erroneous.

The Epsco Personnel Credit Application

Epsco introduced Plaintiff's Exhibit #9, a personnel credit application, which was received from CWC. Adams testified that the exhibit represented a completed credit application that she received from CWC. The type of business checked on the credit application is "partnership." Adams testified that the application showed the company to be a partnership, and that this information was relied upon in extending credit. Clegg testified that he viewed the credit application which indicated that CWC was a partnership, and that his decision to extend credit to CWC was

based, in part, on his belief that CWC was a partnership. Gary denied filling out the credit application form.

It was within the trial court's discretion to find Adams's and Clegg's testimony more credible than Gary's testimony and to determine that Epsco relied on the statement of partnership on the credit application before extending credit to CWC. *See, e.g., Lee, supra; Myrick, supra.* The trial court's finding concerning the credit application is not clearly erroneous.

The Checks to Epsco

Epsco argues that Plaintiff's Exhibit #3 and Plaintiff's Exhibit #11, checks written to Epsco showing the CWC account to be in the name of "Gary A. or Reggie J. Chavers," indicates that Reggie was holding himself out to be a partner of CWC. Plaintiff's Exhibit #3 was signed by Gary, and Plaintiff's Exhibit #11 was signed by Reggie. The checks are evidence that Reggie was holding himself out to the public as a partner of CWC, and Epsco could have detrimentally relied on the checks before extending credit to CWC. The trial court was not clearly erroneous in finding that the checks supported a finding of partnership by estoppel.

The Business Card

Epsco introduced Plaintiff's Exhibit #4, a business card that states "Chavers Welding, Construction & Crane Service." Listed on the card as "owners" are Gary Chavers and Reggie Chavers. Gary testified that the business cards were printed incorrectly, and that Reggie's name should not have been included as an owner. He also testified that some of the cards might have been handed out, and that it was possible that he might have given one of the cards to a business listed as one of CWC's credit references on Plaintiff's Exhibit #1.

The business card listing Reggie as an owner indicates that Reggie was holding himself out as a partner. As we stated in *Watkins, supra,* when a person holds himself out as a member of partnership, any one dealing with the firm on the faith of such representation is entitled to assume the relation continues until

notice of some kind is given of its discontinuance. There is no indication that Reggie ever informed any person who received a business card that the business relationship listed on the card was incorrect or had been discontinued. The trial court's finding concerning the business card is not clearly erroneous.

The Dealership Application

Epsco introduced Plaintiff's Exhibit #5, an application form from "Chavers Welding," signed by Reggie, seeking a dealership from Sukup Manufacturing. The application, dated January 23, 1997, lists "Gary & Reggie Chavers" as owners of "Chavers Welding." The application is signed by Reggie. Reggie admits that he signed the dealership application and represented that he was an owner of "Chavers Welding," but he dismisses his statement of ownership as mere "puffery" on his part. Epsco argues that instead, the application shows that Reggie was holding himself out to the public as being a partner. The trial court's determination that Reggie's dealership application supports a finding of partnership by estoppel is not clearly erroneous.

In sum, the trial court was not clearly erroneous in finding that Reggie and Mark held themselves out as partners of CWC and that Epsco detrimentally relied on the existence of the partnership before extending credit to CWC. The appellants argue that even if we find Reggie liable based upon partnership by estoppel, there was scant proof of Mark being liable based upon partnership by estoppel. We disagree. We are aware that some examples of holding out cited in the trial court's order pertain only to Reggie. However, the representations attributed to both Reggie and Mark are sufficient proof to support the trial court's finding that both Reggie and Mark are estopped from denying liability to Epsco.

Affirmed.

CRAIGHEAD ELECTRIC COOPERATIVE CORPORATION *v.* CRAIGHEAD COUNTY, Arkansas

02-812 98 S.W.3d 414

Supreme Court of Arkansas
Opinion delivered February 20, 2003

Lyons, Emerson & Cone. P.L.C., by: *Jim Lyons*, for appellant.

Duncan & Rainwater, P.A., by: *Michael Rainwater*, for appellee.

JIM HANNAH, Justice. Craighead Electric Cooperative Corporation ("the Cooperative") appeals summary judgment entered against it by the Craighead County Circuit Court.

The Cooperative asserts that material questions of fact precluded entry of summary judgment. We agree.

The Cooperative sued Craighead County ("the County") alleging that in widening roads, the County encroached upon easements and rights-of-way owned or possessed by the Cooperative, causing the Cooperative damages in costs in moving power lines and poles and in taking of the easements or rights-of-way. The County brought a motion for summary judgment asserting that only the County had a right-of-way in the land used to widen the roads because the County had sixty-foot rights-of-way since entry of a County Court order in 1907. The trial court found that the 1907 Order of the Craighead County Court conveyed to the County a sixty foot right-of-way in the four roads at issue in this case.

Because we hold that the 1907 Order does not purport to convey a property interest to the County, we need not address the issue of whether the 1907 Order could convey a property interest to the County, or whether the Cooperative would have standing to challenge any taking by the 1907 Order. We consequently hold that the issue of whether the Cooperative holds easements or rights-of-way that were encroached upon by the County has not been addressed by the trial court. Thus, a question of material fact remains undetermined by the trial court. Therefore, the summary judgment of the Craighead County Circuit Court must be reversed.

Facts

The Cooperative sued the County alleging that the County had encroached on easements and rights of way owned or possessed by the Cooperative. More specifically, the Cooperative alleged that the County enlarged roadways without notice, and in some instances with notice, moving road ditches and soil so as to leave Cooperative power poles unsupported, leaning, and otherwise in unsafe conditions that required the Cooperative to move poles and power lines at its own expense. The Cooperative sued for $100,171.20 in compensation for property taken and for costs of moving lines and poles caused by the widening of four specific

roadways. The Cooperative further sought declaratory judgment that compensation would be required for future takings by the County and for costs and fees.

The County moved for summary judgment under Ark. R. Civ. P. 56, alleging that the Cooperative had no property rights in the affected easements, nor any equitable right to compensation. The County also argued that the Cooperative decided to move the poles on its own, and that there was no taking.

The trial court granted summary judgment, finding that a 1907 Craighead County Court order conveyed a sixty-foot easement to the County on all the affected roads; therefore, the Cooperative held no interest in the land on which the poles stood. The trial court further found that pursuant to the common-law rule, the Cooperative had to bear its own costs of relocation. The trial court additionally found that if there was an issue of an unconstitutional taking under the 1907 order, the Cooperative lacked standing to raise it; instead the affected landowners had to raise the issue. The Cooperative appeals the summary judgment.

Standard of Review

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. *Cole v. Laws*, 349 Ark. 177, 76 S.W.3d 878 (2002); *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999); *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998); *Pugh, supra.*

Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. *Cole, supra; Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998); *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997). After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts. *Cole, supra; George, supra.*

Easements and Rights-of-Way

We note first that the parties use the terms right-of-way and easement interchangeably. A right-of-way is an easement and "right-of-way" is usually the term used to describe the easement itself or the strip of land which is occupied for the easement. *Loyd v. Southwest Ark. Util. Corp.*, 264 Ark. 818, 825, 580 S.W.2d 935 (1979). Also, as the County asserts in citing *Arkansas State Highway Commission v. Cordes Motors, Inc.*, 315 Ark. 285, 867 S.W.2d 178 (1993), a right-of-way or easement in a road may be acquired by prescription. The Cooperative asserts that it holds a right-of-way in the land used by the County to widen the subject roads. The County argues that by way of the 1907 Order, it has a right-of-way in the land used to widen the roads.

The parties agree that the landowners adjoining the roads hold the fee in the land, and that any right to use the land consumed in widening the roads comes by way of an easement or right-of-way. A right-of-way or easement is entitled to all the constitutional protections afforded other property rights. *Southwestern Bell Tel. Co. v. Davis*, 247 Ark. 381, 385, 445 S.W.2d 505 (1969).

We will first dispense with the argument that the 1907 Order conveyed a right-of-way to the County. The August 17, 1907, Order of the Craighead County Court states:

> On this day it is ordered by the Court that all Public Roads established in Craighead County, where the order establishing same fails to state the width, shall be construed to read sixty feet.

The trial court found that this order was effective to confer on the County a right-of-way of sixty feet in the roads in question. By its terms the 1907 Order does not attempt to confer an interest in property. The 1907 Order attempts to modify county court orders establishing roads that are silent regarding the width of the road to be established. It goes no further. Therefore, no property right was conveyed by the 1907 Order alone.

The County alleges that even without the 1907 Order, the Cooperative failed to prove below that it held an interest in the land where its poles and power lines were located, that it has no franchise or deed proving ownership, that it has agreements showing entry on to the land was permissive, that it could acquire no easement against the County by adverse possession, and that the common-law rule is utilities pay their own costs of relocation.

The trial court's order on summary judgment does state that to prevail in the event the 1907 Order was ineffective, the Cooperative had to show that it held an easement by prescription, that the County encroached on that easement, and that the Cooperative suffered damages. However, the trial court found the 1907 Order to be effective and consequently made no determination of what other rights might exist in the easement, whether those rights are held by the County or by the Cooperative. It is also true that the trial court additionally found that applying the common-law rule that utilities pay their own relocation costs meant the Cooperative was responsible for the costs of relocation. The Cooperative challenges this finding, and we agree that application of the common-law rule in Arkansas is limited and not applicable in this case.

Whether the County, the Cooperative, or both possess a right-of-way in the land adjoining the roadway has not been determined below. We note that if the County had a prescriptive right-of-way in the roads as they existed before widening, that right-of-way does not vest in the County the right at a later date to widen or enlarge the prescriptive right except by just compensation to or the permission of the adjoining easement owner or landowner. *Davis, supra.*

The trial court must determine what rights, if any, both the County and the Cooperative may possess in the land used to widen the subject roads. The Cooperative alleged by way of the Affidavit of Cooperative manager Wayne Honeycutt that the Cooperative has never sought permission to enter the land where its poles and lines are located, and that the Cooperative maintained the poles and lines, and cut tree limbs, trees, and brush in the area where the poles are located. According to Mr. Honeycutt, the use of the land has always been under a claim of right. There is a material question of fact regarding whether the Cooperative has a prescriptive right in the land used to widen the subject roads. Likewise, the County alleges a similar right in the same land.

The evidence shows that the poles and power lines were placed along the subject roads at the latest between 1947 and 1951. There is no evidence that the Cooperative obtained and recorded written easements or that it obtained permission. Some records were provided showing power customers in the last few years have agreed to grant and convey an easement, but no easements were recorded based on these agreements, which likely long post-date any interest by prescription acquired by the Cooperative anyway. The trial court stated in a footnote to its order that the later agreements granting the right to obtain an easement would show entry was now by permission. The agreement was to "grant and convey an easement" or right-of-way, and therefore was an agreement to convey an interest in the property. Such a property interest would be due constitutional protection by the courts. *Davis, supra.* The agreements do not grant permission to enter onto the property. The language in the agreements cuts against the County and tends to show the entry on the land was not permissive.

The facts in this case are simply that the subject four roads were built at an undetermined earlier date and constructed at that time of undetermined dimensions. The County asserts that it has a prescriptive right in the land used in widening the roads, and that the Cooperative may not acquire an interest in the property by adverse possession because adverse possession is not effective against the County as a part of the State. The parties agree that the Cooperative could not obtain a property interest in the

County's property by adverse possession. This is a correct statement of the law. *Arkansas Game and Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987). However, the Cooperative does not assert that it has acquired a right-of-way against the County by adverse possession or prescription, but rather that it has acquired that right against the fee holder. This court in *Cathey v. Arkansas Power & Light Co.*, 193 Ark. 92, 95, 97 S.W.2d 624 (1936), stated:

> The highway department had a right to condemn or take a right-of-way over appellant's land. It, however, could not do this without paying him just compensation therefor, and it would have no right to appropriate or take the right-of-way over one's land for any purpose other than for a highway for the use of the public, and every additional servitude to which the land is subjected entitles the owner to compensation for such additional servitude.

Cathey, 193 Ark. at 95. This court in *Cathey, supra* further stated:

> The condemnation of land for a highway does not deprive the landowner of the fee in the land, but the right-of-way gives the public the right to use it as a highway. The appellee, having erected its poles and wires on appellant's land, was a trespasser and liable for nominal damages whether there were any actual damages or not.

Cathey, 193 Ark. at 94. This encroachment by the power company constitutes a new servitude. *Cathey, supra*; *Southwestern Bell Tel. Co. v. Biddle*, 186 Ark. 294, 298, 54 S.W.2d 57 (1932). *See also*, *Padgett v. Arkansas Power & Light Co.*, 226 Ark. 409, 413, 290 S.W.2d 426 (1956). The parties agree that the roads, and the poles and power lines, constitute an encumbrance on the property of the adjoining landowners. The trial court must determine who had what rights in the land used in widening the roads. If the Cooperative has property rights in the easements adjoining the subject roads, it may not be ousted from its occupancy of that portion of the street or easement or forced to move or relocate without just compensation for its costs. *City of Little Rock v. Ark. La. Gas Co.*, 261 Ark. 347, 548 S.W.2d 133 (1977). It may turn out that the Cooperative has no such right, but to date, neither the rights of the Cooperative nor the rights of the County have been determined by the trial court.

Common Law and Franchises

The trial court found that the common law requires a utility to bear its own relocation costs where the county widens its roads. The County asserts that under the common-law rule, outside of four exceptions, a utility must bear its own costs of relocation. The County attempts to expand the common-law rule beyond its bounds in Arkansas. The general common-law rule is that a utility must bear its own relocation costs when relocation of equipment is required by public necessity. *Southwestern Bell Tel. Co. v. City of Fayetteville.*, 271 Ark. 630, 634, 609 S.W.2d 914 (1980). It should be noted that in the *City of Fayetteville,* this court noted that our decisions were departing from the very common-law rule cited by the County. *City of Fayetteville*, 271 Ark. at 635. It also must be noted that in neither of the cases cited by the County was the utility forced to pay the costs of its relocation. Further, the County's argument about the common-law rule ignores the Cooperative's argument it has a property right in a right-of way that would be violated.

The existence of a public necessity allows the state to exercise its police power. *Phillips v. Town of Oak Grove*, 333 Ark. 183, 189, 968 S.W.2d 600 (1998). The police power is an attribute of sovereignty and a necessary attribute of every civilized government. It is a general term used to express the particular right of a government which is inherent in every sovereignty. *Geirin v. City of Little Rock*, 203 Ark. 103, 108, 155 S.W.2d 719 (1941), citing 11 Am. Jur. 245. *See also Arkansas County v. Burris*, 308 Ark. 490, 496, 825 S.W.2d 590 (1992). However, this court has stated that the police power should not be indiscriminately or unnecessarily used, that the police power of the State is one founded in public necessity, and this necessity must exist in order to justify its exercise. *Ark. State Hwy. Comm'n v. Ark. Power & Light Co.*, 231 Ark. 307, 311, 330 S.W.2d 77 (1959). *See also Hand v. H & R Block, Inc.*, 258 Ark. 774, 528 S.W.2d 916 (1975); *Beaty v. Humphrey*, 195 Ark. 1008, 1013-1014, 115 S.W.2d 559 (1938). In *Arkansas State Highway Commission*, a case involving a utility, this court determined that there was no need to use the police power because the authority under which the Highway Commission intended to undertake construction provided that the prop-

erty and property rights may be acquired by gift, devise, purchase, or condemnation. Ark. Code Ann. § 27-68-108 (Repl. 1994). The road construction at issue was undertaken under this same statute.

The County alleges that case law supports the conclusion that under these facts, the Cooperative must bear its own costs to move the poles and power lines, citing language in *Ark. State Hwy. Comm. supra.*, "But even though the Power Company has the right to maintain its poles on the rights of way, it does not mean that the company could not be compelled to move its facilities so as to not unnecessarily interfere with the use of the streets." *Ark. State Hwy Comm'n*, 231 Ark. at 309. The *Arkansas State Highway Commission* case and the quoted language is cited in the dissent in *Southwestern Bell Tel. Co. v. City of Fayetteville*, 271 Ark. 630, 636, 609 S.W.2d 914 (1980). However, in *Ark. State Hwy. Comm'n*, the court was discussing a written franchise granted to the power company by the City of El Dorado, which provided, "provided the streets, alleys, avenues, and sidewalks shall not be unnecessarily and unreasonably impaired or obstructed." *Ark. State Hwy. Comm.*, 231 Ark. at 310. *Arkansas Power & Light Co., supra*, also involved a franchise. A review of the briefs, abstracts, and addendums reveals no franchise in the present case. Indeed, the County argues in its brief at page thirteen that the Cooperative has failed to produce a franchise or contract. Whatever rights the Cooperative has neither arise from nor are controlled by a written franchise or contract.

The trial court must determine whether the Cooperative acquired a prescriptive right in the property where the poles and power lines were located. That right is against the landowner as a new servitude on the land. As discussed above, the landowner still holds the fee. The cases distinguish the erection of utilities as distinct and not subservient to any right-of-way or easement the County may have for construction of a road. The County, however, notes that under Ark. Code Ann. § 18-15-803 (Supp. 2001), the Cooperative may construct its poles and power lines along a public highway. The County goes on to note that Ark. Code Ann. § 18-15-503 does not require that the Cooperative pay for a right-of-way and also does not require that the Cooperative be

compensated when it must relocate its poles. This statute sets out the right to acquire a right-of-way. *Loyd, supra.* However, a right-of-way is not granted by the statute. The Cooperative is claiming the right-of-way by adverse possession as against the landowners.

If the Cooperative has a property interest in the land where the poles and power lines were standing before the subject four roads were widened, then forcing the movement of the poles and power lines may constitute a taking that requires compensation. The common-law rule is not that a utility is required to bear the costs of its own relocation where the county widens a road, but rather the common-law rule is that a utility must bear the costs of its own relocation when relocation of that equipment is required by a public necessity. *Southwester Bell Tel. Co., supra.*

Reversed and remanded.

Jimmy Ray HEIKKILA *v.* STATE of Arkansas

CR 02-852 98 S.W.3d 805

Supreme Court of Arkansas
Opinion delivered February 20, 2003

The Jesse Law Firm, P.L.C., by: *Mark Alan Jesse*, for appellant.

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Justice. Jimmy Ray Heikkila appeals his conviction and sentence on two counts of incest. He was also convicted of rape, but he does not appeal that conviction. Heikkila alleges that the trial court erred in submitting the incest charges to the jury because he was accused of sexual intercourse or deviate sexual activity with his two nieces to whom he was related by affinity but not by consanguinity. Heikkila asserts that applying the rule that criminal statutes are strictly construed requires the conclusion that the alleged conduct with his nieces was not prohibited under the incest statute because he was not related to his nieces by blood. We hold that the incest statute prohibits sexual intercourse or deviate sexual activity between an uncle and a niece. The language of the statute is clear and makes no mention of affinity or consanguinity. The convictions and sentences are affirmed.

Facts

Heikkila is not related by blood to the two nieces he is accused of engaging in incest. They are the children of Heikkila's wife's sister. Both nieces were below the age of sixteen at the time of the incest. The two nieces came to live with Heikkila in 1990 after they had been in foster care for six months following removal from the home of their grandmother. The nieces considered Heikkila and his wife father and mother, calling Heikkila dad and his wife Tia, which is Spanish for aunt. Heikkila was charged with acts of incest and rape beginning in 1990.

Incest

Heikkila argues that the word "niece" in the incest statute, Ark. Code Ann. § 5-26-202 (Repl. 1997), refers only to nieces to whom a person is related to by blood. Arkansas's incest statute provides:

> (a) A person commits incest if, being sixteen (16) years of age or older, he purports to marry, has sexual intercourse with, or engages in deviate sexual activity with a person he knows to be:
>
> (1) An ancestor or a descendant; or
>
> (2) A stepchild or adopted child; or
>
> (3) A brother or sister of the whole or half blood; or
>
> (4) An uncle, aunt, nephew, or niece; or
>
> (5) A stepgrandchild or adopted grandchild.
>
> (b) The relationships referred to in this section shall include blood relationship without regard to legitimacy.
>
> (c) Incest is a Class C felony; however, incest is a Class A felony if the victim is under sixteen (16) years of age and the perpetrator is over twenty-one (21) years of age at the time of the offense.

This court has never interpreted "niece" as it appears in Ark. Code Ann. § 5-26-202. We are therefore required to interpret the incest statute. We strictly construe criminal statutes and resolve any doubts in favor of the defendant. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002); *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 the rule that criminal statutes must be strictly construed and pursued. *Williams, supra.* The courts cannot, and should not, by construction or intendment, create offenses under statutes which are not in express terms created by the Legislature. *Williams*, 347 Ark. at 742. We are without authority to declare an act to come within the criminal laws of this state by implication. *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984). It would violate the accepted canons of interpretation to declare an act to come within the criminal laws of the State merely by implication. *Lewis v. State*, 220 Ark. 259, 247 S.W.2d 195 (1952) (citing *State v. Simmons*, 117 Ark. 159, 174 S.W. 238 (1915)). Nothing is taken as intended which is not clearly expressed. *Graham v. State*, 314 Ark. 152, 861 S.W.2d 299 (1993); *Hales v. State*, 299 Ark. 93, 771 S.W.2d 285 (1989).

The incest statute prohibits sexual intercourse or deviate sexual activity with five named categories of persons, including "uncle, aunt, nephew or niece." The word "niece" is not defined in the statute. However, the statute in its express terms creates criminal liability for sexual intercourse or deviate sexual activity with one's niece. *Webster's* defines a niece as a female descendant or relative, a daughter of one's brother or sister, or a daughter of one's brother-in-law or sister-in-law. *Black's* defines niece as "the daughter of a person's brother or sister; sometimes understood to include the daughter of a person's brother-in-law or sister-in-law." *Black's Law Dictionary* 1066 (7th Ed. 1999). *Webster's Third New International Dictionary*, 1526 (1993). Both nieces in this case were the daughters of Heikkila's sister-in-law. When the words used in a statute have a well-defined meaning, and the wording of the statute is clear, we give those words their plain meaning. *Boyd v. State*, 313 Ark. 171, 853 S.W.2d 263 (1993). Therefore, under the express terms of the statute, the conduct between Heikkila and his nieces was prohibited.

The incest statute protects the integrity of the family. *Camp v. State*, 288 Ark. 269, 704 S.W.2d 617 (1986). This protection extends to step-relationships as well as blood relationships because sexual activity in step-relationships is equally disruptive of the family as would be sexual activity between blood relations. *Camp, supra.* Although Heikkila's relationship to his nieces would not be characterized as a step-uncle, as with a stepfather, Heikkila was not related to his nieces by blood. Where uncle and niece are not related by blood, the relationship is analogous to a step-relationship. Regardless of whether Heikkila was related to his nieces by consanguinity or affinity, the State's charges against him under Ark. Code Ann. § 5-26-202 would effectively be the same. *See e.g. Douhitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996).

Affirmed.

Dennis James SMITH *v.* STATE of Arkansas

CR 01-1132 98 S.W.3d 433

Supreme Court of Arkansas
Opinion delivered February 20, 2003

G.B. "Bing" Colvin, III, public defender, for appellant.

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Justice. A Drew County jury convicted Dennis James Smith of three counts of kidnapping, four counts of rape, two counts of attempted capital murder, one count of first-degree battery, and one count of vehicular piracy. He received the maximum sentences on all counts, all to be served consecutively except for the battery conviction, for a total of seven life sentences plus eighty years in the Arkansas Department of Correction. On appeal, Smith raises six points for reversal. We hold that there is no merit to any issue except sufficiency of the evidence on the first-degree battery conviction. The trial court erred in denying the directed-verdict motion where the evidence failed to show that Smith caused serious physical injury as required by Ark. Code Ann. § 5-13-201(a)(1) (Repl. 1997) or physical injury by means of a firearm as required by Ark. Code Ann. § 5-13-201(a)(7) (Repl. 1997). We modify the sentence on first-degree battery from twenty years' imprisonment to six years' imprisonment, the maximum sentence for second-degree battery.

The events leading up to Smith's convictions began on June 22, 2000, when he robbed a grocery store located in Desha County at gunpoint and took the store's owner, George Barnes, hostage. Smith drove Barnes in his pickup to a crop-dusting airport near Tillar in Drew County. At the airport, they encountered Wes Lawson, and Smith forced both men to accompany him into the airport office. Judy Quandt, the wife of the crop-dusting pilot, Fred Quandt, was in the office. Smith told Judy to call her husband on the radio and tell him that if he did not come back to the airport, Smith would kill everybody in the office. Smith then ordered all three hostages to take off their clothes. He forced the two men into the bathroom but kept Judy with him. Judy testified that Smith told her to bring up something on her computer, and when she was unable to bring up what he wanted Smith hit her more than once in the head with the butt of a gun.

Upon receiving his wife's urgent call, Fred Quandt landed his plane at the airport. With the plane's engines still running, he rushed toward the office wearing a helmet and earplugs, and did

not heed or hear an order to "get naked," whereupon Smith shot him in the stomach. Although seriously injured, Fred was able to escape and eventually recovered. After shooting Fred, Smith ordered Lawson to stand in the front doorway and threatened to shoot him next. Lawson then opened the front door and started running away from the building. During his escape, he sustained a gunshot wound to his arm and side that was not fatal.

Thereafter, Smith took the two remaining hostages into the bathroom, where he raped Judy, forced her to engage in oral sex with him, and forced her to engage in oral sex with Barnes. Over the course of several hours, Smith ordered the hostages to call the FBI, and he spoke by phone with various people while law enforcement officers surrounded the building. Finally, Smith instructed the hostages to put on their clothing. Then, he released Barnes and,. while holding Judy for the purpose of shielding himself, Smith exited the office and was arrested.

Initially, Smith was charged with aggravated robbery, three counts of kidnapping, two counts of attempted capital murder, and two counts of rape. Based on a court-ordered mental evaluation, Smith was found unfit to proceed and committed to the State Hospital on December 4, 2000. On May 8, 2001, the State Hospital declared Smith fit to proceed, and the State amended the information to include three counts of kidnapping, two counts of attempted capital murder, four counts of rape, and one count each of first degree battery, vehicular piracy, and aggravated robbery. The count for the aggravated robbery offense that occurred in Desha County was nolle prossed as a result of an objection to venue.[1] Smith was tried by a Drew County jury and found guilty of all other counts. He was sentenced to seven terms of life imprisonment for four counts of rape and three counts of kidnapping, thirty years for each of the two counts of attempted capital murder, twenty years for first-degree battery and twenty years for vehicular piracy, with all sentences to run consecutively, except the sentence on the first-degree battery conviction.

---

[1] The aggravated robbery charge was refiled in Desha County Circuit Court and is the subject of a separate appeal in case number 02-895. This conviction was affirmed in *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003).

Smith filed a timely appeal and raises six points for reversal. Three of the points involve challenges to the sufficiency of the evidence and three pertain to alleged discovery violations and procedural error. For double jeopardy reasons, we first consider Smith's sufficiency-of-the-evidence arguments. *Atkinson v. State*, 347 Ark. 336, 345, 64 S.W.3d 259, 265 (2002).

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Id.* The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* 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, and only evidence supporting the verdict will be considered. *Id.*

I. Sufficiency of the Evidence — Class Y Felony Kidnapping Conviction

Smith's first point on appeal is that with respect to the kidnapping of Barnes and Judy, he was only guilty of a class B felony because he released those hostages alive and in a safe place. We do not reach the merits of this point because it is not preserved for appellate review. In his directed-verdict motions on the kidnapping charges, Smith failed to specify how the State's case was deficient as required by Ark. R. Crim. P. 33.1.

Rule 33.1 of the Arkansas Rules of Criminal Procedure provides that

> [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.

Ark. R. Crim. P. 33.1(c) (2002); *see, e.g., Bowen v. State*, 342 Ark. 581, 30 S.W.3d 86 (2000). As to the kidnapping charges, defense counsel merely asserted that the State did not make a prima facie

case. Such an assertion does not identify a specific deficiency; rather, it is nothing more than a statement that the evidence is insufficient. Smith's motions for directed verdict, stating only that the State did not make a prima facia case, but not specifying in what respect the State's case was deficient, were not specific enough to preserve the issue for appellate review. *See Spencer v. State*, 348 Ark. 230, 72 S.W.3d 461 (2002).

II. Sufficiency of the Evidence — First-Degree Battery Conviction

As his second issue on appeal, Smith argues that he could only be guilty of second-degree battery and not first-degree battery. Smith caused injury to Judy by striking her with the butt of a pistol. When asked what she meant by stating Smith had hit her with the butt of the gun, Judy specifically testified that she was struck by the part of the pistol that Smith was holding in his hand. Based on this conduct, Smith was charged with first-degree battery.

The first-degree battery statute provides, in relevant part, as follows:

> (a) A person commits battery in the first degree if:
>
> (1) With the purpose of causing serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon; or
>
> * * * *
>
> (7) With the purpose of causing physical injury to another person he causes physical injury to any person by means of a firearm.

Ark. Code Ann. § 5-13-201 (Repl. 1997). It is undisputed that Judy was injured when Smith struck her with the butt of the pistol, but the injury does not rise to the level of a serious physical injury as defined by Ark. Code Ann. § 5-1-102(19) (Supp. 2001). Judy testified that she required no stitches.[2]

---

[2] We note *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999), a case where a victim was struck in the head with a firearm in her bedroom, dragged outside by her foot, and put in a truck where she was then struck in the face several times causing her head to strike the back glass of the truck cab. The perpetrator then placed a shirt around the

The issue we are then faced with is whether striking a person with the butt of a pistol constitutes causing an injury to another person by means of a firearm under Ark. Code Ann. § 5-13-201(a)(7). This presents an issue of statutory construction.

We strictly construe criminal statutes and resolve any doubts in favor of the defendant. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002); *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. *Williams, supra.* The courts cannot, and should not, by construction or intendment, create offenses under statutes which are not in express terms created by the Legislature. *Williams*, 347 Ark. at 742. We are without authority to declare an act to come within the criminal laws of this state by implication. *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984). It would violate the accepted canons of interpretation to declare an act to come within the criminal laws of the State merely by implication. *Lewis v. State*, 220 Ark. 259, 247 S.W.2d 195 (1952), (citing *State v. Simmons*, 117 Ark. 159, 174 S.W. 238 (1915)). Nothing is taken as intended which is not clearly expressed. *Graham v. State*, 314 Ark. 152, 861 S.W.2d 299 (1993); *Hales v. State*, 299 Ark. 93, 771 S.W.2d 285 (1989).

Recognizing we must strictly construe the statute, we next consider within that restriction the basic rule of statutory construction which is to give effect to the intent of the legislature. *Short v. State*, 349 Ark. 492, 79 S.W.3d 313 (2002). We construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language, and if the lan-

---

victim's head to stop the bleeding and later applied paper towels and a "toboggan" when the victim bled through the shirt. Her surgeon characterized her injuries as "serious physical injuries." *Bangs*, 338 Ark. at 521.

Thus, naturally, serious physical injury may be inflicted by using a firearm as a club, however, in *Bangs,* the prosecutor charged first-degree battery under Ark. Code Ann. §5-13-201(a)(3), which provides:

> (3) He causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life. . .

In the present case, Smith was not charged under Ark. Code Ann. §5-13-201(a)(3), rather he was charged under Ark. Code Ann. §5-13-201(a)(7).

guage 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. *Id.* Additionally, in construing any statute, we place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. *Id.*

We first note that there is no issue of whether Judy was struck in the head with a firearm. Smith used the pistol to shoot Fred and Lawson. Therefore, there can be no dispute that Smith struck Judy on the head with a firearm. Thus, we need not consider the definition of a firearm. The issue is simply whether striking Judy over the head with a firearm constitutes "physical injury . . . by means of a firearm" as required by the first-degree battery statute.

If the words "by means of" in Ark. Code Ann. § 5-13-201(a)(7), are changed to, "With the purpose of causing physical injury to another person he causes physical injury to another person by . . . a firearm," the State's argument would be more understandable. There is no doubt that Smith caused physical injury by striking Judy with a firearm. However, the phrase "by means of" is in the statute and may not be ignored. This court construes a 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. *Turnbough v. Mammoth Springs Sch. Dist. No. 2*, 349 Ark. 341, 78 S.W.3d 89 (2002). To conclude that the conduct in this case constitutes first-degree battery under Ark. Code Ann. § 5-13-201(a)(7) requires that the court ignore the phrase "by means of." The phrase "by means of" must be considered because it alters the meaning of the statute.

Websters defines "by means of" as "through the agency or instrumentality of." *Webster's Third New International Dictionary*, 307 (1993). The term "by means of a firearm" is found in a number of different types of cases and is not restricted to cases involving a battery. The cases do not construe "by means of a firearm," directly or by implication, to mean any injury inflicted by a firearm. The cases all use the term "by means of a firearm" where the firearm has been used as a firearm, including shooting,

brandishing, or where a firearm is otherwise used to threaten that it will be used as a firearm.

For example, in *Rawls v. State*, 260 Ark. 430, 541 S.W.2d 298 (1976), Rawls was convicted and sentenced for second-degree murder committed by means of a firearm. Rawls shot R.C. Edwards fourteen times with a rifle. In addition, both *Taylor v. State*, 77 Ark. App. 144, 72 S.W.3d 882 (2002), and *Maxwell v. State*, 73 Ark. App. 45, 41 S.W.3d 402 (2001), include the term "by means of a firearm," and the injuries were injuries caused by bullets.

Cases from other states containing the term "by means of a firearm" do not differ. In *State v. Rivera*, 74 Conn. App. 129, 810 A.2d 824 (2002), the appellant shot someone in the abdomen. In *Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir. 2002), the victim was killed by shooting. In *People v. Cook*, 91 Cal. App. 4th 910, 111 Cal. Rptr. 2d 204 (2001), the California Court of Appeals stated, "Consequently, when murder is alleged to have been committed by means of a firearm, it cannot be so committed without also committing an assault with a firearm." *Cook*, 91 Cal. App. 4th at 920. In other words, "by means of a firearm" means use of a firearm as a firearm, not as a club. In *Bowers v. State*, 2 P.3d 1215 (Alaska 2000) the criminal defendant was convicted of assault by means of a firearm when he fired a rifle in the air.

The clear intent of Ark. Code Ann. § 5-13-201(a)(7) is to criminalize and treat as battery in the first-degree any physical injury caused by use of a firearm as a firearm because of the inherent potentially deadly character of the discharge of a firearm. It is not intended to include an injury such as clubbing. That is covered by Ark. Code Ann. § 5-13-201(a)(1) (Repl. 1997) where there is serious physical injury, or by Ark. Code Ann. §5-13-202(a)(1) where there is physical injury, as in this case.

It is not the mere presence of the firearm or its use as a club that elevates the crime to first-degree battery. Under Ark. Code Ann. § 16-90-120 (1987), a person convicted of a felony where he or she employed a firearm as a means of committing or escaping from the felony may be subjected to an additional period of confinement. This statute is not at issue in this case.

The plain and ordinary meaning of "by means of a firearm" is that the firearm be used as a firearm. To conclude otherwise is to ignore the rules of statutory construction.

When the proof offered supports a conviction on a lesser included offense but not the offense the accused was convicted of, we may reduce the punishment to the maximum for the lesser included offense, or reduce it to the minimum for the lesser offense or something in between, depending on the circumstances. *Bishop v. State*, 294 Ark. 303, 742 S.W.2d 911 (1988); *Dixon v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977). In this case we find that it is appropriate to reduce the sentence from twenty years imprisonment, the maximum for first-degree battery, to six years, the maximum sentence for second degree battery. The trial court ordered the original sentence on first degree battery to run concurrently. The modified sentence will also run concurrently.

III. Sufficiency of the Evidence — Vehicular Piracy Conviction

Smith's third point on appeal is that the State failed to meet its burden of proving the elements of vehicular piracy because he never gained control of the aircraft. The circuit court found that Fred's actions in returning to the airport and landing the plane were not voluntary, but were the result of compulsion.

"A person commits vehicular piracy if, without lawful authority, he seizes or exercises control, by force or threat of violence, over [a]ny aircraft occupied by an unconsenting person . . . ." Ark. Code Ann. § 5-11-105(a)(1) (Repl. 1997). The statute does not require that the threat of violence be directed toward Fred. It only requires that the threat be sufficient to exercise control over the aircraft such that a person becomes an unconsenting occupant of the aircraft.[3]

In this case, it is undisputed that Smith was threatening to kill everyone at the airport office if Fred refused to return to

[3] This is analogous to the proof required in cases of rape by forcible compulsion. Ark. Code Ann. § 5-14-103(a)(1)(A) (Supp. 2001). *See Jones v. State*, 348 Ark. 619, 74 S.W.3d 663 (2002) (finding substantial evidence where the perpetrator threatened the victim's children and roommate).

the airport and land the plane. Thus, because Smith exercised control over the aircraft through a threat of violence to the Fred's wife and others, Fred became an unconsenting occupant of the plane. Therefore, the circuit court did not err in denying Smith's motion for a directed verdict on this count.

As to the other points raised on appeal, Smith asserts his convictions should be reversed because of two discovery violations and the sentencing phase of his trial should be reversed because of a procedural error. Specifically, he contends that (1) the circuit court erred in denying his motion for a continuance based on the voluminous discovery presented within ten days of trial; (2) the circuit court erred in allowing the State to present witnesses without providing him with a witness list; and (3) the circuit court erred in not allowing him to argue during the sentencing phase that the sentences would run consecutively rather than concurrently.

IV. Continuance for Investigation of a Phone-Call List

While Smith frames this argument as an error based on the denial of a continuance requested in response to "voluminous discovery within ten days of trial," his only argument concerns a list of people identified in confidential telephone bills. He contends that the circuit court's ruling prejudiced his ability to contact the people on the list for evidence of paranoia to support his mental-defect defense. The trial court denied a continuance, noting that Smith had the list for six days prior to trial and that he had not brought any specific item to the court's attention that would justify a continuance.

Arkansas Rule of Criminal Procedure 17.1 provides in part:

> (d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

Ark. R. Crim. P. 17.1(d) (2002). The prosecutor must disclose information in sufficient time to permit the defense to make ben-

eficial use of it, and withholding significant evidence that denies the defendant a fair trial is reversible error. *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002), *cert. denied* 537 U.S. 1051 (2002). However, a defendant cannot rely upon discovery as a total substitute for his own investigation. *Id.*

The threshold question is whether there was a discovery violation. Upon receipt of the telephone records,[4] the State promptly provided Smith's counsel with the list of names and phone numbers of twenty-five people and tape recordings of many of the calls. Because the State met its obligation to promptly provide the information to defense counsel, there was no discovery violation. The question then becomes whether the trial court erred in denying Smith's motion for a continuance.

We review the grant or denial of a motion for continuance under an abuse of discretion standard. *Ware v. State*, 348 Ark. 181, 75 S.W.3d 165 (2002). 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. *Id.* When a motion for continuance is based on a lack of time to prepare, this court considers the totality of the circumstances. *Id.*

The defense had six days to investigate twenty-five telephone calls, many of which were tape recorded.[5] Smith's counsel did not direct the trial court's attention to any particular call or calls that warranted a continuance. On appeal, Smith merely speculates that one of the persons on the list might have been able to testify in support of his affirmative defense of mental incompetence. Furthermore, Smith cannot rely upon discovery as a substitute for his own investigation. He was aware that phone calls were made from the airport, and the information could have been obtained through his own investigation. Under these cir-

[4] The State explained to the circuit court that, for various reasons, it had difficulty obtaining the list of phone calls.

[5] Although Smith contended below that he did not have access to the proper equipment to play microcassette tapes, he does not make that argument on appeal. According to the prosecutor, the public defender's office representing Smith at trial and on appeal had provided the prosecutor's office with a microcassette tape recorder.

cumstances, we cannot say that the trial court abused its discretion in denying a continuance. We affirm the trial court on this point as well.

V. The State's Discovery Obligations — Providing a Witness List

Next, Smith asserts that the court erred in denying his motion to prohibit any of the State's witnesses from testifying because no witness list was provided by the prosecutor when there were over 150 potential witnesses identified in the prosecutor's file. The State responds that Smith never made a specific request for a witness list, but instead relied on the general provisions of Ark. R. Crim. P. 17.1. Because the prosecuting attorney's office maintained an open-file policy, the State contends that it satisfied the discovery requirements.

Rule 17.1 of the Arkansas Rules of Criminal Procedure provides for the discovery of the names and addresses of persons the State plans to call as witnesses: "[T]he prosecuting attorney shall disclose to defense counsel, upon timely request, . . . the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial . . . ." Ark. R. Crim. P. 17.1(a)(i) (2002). Rule 17.2 permits a prosecuting attorney to fulfill his or her discovery obligations through the use of an open-file policy. Ark. R. Crim. P. 17.2 (2002). If a prosecutor's office intends to fulfill its discovery obligations by relying upon an open-file policy, it must make every practicable effort to ensure that the information and records contained in the file are complete and that the documents employed at trial are identical to the material available to the defense in the open file. *Robinson v. State*, 317 Ark. 512, 879 S.W.2d 419 (1994). In order to obtain a reversal of a criminal conviction on the basis of a discovery violation, the appellant must make a showing of prejudice. *Id.* In the event of a discovery violation, the choice of an appropriate sanction is within the trial court's discretion. *Howard v. State, supra.*

On June 23, 2000, Smith made a motion for discovery based on Rules 17.1, 17.3, and 17.4. The language generally followed the wording of the rules and requested "[t]he names and

addresses of persons the Prosecuting Attorney intends to call as a witness at any hearing or at trial and a short, plain statement of their anticipated testimony . . . ." However, at no time before the day of trial on July 17, 2001, did Smith make any further requests for a witness list, either by independent motion or at any of the four additional hearings held after the initial hearing. At all times, Smith had access to the State's case file and had been provided with copies of the investigative reports from which the State would select its witnesses. Smith made no objections to the State fulfilling its discovery obligations through an open-file policy until the day of trial, and then he requested only the extreme remedy of prohibiting all of the State's witnesses from testifying. He did not request a continuance or any lesser sanction for the alleged discovery violation.[6] The trial court did not abuse its discretion in denying Smith's eleventh-hour motion to strike all of the State's witnesses.

VI. Closing Argument — Consecutive Sentencing

For his final point on appeal, Smith asks this court to hold that the trial court erred in sustaining the State's objection to his closing argument regarding the matter of consecutive sentences. Smith contends he was only arguing the law as set out in Ark. Code Ann. § 5-4-403 (Supp. 2001). The trial court is given broad discretion to control counsel in closing arguments, and this court does not interfere with that discretion absent a manifest abuse of discretion. *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999) (citing *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998); *Lee v. State*, 326 Ark. 529, 932 S.W.2d 756 (1996)). It is the trial court's duty to maintain control of the trial and to prohibit counsel from making improper arguments. *Leaks v. State*, *supra* (citing *Peebles v. State*, 305 Ark. 338, 808 S.W.2d 331 (1991)).

During the closing arguments, the State asked the jury to give Smith life sentences rather than sentences for a term of years

[6] Smith argues in his appellate brief that the trial court should have given him a continuance to interview the State's witnesses following receipt of a witness list. However, he made no such request below so the issue is not preserved for appellate review.

because he would not have to serve an entire term-of-years sentence before being eligible for parole. Defense counsel then made statements to the jury about consecutive sentences, and the State voiced its objection. The colloquy between defense counsel, the prosecutor, and the trial court was as follows:

> DEFENSE COUNSEL: But if you really, really, really want to punish Dennis Smith, and you want each one of these people out here to know that Dennis Smith is going to remember what he did to them, let me suggest that you do this: Don't give him life because he'll be in there for the rest of his life on what he considers just one episode. And he won't ever think again about these people out here (*Indicating*).
>
> Let me suggest that you do this: On each kidnapping charge and on each rape charge, he's got to do seventy percent of any years that you give him. And let me suggest that you do this: You give him thirty years on each one of those involving Mrs. Quandt, Mr. Quandt, and the kidnapping of Wes Lawson, and the kidnapping of George Barnes. And he's got to do twenty-one years of each one of those sentences before he starts the next. . . .
>
> PROSECUTOR: Your Honor, I'm going to object to that. Consecutive and concurrent is the Court's choice and it is not automatic. And I object to the suggestion to this jury that it is.
>
> THE COURT: I'll sustain that objection.
>
> DEFENSE COUNSEL: Well, Your Honor, it's a possibility. And I submit to the court that the Court's got every right to stack them and that's proper argument.
>
> THE COURT: I don't think it is proper argument. I think it goes beyond the law that has been given to the jury, and I'll sustain the objection.
>
> DEFENSE COUNSEL: Is the Court saying that he's not going to stack any of these charges?
>
> THE COURT: No. I'm saying that it's not a jury consideration. It's my decision. It's improper argument on the law that's been given to this jury. So I sustain the objection.

The power to determine whether multiple sentences are to run consecutively or concurrently is established by statute:

> (a) When multiple sentences of imprisonment are imposed on a defendant convicted of more than one (1) offense, . . . the sentences shall run concurrently unless, upon recommendation of the jury or the court's own motion, the court orders the sentences to run consecutively.
>
> * * * *
>
> (d) The court is not bound by recommendations of the jury concerning sentencing options under this section.

Ark. Code Ann. § 5-4-403(a), (d) (Supp. 2001). The decision to impose consecutive or concurrent sentences lies solely within the province of the trial judge, and the appellant assumes a heavy burden of showing that the trial judge failed to give due consideration in the exercise of that discretion. *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996) (citing *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996)).

[redacted] Defense counsel's statement to the jury — "he's got to do twenty-one years of each one of those sentences before he starts the next" — was not a correct statement of the law because it clearly suggests that multiple sentences automatically run consecutively. Even defense counsel stated to the trial judge that consecutive sentences were only a possibility. Yet, there was no offer to restate the argument so that it would represent an accurate statement of the law. As noted above, the trial judge has the responsibility to prohibit counsel from making improper arguments. *Leaks v. State, supra.* Because defense counsel's argument to the jury was not a correct statement of the law, the trial court did not err in sustaining the State's objection.

For the foregoing reasons, the convictions and sentences are affirmed, excepting first-degree battery, which is modified as stated above. The record has been reviewed for other reversible error, as required by Supreme Court Rule 4-3(h), and none has been found.

Affirmed as modified.

GLAZE, IMBER, and THORNTON, JJ., concurring in part and dissenting in part.

ANNABELLE CLINTON IMBER, Justice, concurring in part; dissenting in part. I agree with the majority, except I would affirm on all points. The first-degree battery statute clearly encompasses Mr. Smith's conduct in striking Mrs. Quandt repeatedly on the head with the butt of his gun.

The relevant portion of the first-degree battery statute provides as follows: "(a) A person commits battery in the first degree if . . . [w]ith the purpose of causing physical injury to another person he causes physical injury to any person by means of a firearm." Ark. Code Ann. § 5-13-201(a)(7) (Repl. 1997). The second-degree battery statute provides, in relevant part, that "[a] person commits battery in the second degree if . . . [w]ith the purpose ofcausing physical injury to another person, he causes physical injury to any person by means of a deadly weapon other than a firearm . . . ." Ark. Code Ann. § 5-13-202(a)(2) (Supp. 2001). The Arkansas Criminal Code specifically defines the term "firearm:

> "Firearm" means any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use, *including such a device that is not loaded or lacks a clip or other component to render it immediately operable*, and components that can readily be assembled into such a device;

Ark. Code Ann. § 5-1-102(6) (Supp. 2001) (emphasis added). Likewise, "deadly weapon" is defined as:

> (A) A firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious physical injury; or
>
> (B) Anything that in the manner of its use or intended use is capable of causing death or serious physical injury

Ark. Code Ann. § 5-1-102(4) (Supp. 2001). Mr. Smith claims, and the majority agrees, that under the above-cited statutory provisions, he did not commit first-degree battery because he did not cause physical injury by *shooting* a firearm and, thus, did not cause physical injury *by means of* a firearm as required by section 5-13-201(a)(7). He concludes by stating that he used a "deadly weapon

other than a firearm" and, therefore, was only guilty of second-degree battery.

The General Assembly amended the original criminal code to specify that the use of a firearm in the commission of a battery would be a factor that distinguishes first-degree battery from second-degree battery. *See* Ark. Stat. Ann. §§ 41-1601, 41-1602 (Repl. 1977). In construing section 5-13-201(a)(7) just as it reads, giving the words their ordinary and usually accepted meaning in common language, it is clear that the statute does not qualify the means by which a firearm is used to cause injury. If the General Assembly had meant to limit the offense to *shooting* a firearm, it could have said so, as it has in other provisions of the criminal code. *See* Ark. Code Ann. § 5-13-310(a)(1) (Repl. 1997) ("[a] person commits a terroristic act when . . . [h]e shoots at . . . an object with the purpose to cause injury."); Ark. Code Ann. § 5-74-107(a)(1) (Repl. 1997) ("[a] person commits unlawful discharge of a firearm from a vehicle in the first degree if he knowingly discharges a firearm from a vehicle and thereby causes death or serious physical injury . . . ."). More importantly, the statutory definition of firearm includes guns that are not immediately operable. Ark. Code Ann. § 5-1-102(6). Thus, because a gun need not be operable to be a firearm, physical injury by means of a firearm is not limited to the shooting of a firearm.

The majority states that we need not consider the statutory definition of firearm, and then proceeds to conclude that the phrase "by means of a firearm" means the use of a firearm *as a firearm*. I fail to understand how such a conclusion can be reached without reference to the statutory definition of a firearm, which includes "a device that is not . . . immediately operable . . . ." Ark. Code Ann. § 5-1-102(6). In other words, the majority's interpretation of the phrase "by means of a firearm" simply defies common sense. On the one hand, a firearm must be used as a firearm; but, on the other hand, the statutory definition of "firearm" is irrelevant. In short, the majority ignores the statutory definition of "firearm."

For the above-stated reasons, I must conclude that Mr. Smith's actions in striking Mrs. Quandt with the butt of a gun

constitute first-degree battery within the plain meaning of Ark. Code Ann. § 5-13-201(a)(7). The trial court did not err in denying Mr. Smith's motion for directed verdict on the charge of first-degree battery.

GLAZE and THORNTON, JJ., join.

IN THE MATTER of ESTATES of J.I. SEAY, Sr., and Hilma R. Seay, *Deceased*, George L. Seay and James Irby Seay, Jr. *v.* Helen S. QUINN and Bancorpsouth (Formerly First National Bank in Stuttgart, Arkansas)

02-650 98 S.W.3d 821

Supreme Court of Arkansas
Opinion delivered February 28, 2003

[Petition for rehearing denied April 10, 2003.]

Charles J. Lincoln, P.A.; and *Richard H. Wootton*, for appellants.

Malcolm R. Smith, P.A., for appellees.

W. H. "DUB" ARNOLD, Chief Justice. Before us now is the fifth appeal of this case and the second appeal of the November 29, 1999, order entered by the trial court. We hold that appellants have not filed a sufficient record to consider the issues appealed. As such, the case is affirmed.

The underlying facts leading to this case involve a dispute over the distribution of the assets of a liquidating trust which contained approximately 1,600 acres of land previously held by a closely-held family corporation called Wild Life Farms, Inc. (hereafter "WF") and the resulting tax and asset issues that ensued once James Irby Seay, Sr., died and his will was admitted into probate in September of 1981.

In the initial appeal of this matter, appellants George Seay and James Seay, Jr., had originally filed suit against the trustees, alleging the Seays were entitled to the trust assets and the trustees had no power to have conveyed the title to the acreage to WF.[1] Eventually, the chancellor granted partial summary judgment in favor of WF. A trial was then held in the matter from October 5, 1998, to October 12, 1998; and, on December 18, 1998, the chancellor entered an "interim decree" dismissing the Seays' complaint "except as to matters and things hereby reserved as set out in the court's findings of fact and conclusions of law." The Seays appealed the chancellor's earlier September 28th order granting WF partial summary judgment, but their appeal was later dismissed by the court of appeals on October 27, 1999, because the

[1] The Seays alleged many counts setting out their claims for damages and relief, but it is unnecessary for purposes of this opinion to discuss those claims here.

chancellor's order was not final. *See Seay v. Wildlife Farms, Inc.*, CA-99-122, slip op. at 4 (Ark. App. October 27, 1999). The court of appeals further held that the Seays failed to comply with Ark. R. Civ. P. 54(b) under which they could have acquired an express determination that they could appeal the non-final order because there was no reason to delay an appeal. *Id.*

After the Seays' appeal was dismissed, the parties returned to the chancellor, and he entered a final order on November 29, 1999, resolving the issues against the Seays that had been previously reserved in the chancellor's "interim decree" dated December 18, 1998. The Seays then appealed the November 29, 1999, order, which this Court dismissed as untimely due to the Seays' failure to obtain a timely extension to file the record under Ark. R. App.—Civ. 5(b). *Seay v. Wildlife Farms, Inc.*, 342 Ark. 503, 29 S.W.3d 711 (2000).

The trial court entered three orders dated after this Court's 2000 decision, which the Seays now appeal. In our 2000 decision, we held that the Seays, by filing a brief dealing only with the summary-judgment issue, had waived or abandoned any other issues they could have raised. *Id.* at 510. We, therefore, now hold that all issues and orders entered before November 29, 1999, are moot based upon this Court's 2000 decision dismissing the appeal of the November 29, 1999, order; as such, the only three issues before us are: an October 3, 2001, order denying a motion for reconsideration; an October 30, 2001, order denying discovery; and, an order of final distribution filed February 27, 2002, granting attorneys' fees. Appellants have failed to file a sufficient record before us to decide these issues; as such, the case is affirmed.

I. Order Denying Motion for Reconsideration

The trial court's order denying appellants' motion for reconsideration does not appear in the addendum, and it was not abstracted. The order does appear in the record; however, the order only denies the motion and does not tell us what was before the court. Further, the motion for reconsideration itself does not appear in the addendum, abstract, or record, either as a written

motion or as an oral motion set out in a transcription of a hearing. It is impossible for us to know what the motion entailed.

II. Order Denying Discovery

Likewise, as with the motion for reconsideration, we have only the order denying discovery and nothing else abstracted or included in the addendum. It is unclear what the discovery was even about, other than it related to attorneys' fees that were granted after this Court's 2000 opinion; we only know this from the transcription included in the record of a discussion that states that the motion was about attorneys' fees.

III. Final Order of Distribution

Appellants contend that the probate court lacked jurisdiction to grant attorneys' fees, which were granted in the February 27, 2002, order of final distribution. Appellants argue that the fees were granted based upon work done with respect to the trusts created by Mr. Seay, Sr.'s will and that only a chancery court has jurisdiction over construction, operation, and interpretation of trusts. Appellants argue that this is a question of subject-matter jurisdiction and attempt, in their argument, which is extremely broad, to revert back to issues litigated in the 1980s on this issue. As stated above, appellants are limited by our prior opinion to fees granted after the November 29, 1999, order. As such, the only period for which the Seays can contest this issue is from the November 29, 1999, order involved in our 2000 decision and the closing of the estate on February 27, 2002.

The only order after November 29, 1999, granting fees is the November 15, 2001, order which, like the other orders discussed above, is not included in the addendum, abstract, or even in the record. The only copy appears as an exhibit to the appellants' response to appellees' motion to dismiss this appeal. This copy does not comply with our rules. *See* Ark. R. App. P.—Civ. 6, 7. Moreover, the final order of distribution merely confirms that final distribution has been made "in accordance with previous orders," which are not included for this Court's consideration.

We have stated time and time again that it is the appellant's burden to produce a record on appeal sufficient for our review. *Gibbs v. Hensely*, 345 Ark. 179, 44 S.W.3d 334 (2001); *Lee v. Villines*, 328 Ark. 189, 942 S.W.2d 844 (1997); *Ozark Auto Transp., Inc. v. Starkey*, 327 Ark. 227, 937 S.W.2d 175 (1997); *see also Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999); *SD Leasing Inc. v. RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983). The record simply does not place the matters argued before this Court. Issues outside the record will not be considered on appeal. *Gibbs v. Hensely, supra*; *Stewart v. Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1992).

For all of the foregoing reasons, we do not have a sufficient record before us to consider the issues appealed. As such, the case is affirmed.

Affirmed.

STATE of Arkansas *v.* $258,035 U.S. CURRENCY; $195,320 U.S. Currency; Arkansas State Highway and Transportation Department

02-1041 98 S.W.3d 818

Supreme Court of Arkansas
Opinion delivered February 28, 2003

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellant.

One brief only.

W. H. "DUB" ARNOLD, Chief Justice. Appellant State of Arkansas brings this appeal from an amended order finding that seized monies under the Arkansas Drug Forfeiture Act be awarded to the Crawford County general fund. The State brings two points on appeal: 1) whether the trial court lacked the authority to set aside the May 16, 2002, judgment in the absence of a request by an opposing party and a showing of grounds for setting aside a default judgment pursuant to Arkansas Rule of Civil Procedure 55; and, 2) assuming that the trial court was permitted to set aside a default judgment in the absence of a request to do so, whether the trial court nonetheless erred by ordering the subject money forfeited to the County instead of the State. For

the reasons that follow, we reverse and hold that the trial court lacked authority to set aside the judgment.

On January 21, 2002, Arkansas Highway Patrol Officer Timothy Gushing seized currency totaling $258,035.00 from a truck driven by Ramkumar Naraine. Officer Gushing observed Naraine filling out his log book after Officer Gushing requested it from Naraine. Officer Gushing conducted an inspection of the truck and the truck's equipment. Officer Gushing asked Naraine if Naraine had any problems with the searching of the inside of the truck, and Naraine stated that he did not mind. Once inside of the cab of the truck, Officer Gushing observed a large suitcase with large amounts of cash wrapped in several bags. At the scene, Naraine advised the officers orally and in writing that the money was not his, that he had no interest in the money, and that he had no claim for its return to him.

On February 13, 2002, Officer Gushing stopped a truck and made contact with the driver, Parkin, and another driver, Fitzroy Brown. While Officer Gushing was visiting with Parkin, Parkin appeared to be nervous and in a hurry to get out of the station. Parkin gave Officer Gushing his log book and Officer Gushing noticed that Parkin had not driven for a week. Officer Gushing believed that there might be a second log book inside of the truck and obtained consent to search the truck. While searching the truck and trailer, Officer Gushing discovered a bag filled with United States currency totaling $195,320.00. Both Parkin and Brown advised officers orally and in writing that the money was not theirs, that they had no interest in the money, and that they had no claim for its return.

The State filed *in rem* forfeiture complaints against the currency in the two separate cases, and the circuit clerk issued summons. The State filed affidavits in each case, requesting that the warning orders issue pursuant to Ark. R. Civ. P. 4(a); those warning orders were issued and duly published. After more than thirty days had passed, no answer had been filed; therefore, the State filed an affidavit requesting default judgments in each case.

The trial court granted the State's motion, and default judgments were entered on May 16, 2002. The trial court found by a

preponderance of the evidence that the subject currency was subject to forfeiture pursuant to Ark. Code Ann. § 5-64-505 (Supp. 2001) and ordered that the money be forfeited to the State for distribution pursuant to that statute.

When a local bank requested that the judgments be amended to reflect the amounts actually seized, the trial court instead set the matter for an "inquiry hearing." On June 12, 2002, the trial court conducted a hearing at which the officers testified regarding the seizure of the property. After the hearing, the trial court, over the State's objection, ordered the money forfeited to the Crawford County general fund. On July 9, 2002, the trial court entered amended orders that contained no findings of fact or conclusions of law, but merely noted that the monies were seized and would be awarded to the Crawford County general fund. At the conclusion of the hearing, the following dialogue occurred:

> THE COURT: All right, the court having heard the testimony, they're going to forfeit this money to the County General Fund. I don't think there's sufficient evidence on that, that will be the order of the court.
>
> MR. MEDLOCK: Judge, I don't know if there's any authority to do that?
>
> THE COURT: I don't know either, but we'll find out.

The State filed timely notices of appeal from each judgment.

Default judgments are governed by Rule 55 of the Arkansas Rules of Civil Procedure. That Rule provides, in pertinent part, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, judgment by default may be entered by the court." Ark. R. Civ. P. 55(a) (2002). Although default judgments are not favored in the law, a default judgment is just as binding and enforceable as a judgment entered after a trial on the merits. *B & F Engineering, Inc. v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). Additionally, according to Arkansas Rule of Civil Procedure 55(c):

> The court may, *upon motion*, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud, misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. *The party seeking to have the judgment set aside must demonstrate a meritorious defense to the action*; however, if the judgment is void, no other defense to the action need be shown.

Ark. R. Civ. P. 55(c) (emphasis added). Furthermore, a party seeking relief from a default judgment must demonstrate one of the four grounds set out in Rule 55(c), and, unless the judgment is absolutely void, demonstrate a meritorious defense. *Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996). Under these standards, the trial court erred by setting aside the May 6, 2002, judgments and entering the amended judgments.

Although a trial court has the authority to set aside a default judgment, it may not do so in the absence of a request to do so. Rule 55(c) contemplates that a request to set aside a default judgment be made by an adverse party. Rule 55(c) qualifies a trial court's ability to set aside a default judgment by providing that it may do so "upon motion." Ark. R. Civ. P. 55(c). It does not permit the trial court to act upon its own initiative. Other rules that contemplate actions by the court specify that the court may act upon its own initiative. *See* Ark. R. Civ. P. 4(i) (2002)(the action shall be dismissed as to that defendant without prejudice upon motion or upon the request of a party or on its own initiative); Ark. R. Civ. P. 6(b)(1) (2002)(the court, for cause shown, may at any time in its discretion . . . with or without motion or notice, order the period enlarged); Ark. R. Civ. P. 21 (2002)(parties may be dropped or added by order of the court on motion of any party or on its own initiative); Ark. R. Civ. P. 39(a)(2) (2002) (. . .the trial of all issues so demanded shall be by jury unless . . . the court upon motion or on its own initiative finds that a right of trial. . .); Ark. R. Civ. P. 39(c) (2002)(In all actions not triable of right by a jury, the court upon motion or of its own initiative may try any issue. . .); Ark. R. Civ. P. 40(a) (2002)(the court may assign a trial date on its own motion even though neither party has requested a setting); and Ark. R. Civ. P. 60(a) (2002)(the court may modify or vacate judgment, order, or decree on motion of

the court or any party. . .). Rule 55(c) further provides that, to obtain relief from a default judgment, the moving party must demonstrate grounds and must demonstrate a meritorious defense. Thus, the Rule clearly requires a pleading filed by an adverse party setting forth the grounds for relief. *See* Ark. R. Civ. P. 7(b)(1) (2002)(an application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought).

Here, the trial court acted on its own initiative, conducted a hearing, and, over the State's claim that it lacked authority to do so, set aside the default judgment and entered an order forfeiting the appellee property to the county general fund. Because the trial court lacked authority to set aside the original default judgment in the absence of a motion by an adverse party, we reverse. Therefore, we do not need to address the State's second point on appeal.

Reversed.

IMBER, J., not participating.

Joyce WHALEY and Keith Whaley *v.*
KROGER COMPANY

02-874 98 S.W.3d 824

Supreme Court of Arkansas
Opinion delivered February 28, 2003

McCullough Law Firm, by; *R.S. McCullough*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Michael J. Emerson* and *Christine A. Cryer*, for appellee.

W. H. "Dub" Arnold, Chief Justice. This appeal arises from a personal-injury case arising out of an alleged electrical shock at a Kroger store in Dewitt, Arkansas, in August 1997. The case was tried before a jury on January 22, 2002,

which resulted in a unanimous defense verdict. In this appeal, appellants do not question anything about the trial, evidence, rulings of the trial court, the jury verdict, or the sufficiency of the evidence in support of the defense verdict. Rather, appellants' sole ground for appeal is whether the trial court committed reversible error in failing to disqualify appellee Kroger's counsel on the basis of a September 19, 2001, letter concerning settlement negotiations. In that letter, appellee expressed a desire to continue negotiating, but would do so only if appellants withdrew a motion for sanctions which was based upon an order compelling discovery, which appellee argues it never received. There was a hearing on the matter on September 25, 2001, but the trial court did not rule on the motion to disqualify at that time. Appellants renewed the motion to disqualify on the morning of trial, and the trial court denied the motion.

Appellants argue that during attempts to settle this case before trial, appellee took the position that it would not settle with appellants unless and until appellants withdrew a motion for sanctions which was filed based upon appellee's failure to timely answer discovery demands. Appellants state that while appellee, at times, tried to refute the fact that it had received communications relative to the same and the trial court's order in regards to the same, appellee had filed replies and made responses that indicated that it had received the materials. Appellants assert that the difficulty in this case is based upon the fact that a motion to disqualify appellee's counsel was filed by appellants after appellee's counsel personally interjected himself into the litigation by taking certain matters personally, rather than professionally, and decided that not only would the instant matter not be settled, but that in the future other cases that he might have with appellants' counsel would also be subject to "non-settling," based on appellee's counsel being upset by the filing of the motion to compel.

Appellants contend that the conduct of appellee's counsel went beyond zealous representation, and became personal conduct with a "vent of personal animus that went beyond the bounds of the authorized and desired practice of law." Appellants assert that appellee's counsel should have been disqualified from this matter based upon the conduct that appears to violate the Model Rules

of Professional Conduct in that counsel was placing his own personal interest into the matter. Appellants contend that when counsel becomes personally involved in a matter where judgment is likely to be clouded or he has an interest in the matter, the same should recuse or be disqualified. Model Rule of Professional Conduct 1.7. According to appellants, appellee's counsel allowed himself to become personally involved due to the terms of his letter, pleadings, and comments in regard to the problems appellants perceived in this matter. Based on all of the above, appellants state that appellee's counsel should have removed himself from this matter, and when that did not occur, the trial court should have disqualified appellee's counsel. Appellants assert that the trial court committed error relative to this matter by not removing appellee's counsel. *Seeco, Inc. v. Hales*, 334 Ark. 134, 969 S.W.2d 193 (1998); *American Carriers Inc. v. Kroger*, 302 Ark. 86, 787 S.W.2d 669 (1990).

Appellants argue that, based on the above, this court should enter an order reversing this matter and directing that appellee's counsel be disqualified, and that this matter should be restored to the trial court's calendar. Otherwise, the prohibitions and sanctions relative to the Model Rules of Professional Conduct violations will not be perceived by appellee and appellee's counsel to have any "teeth" or remedy, and any violations that occur will not and cannot be otherwise addressed. We disagree and affirm the trial court.

Appellants do not provide this court with any factual basis or legal authority for the proposition that Kroger's counsel should have been disqualified. The only evidence having any bearing on the motion to disqualify is a September 19, 2001, letter from appellee's counsel to appellants' counsel. That letter expressed appellee's desire to continue settlement negotiations, provided that appellants' counsel withdraw a motion for sanctions which was based upon an order compelling discovery, which appellee's counsel states he never received.

Furthermore, appellants do not show how appellee's counsel placed his personal interests over the interests of his client. The jury verdict attests to the fact that appellee's counsel adequately

looked after the interests of Kroger, and the trial of the case went forward without any problems. Appellants do not allege any defect or irregularity in any phase of the trial, argument or conduct of counsel, the introduction of evidence, or the sufficiency of the evidence.

This is not a situation where there is a conflict of interest, former representation, or even the appearance of impropriety. Appellants do not allege any former relationship or representation by appellee's attorney or his firm; rather, the record in this appeal contains one letter that referenced a settlement offer and a desire to continue negotiating, but requested that appellants withdraw a baseless motion for sanctions as a prelude to further negotiations. This letter evidences no personal animus or how such animus, even if true, was prejudicial to the fair and impartial administration of justice.

This court has stated:

> Disqualification is an absolutely necessary measure to protect and preserve the integrity of the attorney-client relationship; yet it is a drastic measure to be imposed only where clearly required by the circumstances. We must never forget that a disqualification, though aimed at protecting the soundness of the attorney-client relationship, also interferes with, or perhaps destroys, a voluntary relationship by depriving a litigant of counsel of his own choosing oftentimes affecting associations of long standing. The role of the court is to balance the current client's right to counsel of choice with the former client's right to protection of confidences transmitted, or likely to have been acquired, during the prior representation.

Burnette v. Morgan, 303 Ark. 150, 794 S.W.2d 145 (1990). Therefore, disqualification would be appropriate in a case where appellee's counsel or firm has had a former relationship with appellants, and this is not the case here and has not even been alleged. Thus, this is not a conflict of interest or situation where appellee's counsel or his firm obtained confidential or proprietary information from appellants.

Appellee further submits that it has been required to go to the time and expense of defending this frivolous appeal in a

motion for sanctions before this court. Appellee contends that this appeal has been prosecuted with absolutely no factual or legal support, and for these reasons and pursuant to Rule 11 of the Rules of Appellate Procedure—Civil, it filed a motion for sanctions for the imposition of costs and a reasonable attorney's fee to be assessed against appellants' counsel personally. We agree, and grant appellee's motion for sanctions.

A review of this case confirms that there is no violation of any of the Model Rules of Professional Conduct by appellee's counsel. Further, there is no factual or legal support for this appeal. For these reasons, sanctions are appropriate and are assessed against appellants' counsel, personally. Appellee certified that it took ten hours to review the record, conduct research, draft and finalize its appeal brief in this case. Appellee's counsel's hourly fee is $150.00; therefore $1,500.00, plus costs, is assessed against appellants' counsel to be paid to appellee.

Affirmed.

David COLBURN *v.* STATE of Arkansas

CR 02-731 98 S.W.3d 808

Supreme Court of Arkansas
Opinion delivered February 28, 2003

William R. Simpson, Jr., Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

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

TOM GLAZE, Justice. This case ensues from a domestic dispute between the appellant, David Colburn, and his wife, Donna Colburn. On August 14, 2001, and on August 15, 2001, David caused physical injury to Donna, and he later was charged separately on both counts with committing domestic battering in the third degree under Ark. Code Ann. § 5-26-305 (Supp. 2001).

The record reflects that, on August 16, 2001, David pled guilty in Little Rock Municipal Court to the Class A misdemeanor third-degree domestic battering of Donna, which occurred on August 15. On October 17, 2001, the State filed an information in Pulaski County Circuit Court against David in connection with the August 14 battering of Donna, charging him with a Class D felony offense of third-degree battering.[1] Section 5-26-305(b)(2)(A)(iii) provides a third-degree battering charge is a

[1] The record is not clear why the August 15 charge was filed in municipal court and the August 14 charge was later filed in circuit court.

Class D felony if, within the past five years, the person has committed a *prior offense* of domestic battering in the third degree. Otherwise, third-degree domestic battering is a Class A misdemeanor. § 5-26-305(B)(1).

At trial, the State moved to introduce a certified copy of David's municipal court guilty plea. In response, David contended that his conviction for domestic battering in municipal court was not relevant, and therefore could not be used to enhance the felony third-degree battering charge in circuit court. He reasoned that, since the August 15 offense was subsequent, not prior, to the August 14 offense charged in circuit court, felony third-degree domestic battering could not be established, and he was entitled to a directed verdict. The circuit court denied David's motion to dismiss, and David rested his case without presenting a case-in-chief. The court found David guilty of Class D felony third-degree domestic battering and subsequently sentenced him to eighteen months' imprisonment. David brings this appeal, raising two points for reversal.

David's first argument is that the trial court erred in admitting the State's exhibit of the certified copy of his municipal court guilty plea to the misdemeanor domestic battering charge which occurred on August 15, 2001. He refers to § 5-26-305(a) and (b)(2)(A)(iii) (Supp. 2001), and asserts that to prove a Class D felony domestic battering in the third degree, the State must prove a person committed a prior offense of third-degree domestic battering within the past five years. David argued below and in this appeal that the certified copy of his guilty plea in municipal court to the August 15 offense was not relevant because he committed that offense subsequent, and not prior, to the felony battering offense which occurred on August 14. David asserts that, to be relevant, the municipal court's prior conviction would have had to show the added element that, within five years before the August 14 felony battering charge in issue here, he committed an offense of domestic battering. In other words, David submits that there is a distinction between a *prior conviction* and having committed a *prior offense*.

David further adds that the language of § 5-26-305 referring to "within the past five years" is ambiguous in that the provision does not specifically state a date to be used in determining when the "past five years" begins. He suggests that two possible beginning points are (1) the date the defendant committed the domestic battering in issue, or (2) the date the defendant stands trial for having committed the offense. Citing *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002), David argues that, when an ambiguity exists in a criminal statute, this court strictly interprets the statute in the defendant's favor. The State's view of § 5-26-305 is that the legislature intended to allow enhancement with convictions occurring within five years prior to the trial of the August 14 enhanced offense, regardless of the chronological order in which the offenses were committed.

The State agrees with David that we must interpret § 5-26-305(b)(2)(A)(iii) and determine whether the five-year backward calculation of offenses begins on the date David committed the enhanced offense or the date the enhanced offense is tried. However, the State submits that the legislative intent supports the interpretation to allow enhancement with all offenses that occur five years prior to trial of the enhanced offense. In other words, the State argues David's August 16 conviction shows he had committed another battering offense within five years of his trial for the August 14 offense; therefore, the August 16 conviction involving the August 15 offense was relevant for enhancement purposes. The State offers several theories in support of its position.

First, the State argues that we should interpret the term "prior offense," as employed in § 5-26-305(b)(2)(A), to mean a defendant who has been previously convicted, regardless of the chronological order in which the offense or misconduct occurred. The State claims such an interpretation is consistent with case law. It cites *Nail v. State*, 225 Ark. 495, 283 S.W.2d 683 (1955), for the proposition that, without any statutory language indicating that the dates the defendants commit their offenses are determinative, "offense" is synonymous with "conviction." In *Nail*, the prosecuting attorney filed an information against the defendant simply by following the language of the statute by charging Nail with a second offense committed within one year of the "*first offense*,"

which latter term the Legislature clearly meant to be synonymous with the first, or prior "conviction." The *Nail* court further stated the following:

> While the fact of conviction should be sufficiently averred in an information or indictment seeking to charge an accused as a second or subsequent offender, it is not essential to use the word "convicted" if its equivalent is otherwise sufficiently alleged. The term "second offense," as it is used in habitual criminal statutes, has been generally defined by the courts as, "one committed after conviction for a first offense." It cannot be legally known that an offense has been committed until there has been a conviction. A second offense, as used in the criminal statutes, is one that has been committed after conviction for a first offense.

Nail, 225 Ark. at 495 (citations omitted).

Our court explained the *Nail* decision in the later case of *Rogers v. State*, 293 Ark. 414, 738 S.W.2d 412 (1987). In *Rogers*, this court interpreted the Omnibus DWI Act, and decided when, under that Act, a prior offense occurred for purposes of penalty enhancement. There, the defendant was charged with the "offense" of DWI for operating his vehicle while intoxicated on May 11, 1986; he had two *prior* DWI "convictions," one on June 22, 1984, and the other on July 17, 1985. There was no proof or stipulation as to the dates on which the two *prior offenses* were committed. However, the trial court found the defendant, Rogers, guilty of "the third offense occurring within three years of the first offense."

This court reversed the trial court because the State did not show that all three "violations" (offenses) occurred within three years of the first violation; instead, it only showed that all three "convictions" occurred within three years. The court rejected the State's contention that an "offense" occurs on the date of the conviction, because the word "offense" is often equated with the word "conviction." The *Rogers* court cited the *Nail* decision and acknowledged it is true that "offense" is often held to mean "conviction." However, the *Rogers* court went on to explain *Nail* and similar cases as follows:

> The State contends that an offense occurs on the date of the conviction, because the word "offense" is often equated with the word "conviction." It is true that "offense" is often held to mean "conviction." [S]uch cases deal with the problem that an act cannot be considered an "offense" until there has been a conviction, and they simply do not address the issue of when an "offense" occurs. There are two different concerns, and the distinction is best illustrated by employing a two-step analysis. *The first step is that the act in issue is not elevated to the status of an "offense" until there is a conviction. The second step is that once a conviction is shown, it must relate back and the act is deemed an "offense" from the moment of commission. Therefore, the offense occurs when the criminal act is committed.*

Rogers, 293 Ark. at 414 (citations omitted) (emphasis added).

When we apply the rationale in *Rogers* to the present case, David's August 15 battering of Donna was not elevated to the status of an "offense" until there was a conviction. Here, once David was convicted on his August 15 battering charge under § 5-26-305(b)(2)(A), that criminal misconduct was deemed an "offense" from the moment of its commission. That being true, David's offense occurring on August 15 was not a prior offense since it occurred after the August 14 battering charge.

The State also compares the enhancement provision in § 5-26-305(b) with cases involving Arkansas's Habitual Offender Statutes. *See* Ark. Code Ann. § 5-4-501 (Supp. 2001). For example, it cites *Beavers v. State*, 345 Ark. 291, 47 S.W.3d 222 (2001), where the court held the Habitual Criminal Statutes are not deterrent, but punitive in nature, so that a prior conviction, *regardless of the date of the crime*, may be used to increase punishment. However, in *Beavers*, the enhancement statute plainly spoke in terms of the *conviction* date of the offenses and not the dates of the actual crimes.[2] *See also Conley v. State*, 272 Ark. 33, 612 S.W.2d 722 (1981). As already thoroughly discussed, the statute

---

[2] Section 5-4-501(d)(1) reads as follows:

> A defendant who *is convicted* of a felony involving violence enumerated in subdivision (d)(2) of this section and who has previously been convicted of two (2) or more of the felonies involving violence enumerated in subdivision (d)(2) of this section shall be sentenced to an extended term of imprisonment, without eligibility

here speaks in terms of a *prior offense* of domestic battering in the third degree.[3] Our case law, like the *Nail* and *Rogers* decisions, has given meaning to the interplay between such terms as "prior offense" and "prior convictions," and when interpreting a statute, we construe it just as the statute reads. *See Hager v. State*, 341 Ark. 633, 19 S.W.3d 16 (2000). Moreover, the Legislature is presumed to know the decisions of the supreme court, and it will not be presumed in construing a statute that the Legislature intended to require the court to pass again upon a subject where its intent is not expressed in unmistakable language. *Books-A-Million, Inc. v. Ark. Painting & Specialities Co.*, 340 Ark. 467, 10 S.W.3d 857 (2000).

In conclusion, we believe § 5-26-305 is, at the very least, ambiguous because it is subject to more than one interpretation. As David is quick to point out, this court strictly construes criminal statutes and resolves any doubt in favor of the defendant. *Williams*, 347 Ark. 728, 67 S.W.3d 548.

David's second and final argument is related and dependent upon our ruling in the first. Defense counsel moved for dismissal because the State had not proved David had committed a "prior offense" to the August 14 offense by introducing the August 16 conviction of the August 15 offense. Since we agree with David that the State's evidence did not amount to substantial evidence, we must reverse and remand.

---

except under § 16-93-1302 for parole or community punishment. (Emphasis added.)

[3] It is noteworthy to point out the phrasing of the previous version of § 5-26-305. That version also defined domestic battering in the third degree as a Class A misdemeanor. However, the statute continued, "if the person has previously been *convicted or found guilty* of domestic battering in the first, second, or third degree, or wife battering in the first, second, or third degree, domestic battering in the third degree is a Class D felony." (Emphasis added.)

Raymond A. MARTINEZ *v.* STATE of Arkansas

CR 01-1114 98 S.W.3d 827

Supreme Court of Arkansas
Opinion delivered February 28, 2003

Patrick J. Benca; and *Hampton & Larkowski*, by: *Mark F. Hampton*, for appellant.

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

ANNABELLE CLINTON IMBER, Judge. Appellant Raymond Martinez was convicted of aggravated robbery and sentenced to imprisonment for ten years. On appeal, he challenges the circuit court's order denying his motion to suppress on three separate grounds. Martinez argues that the officer who detained him was outside his territorial jurisdiction and without statutory authority to arrest him. He also contends that neither his arrest nor the subsequent search of his vehicle was supported by probable cause. This appeal was certified to us by the Arkansas Court of Appeals pursuant to Ark. R. Sup. Ct. 1-2(b)(4), (5) (2002). We find no error and affirm.

Shane Williams was shot and killed by Pam Sowell on January 21, 2000, when he attempted to rob Buddy's Place, a conve-

nience store in the City of Ward owned by Pam and her husband, Alan Sowell.[1] Mr. Sowell, who was also on the premises at the time of the attempted robbery, called 911 after the shooting at 8:39 p.m. He told the operator that a suspect had been shot and was in need of an ambulance. Mr. Sowell also stated that someone else was in the parking lot and a kid was outside the store.

Officer Don Sims of the Austin Police Department was on a routine traffic stop when he heard the radio report that somebody had been shot at Buddy's Place. Officer D. Sims immediately responded to the call and asked if the Ward Police Department needed his assistance. His brother, Eric Sims, who was a police officer with the neighboring City of Ward, answered affirmatively. According to the 911 operator's call logs, Officer Eric Sims was the first officer to arrive at Buddy's Place. He checked in from the store at 8:41 p.m. — just two minutes after the 911 call was received. Meanwhile, his brother was en route to the store. At the suppression hearing, Officer D. Sims testified that he was three minutes away from Buddy's Place. Upon arriving at the scene, he did not see any police vehicles. He also testified about hearing that another suspect armed with a pistol and disguised with a ski mask was still at the scene.

As Officer D. Sims approached Buddy's Place, he saw a white Mazda leaving the store's parking lot. He radioed to dispatch that he was going to stop the vehicle. Another police officer with the Ward Police Department, Patty Andolina, also responded to the initial 911 call. While nearing the scene, she happened to be right behind Officer D. Sims and approved his request to make a stop. Officer D. Sims proceeded to make the stop, and ordered the driver to exit the vehicle and walk slowly back toward him. Next, the police officer ordered the driver, Raymond Martinez, to get down on the ground. Martinez complied, whereupon Officer D. Sims handcuffed him and did a pat-down search for weapons. No weapons were found, and Martinez was placed in the back of the officer's patrol car.

---

[1] Buddy's place was previously known as "Dude's Place."

According to the radio logs, Officer D. Sims reported at 8:45 p.m. that he had a subject in his vehicle. He asked Martinez what he was doing at Buddy's Place and whether he knew what was going on. Martinez responded that he was going into the store to get a coke, but a man told him to leave. Officer D. Sims advised Martinez that he would be released as soon as everything was straightened out. Then, the officer drove back to Buddy's Place and informed Officer E. Sims that he had a suspect in his vehicle.

In the meantime, after Officer Andolina approved the stop by Officer D. Sims, she continued to the crime scene. At the scene, Officer Andolina interviewed an eyewitness, Terry Colbert. This interview took place within ten minutes of her arrival on the scene. Additionally, Officer D. Sims had already returned to the store with Martinez in the back seat of his patrol car. Colbert gave the following description of the fleeing suspect: A dark-headed male, wearing dark clothes and baggy pants. Colbert further stated that he saw the suspect leave like "a bat out of hell" in a white vehicle. With that information, Officer Andolina approached Officer D. Sims's patrol car, opened the door, and visually confirmed that Martinez matched the description given by Colbert.

Shortly thereafter, at 8:53 p.m., Chief Deputy Mike Coffman of the Lonoke County Sheriff's Department arrived on the scene. He began to take pictures of the crime scene, including the white Mazda driven by the subject. When Deputy Coffman got to the Mazda, he reached through an open window and picked up a wallet lying on the passenger seat. The deputy opened the wallet and saw a picture ID that resembled Shane Williams — the victim-perpetrator. According to the radio logs, Deputy Coffman called in the name shown on the ID to check for warrants at 9:18 p.m. The wallet was seized and turned over to a Ward police officer.

Deputy James Kulesa of the Lonoke County Sheriff's Department also assisted in the investigation of the attempted robbery at Buddy's Place. He interviewed Martinez at the Ward Police Department beginning at 10:47 p.m., or about two hours

after the initial 911 call. During the interview, Martinez made statements implicating himself in the crime.

Subsequently, Martinez entered a negotiated plea of guilty and was sentenced to a term of twenty-five years imprisonment. The circuit court, however, allowed him to withdraw his guilty plea due to a claim of ineffective assistance of counsel. Prior to trial, Martinez moved to suppress all evidence obtained after he was arrested, including the incriminating statements made at the police station. He argued that Officer Don Sims was without statutory authority to make the arrest and that the arrest and search were made without probable cause and in violation of the United States and Arkansas Constitutions. After a hearing, and subsequent briefing, the circuit court denied Martinez's motion to suppress and a jury trial ensued. Martinez was convicted of aggravated robbery, and this appeal followed.

When a trial court's denial of a motion to suppress is challenged on appeal, our court makes an independent examination of the issue based on the totality of the circumstances and views the evidence in the light most favorable to the State. *Arnett v. State*, 342 Ark. 66, 27 S.W.3d 721 (2000). The trial court's ruling will only be reversed if it is clearly against the preponderance of the evidence. *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998); *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998).

It is well settled in Arkansas that a law enforcement officer cannot make a warrantless arrest outside of the territorial limits of his jurisdiction without statutory authority. *Arnett v. State*, 342 Ark. 66, 27 S.W.3d 721 (2000). This court has announced the four instances where the General Assembly has delegated authority for law enforcement officers to make an arrest outside of their jurisdiction: (1) "fresh pursuit" cases under Ark. Code Ann. §16-81-301 (1987); (2) when the police officer has a warrant for arrest, as provided by Ark. Code Ann. § 16-81-105 (1987); (3) when a local law enforcement agency requests an outside officer to come into the local jurisdiction and the outside officer is from an agency that has a written policy regulating its officers when they act outside their jurisdiction, as stated in Ark.

Code Ann. § 16-81-106(3), (4) (Supp. 2001); and (4) when a county sheriff requests that a peace officer from a contiguous county come into that sheriff's county and investigate and make arrests for violations of drug laws pursuant to Ark. Code Ann. § 5-64-705 (Repl.1993). *See Henderson v. State*, 329 Ark. 526, 953 S.W.2d 26 (1997) (citing *Perry v. State*, 303 Ark. 100, 794 S.W.2d 141 (1990)). According to Martinez, and conceded by the State, only the third exception is applicable to this case.

Pursuant to Ark. Code Ann. § 16-81-106(c)(B)(3), (4) (Supp. 2001), an officer may make an arrest outside his jurisdiction if (1) he is acting "at the request of or with the permission of the municipal or county law enforcement agency having jurisdiction in the locale where the officer is assisting or working by request," and (2) the extrajurisdictional officer's agency has a "written policy on file regulating the actions of its employees relevant to law enforcement activities outside its jurisdiction." Under this two-pronged analysis, Martinez concedes that the Austin police officer was acting at the request and with the permission of the local agency. He maintains, however, there was no evidence that the Austin Police Department had a written policy regulating its officers when they act outside their jurisdiction.

Martinez is mistaken in his argument under this point. The circuit court made a specific finding in its written opinion attached to the order denying the motion to suppress that the "[Austin police officer's] city does have a policy and procedure about law enforcement assistance to and from his city." The record in this case also reflects that the State produced a copy of the Austin Police Department's written policy and procedure on extrajurisdictional activities. Here, the local law enforcement agency requested the assistance of an outside officer, and that officer's law enforcement agency had the statutorily mandated written policy. *See* Ark. Code Ann. § 16-81-106(3), (4). Under these circumstances, we cannot say that the Austin police officer was acting outside his territorial jurisdiction without the requisite

statutory authority.[2] Thus, we conclude that the circuit court's denial of the motion to suppress was not clearly against the preponderance of the evidence.

For his second point on appeal, Martinez contends that his arrest was not supported by probable cause and amounted to an illegal seizure in violation of both the United States and Arkansas Constitutions. Specifically, he asserts that the "first credible evidence that officers had that the Appellant had any involvement in the incident" developed forty-five minutes after Martinez was detained, when "Chief Deputy Coffman reached into the appellant's vehicle and discovered a wallet belonging to the decedent Williams." We disagree.

Probable cause exists where there is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that a crime has been committed by the person suspected. *Howell v. State*, 350 Ark. 552, 89 S.W.3d 343 (2002); *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989). In assessing the existence of probable cause, this court's review is liberal and is guided by the rule that probable cause to arrest without a warrant does not require the degree of proof sufficient to sustain a conviction. *Howell v. State*, 350 Ark. 552, 89 S.W.3d 343 (2002); *Baxter v. State*, 324 Ark. 440, 922 S.W.2d 682. However, mere suspicion is not enough to support a finding of probable cause to arrest. *Howell v. State*, 350 Ark. 552, 89 S.W.3d 343 (2002); *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986)(citing *Beck v. Ohio*, 379 U.S. 89 (1964)). Probable cause to arrest without a warrant exists when facts and circumstances within the officers' collective knowledge are sufficient in themselves to warrant a person of reasonable caution in believing that an offense has been committed by the person to be arrested. *Howell v. State*, *supra*.

---

[2] This situation is to be contrasted with one where an officer is acting outside his or her territorial jurisdiction and none of the statutory grounds for making an extraterritorial arrest appear to apply to the facts of the case. In the latter situation, the issue becomes whether the local officer is present in his or her capacity as a law enforcement officer and participates in making the arrest. *See Logan v. State,* 264 Ark. 920, 576 S.W.2d 203 (1979).

In this case, Officer D. Sims stopped Martinez within a couple of minutes of the 911 call. At the time of that stop, it was dark and law enforcement officers already knew that there had been an attempted aggravated robbery at Buddy's Place. They also knew that there were at least two suspects, one having been shot by the store owner. The officers were told the second suspect was armed and wearing a ski mask. When Officer D. Sims arrived at the store, the only vehicle seen leaving the crime scene was a white Mazda driven by Martinez. Additionally, ten minutes after the stop, Officer Andolina took a statement from an eyewitness who described the second suspect and the suspect's car. The eyewitness's description matched Martinez and his vehicle.

The information outlined above, which is sufficient to constitute probable cause, was available to police officers prior to the search of Martinez's vehicle. Because the record reflects that probable cause developed before Chief Deputy Coffman found the wallet in Martinez's vehicle, we conclude that the second argument on appeal is without merit.

In his third and final point on appeal, Martinez contends that the search of his vehicle was not supported by probable cause. Specifically, he argues that the moment Chief Deputy Coffman's "hand breached the interior of that vehicle and grabbed that wallet probable cause had to exist." As we have already concluded in connection with his second point, probable cause developed before the search of Martinez's vehicle. Accordingly, Martinez's last point is also without merit.

Affirmed.

U.S. BANK, N.A., Individually and as Trustee for
Empire Funding Home Loan Trust 1997-1;
U.S. Bank, N.A., Individually and as Trustee for
Empire Funding Home Loan Trust 1997-2;
U.S. Bank, N.A., Individually and as Trustee for
Empire Funding Home Loan Trust 1997-3;
U.S. Bank, N.A., Individually and as Trustee for
Empire Funding Home Loan Trust 1997-4;
U.S. Bank, N.A., Individually and as Trustee for
Empire Funding Home Loan Trust 1997-5;
U.S. Bank N.A., Individually and as Trustee for
Empire Funding Home Loan Trust 1998-1;
U.S. Bank, N.A., Individually and as Trustee for
Empire Funding Home Loan Trust 1998-2,
Appellant v. Wilma MILBURN, *Appellee*;
Wilma Milburn *v.* U.S. Bank, Individually and as Trustee

01-1318/01-1008 100 S.W.3d 674

Supreme Court of Arkansas
Opinion delivered February 28, 2003

[redacted]

Rose Law Firm, by: *Herbert C. Rule III*, *Garland J. Garrett*, and *Stephen N. Joiner*, for appellant.

Joe Holifield; and *McMath, Vehik, Drummond, Harrison & Ledbetter, P.A.*, by: *Mart Vehik*, for appellee.

ANNABELLE CLINTON IMBER, Justice. The instant matter comes to us as a set of interlocutory appeals by Appellant U.S. Bank, N.A., stemming from a Rule 23 class-action proceeding. In conjunction with this matter, a motion to dismiss U.S. Bank's appeal was filed in this court by Appellee Wilma Milburn. Because no appeal is properly before us, we must dismiss this set of interlocutory appeals, thereby rendering Milburn's motion to dismiss appeal moot.

Rosslare Funding, Inc., made loans to several individuals. Empire Funding Corporation bought the loans from Rosslare and pooled them together. Empire then transferred the pooled loans into trusts with U.S. Bank named as trustee. Empire sold interests in the pooled loan trusts to investors. U.S. Bank as trustee received and distributed the loan collections to the investors.

The loans Rosslare sold to Empire became the subject of a class-action lawsuit filed by Wilma Milburn in Greene County Circuit Court on August 20, 1998. The original complaint alleged usury, Truth in Lending Act (TILA)/Home Ownership and Equity Protection Act (HOEPA), and common-law fraud claims against several defendants including Rosslare and Empire.[1] On September 21, 1998, the case was removed to federal court where it remained until April 2, 1999, when the case was remanded to state court.[2] In late 1999 and early 2000, Milburn filed motions for class certification on the usury and fraud claims

[1] The other defendants are not pertinent to this appeal.

[2] The federal court granted Milburn's motion to dismiss the TILA / HOEPA claims without prejudice.

pursuant to Arkansas Rule of Civil Procedure 23. She also filed a motion for partial summary judgment on the usury claims contending that Arkansas law should apply to the loans. Empire responded with its own motion for summary judgment on the choice-of-law issue.

On April 20, 2000, Milburn filed a third amended complaint that named additional defendants, including U.S. Bank, N.A., individually and as trustee for certain loan trusts created by Empire. Shortly thereafter, Empire filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code. A hearing on the motions for class certification and summary judgment originally set for June 12, 2000, was postponed until June 8, 2001. In the interim, U.S. Bank filed responses to Milburn's class-certification and summary-judgment motions.[3] At the June 8, 2001 hearing, U.S. Bank objected to the court hearing arguments on Milburn's summary-judgment motion because her motion was not filed against U.S. Bank. Both parties agreed that the summary-judgment motion regarding the choice of law was the "core issue" in the case and that it would be generally dispositive of the merits. The court proceeded to hear the arguments on the issues of class certification and summary judgment. Milburn argued that Arkansas law should apply and thus the loans originating with Rosslare were usurious, while U.S. Bank argued that California law should apply, thereby rendering the interest on the loans below the legal maximum. After the hearing, in an order entered on June 11, 2001, the circuit court certified the class pursuant to Rule 23 of the Arkansas Rules of Civil Procedure. Milburn then filed a motion for approval of the class-action notice on July 17, 2001.

Meanwhile, the circuit court had deferred ruling on Milburn's summary-judgment motion and allowed the parties to file additional briefs on the choice-of-law issue. After U.S. Bank[4] and Milburn filed their respective briefs, the circuit judge sent a letter

[3] Milburn's fourth amended complaint filed on February 27, 2001, identified one additional loan trust as a defendant.

[4] In opposing Milburn's motion, U.S. Bank requested the court to find that California law applies to the loans and U.S. Bank adopted all factual allegations and legal analysis set forth in Empire's earlier responses.

to counsel on July 30, 2001, advising them that "the court . . . hereby finds for the plaintiff in its Motion for Summary Judgment. It is the court's belief that Arkansas law should be applied in this case." Counsel for Milburn was directed to prepare the precedent for an order.

On that same day, the circuit judge signed an order approving the class-action notice, which order was filed on August 1, 2001.[5] The notice advised each class member that the court would exclude the member from the class only if the member so requested within 20 days of the date of the notice. Subsequently, the notice was sent to each class member at his or her last known address in successive mailings on August 3, 2001, and August 9, 2001.

On August 23, 2001, which was twenty days after the first mailing of the class-action notice, the circuit court entered partial summary judgment in favor of Milburn. In its order, the court ruled that Arkansas law applied; and, thus, the mortgage loans were usurious. U.S. Bank's local counsel then filed a motion to be relieved as counsel, which the court granted on September 6, 2001. In the meantime, U.S. Bank had hired new counsel who filed a notice of appeal on September 4, 2001, designating an appeal from three separate orders: (1) the class-certification order; (2) the order approving the class-action notice; and (3) the order granting partial summary judgment. Also, on September 4, U.S. Bank filed a motion requesting reconsideration of the class-certification and partial summary-judgment orders. The motion asked the court to decertify the class, or in the alternative, to set aside the summary judgment, because Milburn obtained partial summary judgment on the merits of the issues in the case prior to completion of notice to the class.

On September 7, 2001, an order was entered appointing the Circuit Clerk of Greene County to act as a receiver, and directing U.S. Bank to pay all principal and interest received from the members of the class into the registry of the court during the pendency

[5] U.S. Bank had filed no response to Milburn's motion for approval of the class-action notice.

of this action. Milburn objected to U.S. Bank's September 4 notice of appeal and on September 17, 2001, filed a motion to dismiss the appeal for lack of jurisdiction. We deferred ruling on the motion until the submission of this appeal. U.S. Bank filed another notice of appeal on October 9, 2001, designating an appeal from the order appointing a receiver. *See* Ark. R. App. P.—Civ. 2(a)(7) (2002). The record was subsequently filed in this court on December 3, 2001.

In its original brief filed on January 22, 2002, U.S. Bank raised four separate points on appeal and requested oral argument. However, the fourth point, which challenged the circuit court's entry of partial summary judgment, was abandoned in the reply brief filed by U.S. Bank on April 16, 2002. U.S. Bank has therefore recognized that the partial-summary-judgment order is not a final order, and, thus, not properly appealable.

At oral argument, U.S. Bank's counsel conceded that the notice of appeal was untimely with respect to the class-certification order and the order approving class notice. Moreover, counsel for the bank admitted that at the time the orders were entered, there was no fundamental error. Nonetheless, while recognizing in its reply brief and at oral argument that the partial summary-judgment order was not a final appealable order, U.S. Bank contends that the entry of partial summary judgment on August 23 "impacted" the prior orders, thereby subsuming or bootstrapping those orders into the partial summary-judgment order. Under the so-called "impact theory" proposed by U.S. Bank, an order may become appealable at a later time when subsequent facts develop relating to that order. Thus, U.S. Bank suggests that the class-certification and class-action notice orders became appealable on August 23 when Milburn's motion for partial summary judgment was granted and entered of record. In other words, August 23 became the date from which to calculate the deadline for filing a timely notice of appeal with respect to the earlier class-certification and class-action notice orders. We decline to adopt the "impact theory" suggested by U.S. Bank.

The jurisdiction of this court depends upon the calculation of filing deadlines pursuant to the Arkansas Rules of Appellate Procedure-Civil. The relevant dates in this case are as follows:

June 11, 2001	Class-certification order entered
August 1, 2001	Order approving class-action notice entered
August 23, 2001	Partial-summary-judgment order entered
September 4, 2001	U.S. Bank filed its notice of appeal from the following orders: (1) class-certification order; (2) order approving class-action notice; and (3) order granting partial summary judgment.
September 4, 2001	U.S. Bank filed its motion for reconsideration of class certification and partial summary judgment
September 7, 2001	Order appointing receivership entered
October 9, 2001	U.S. Bank filed its notice of appeal from the order appointing receiver
October 9, 2001	U.S. Bank filed its motion to reconsider order appointing receiver
December 3, 2001	Record filed with the Supreme Court Clerk

Class-Certification Order

U.S. Bank's notice of appeal filed on September 4, 2001, designated the original class-certification order as an appealable order. That order was entered on June 4, 2001. Pursuant to Rule 2(a)(9) of the Arkansas Rule of Appellate Procedure—Civil, the class-certification order was immediately appealable. U.S. Bank therefore had thirty days from the entry of the order on June 11, 2001, to file a timely notice of appeal. *See* Ark. R. App. P.—Civ. 4(a) (2002). The notice of appeal filed on September 4, 2001, or almost three months after entry of the order, was clearly outside the prescribed thirty-day period.

Initially, in response to Milburn's motion to dismiss appeal, U.S. Bank argued that the class-certification order was an intermediate order to the August 23 partial summary-judgment order. Rule 2(b) of the Arkansas Rules of Appellate Procedure—Civil provides that "[a]n appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment." *See* Ark. R. App. P.—Civ. 2(b) (2002). That argument, however, has been abandoned. As we have already stated, U.S. Bank concedes that the partial summary-judgement order is not a final order. Appellate Rule 2(b) is therefore not applicable.

The deadline for filing a notice of appeal that is set forth in Ark. R. App. P.—Civ. 4(a) — thirty days from the entry of the order appealed from — may be extended under the provisions of Ark. R. App. P.—Civ. 4(b):

> (b) *Extension of time for filing notice of appeal.*
>
> (1) Upon timely filing in the circuit court of . . . any . . . motion to vacate, alter or amend the judgment made no later than 10 days after entry of judgment, the time for filing a notice of appeal shall be extended for all parties. The notice of appeal shall be filed within thirty (30) days from entry of the order disposing of the last motion outstanding. However, if the circuit court neither grants nor denies the motion within thirty (30) days of its filing, the motion shall be deemed denied by operation of law as of the thirtieth day, and the notice of appeal shall be filed within thirty (30) days from that date.

Ark. R. App. P.—Civ. 4(b)(1) (2002). Additionally, if a notice of appeal is filed prior to the disposition of the motion, a party who seeks to appeal from the denial of the motion shall within thirty days amend the previously filed notice of appeal. Ark. R. App. P.—Civ. 4(b)(2) (2002).

First we must point out that U.S. Bank's motion for reconsideration was not filed within ten days of the class-certification order as required by appellate Rule 4(b). Thus, as to any appeal from the June 11 class-certification order, the time for filing a notice of appeal was not extended by the timely filing of any of the motions listed in Ark. R. App. P.—Civ. 4(b)(1), and the deemed-denied rule is not applicable.

While the notice of appeal filed on September 4 was untimely with respect to the class-certification order, U.S. Bank could have appealed the denial of its motion for reconsideration by filing a notice of appeal within thirty days from the entry of such an order. Yet, the record does not reflect any such ruling by the court,[6] or the filing of a notice of appeal that designated the order appealed from as the denial of U.S. Bank's motion for reconsideration. *See* Ark. R. App. P.—Civ. 3(e) (2002).[7] In any event, U.S. Bank admits that no appeal was taken from any ruling by the circuit court on its motion for reconsideration.

The timely filing of a notice of appeal is jurisdictional. *Rossi v. Rossi*, 319 Ark. 373, 892 S.W.2d 246 (1995). Thus, this court lacks jurisdiction to address U.S. Bank's point on appeal challenging the class-certification order.

Approval of Class-Action Notice

Our rules of appellate procedure allow an interlocutory appeal from "[a]n order granting or denying a motion to certify a case as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure." Ark. R. App. P.—Civ. 2(a)(9) (2002). We have held that an order prescribing notice to class members is fundamental to the further conduct of the action and, thus, immediately appealable as a matter of right. *See Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992). Such an interlocutory appeal must be filed within thirty days from entry of the order. Ark. R. App. P.—Civ. 4(a) (2002).

In this case, the order approving class-action notice was entered on August 1, 2001, so the deadline for filing a notice of appeal was Friday, August 31, 2001. Once again, the notice of

---

[6] We note that a copy of an order entered by the circuit court on December 28, 2001, is attached as Exhibit A to U.S. Bank's response to Milburn's supplement to its motion to dismiss appeal. In that order, the circuit court denied U.S. Bank's motions for reconsideration of the class-certification and partial summary-judgment orders and the order appointing a receiver.

[7] Even under Ark. R. App. P.—Civ. 4(b)(2), if a notice of appeal is filed prior to the disposition of the motion, a party who seeks to appeal from the denial of the motion must amend the previously filed notice so as to comply with Ark. R. App. P.—Civ. 3(e).

appeal filed on September 4, 2001, was clearly outside the prescribed thirty-day deadline. For the reasons previously stated in connection with U.S. Bank's attempted appeal of the class-certification order, we conclude that the bank's appeal from the order approving the class-action notice is not properly before this court.

Order Appointing Receiver

For its third point on appeal, U.S. Bank argues that the circuit court erred in appointing a receiver pursuant to Ark. R. Civ. P. 66(a) (2002). We start by noting that an interlocutory order appointing a receiver is immediately appealable. *See* Ark. R. App. P.—Civ. 2(a)(7) (2002). However, U.S. Bank failed to timely file its record with our clerk. The untimely filing of the record procedurally bars the appellant from pursuing an appeal. *See Mitchell v. City of Mountain View*, 304 Ark. 585, 803 S.W.2d 556 (1991) (per curiam). On September 7, 2001, the circuit court entered an order directing the circuit clerk to act as a receiver in this case. U.S. Bank filed a timely notice of appeal on October 9, 2001. Appellate Rule 5(a) provides that when "an appeal is taken from an interlocutory order under Rule 2(a)(6) or (7), the record must be filed with the clerk of the Supreme Court within thirty (30) days from the *entry of such order.*" Ark. R. App. P.—Civ. 5(a) (2002) (emphasis added).

The instant interlocutory order appointing a receiver was entered on September 7, 2001. Thus, the deadline for filing the record was October 9, 2001, which happened to be the same day that U.S. Bank filed its notice of appeal. U.S. Bank did not file the record with this court until December 3, 2001. By failing to timely file the record, U.S. Bank is barred from pursuing this point on appeal.

Request for Sanctions Under Appellate Rule 11

At oral argument, Milburn's counsel asked this court to sanction U.S. Bank pursuant to Rule 11 of the Arkansas Rules of Appellate Procedure—Civil:

> I think the act of claiming this to be a final judgment has caused me and my client considerable harm in this case . . . [T]he final

> order never was a final order and they knew it. Everybody knew it, and they admitted it. They admitted it as soon as they filed the notice of appeal. They were back before the trial court contending it was not a final order because it did not determine damages. Of course, it never determined them. It was not certified as a final order. . . . I ask this court not to permit these defendants, because of the manner in which they brought this appeal up, to raise . . . any issue in the future litigation that they didn't raise in this litigation. I ask the court to award costs for having to respond to an argument . . . .

U.S. Bank's counsel responded by suggesting that such a request would require that a motion be filed in order for there to be an opportunity for presentation of a full explanation by both sides.

Appellate Rule 11 provides in relevant part:

> (b) The Supreme Court or the Court of Appeals shall impose a sanction upon a party or attorney or both for (1) taking or continuing a frivolous appeal or initiating a frivolous proceeding, (2) filing a brief, motion, or other paper in violation of subdivision (a) of this rule, (3) prosecuting an appeal for purposes of delay in violation of Rule 6-2 of the Rules of the Supreme Court and Court of Appeals, and (4) any act of commission or omission that has an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. For purposes of this rule, a frivolous appeal or proceeding is one that has no reasonable legal or factual basis.

Ark. R. App. P.—Civ. 11(b) (2002). Sanctions that may be imposed for violation of this rule are identified in Ark. R. App. P.—Civ. 11(c):

> (c) Sanctions that may be imposed for violations of this rule include, but are not limited to, dismissal of the appeal; striking a brief, motion, or other paper; awarding actual costs and expenses, including reasonable attorneys' fees; imposing a penalty payable to the court; awarding damages attributable to the delay or misconduct; and, where there has been delay, advancing the case on the docket and affirming.

Ark. R. App. P.—Civ. 11(c) (2002). If this court on its own initiative determines that a sanction may be appropriate, a show-cause order may be issued. Ark. R. App. P.—Civ. 11(d) (2002).

In the instant matter, as already noted, U.S. Bank filed its notice of appeal on September 4, 2001 from (1) the class-certifica-

tion order; (2) the order approving the class-action notice; and (3) the order granting partial summary judgment. Then, in a pleading filed with the circuit court on September 6, 2001, U.S. Bank states, "[t]here has been no proof of fraud or insolvency on the part of US Bank that would endanger its capacity to respond to any final judgment which may be entered in this case." In that same pleading opposing the appointment of a receiver, U.S. Bank states, "[t]he holders of beneficial interests in the trusts, of which US Bank is trustee, will be damaged if a receiver is appointed, since they will not receive the payments they contracted for, even though monetary judgement on each claim has not been entered." In a memorandum filed on the same day, U.S. Bank asserts that "[t]here is no danger that it is going to hide its assets to put them beyond reach of a final judgment" and that "the Plaintiffs will not be losing anything by continuing their payments as before, but that the trust beneficiaries would be; all this before a final determination of the amounts that might be due."

On September 27, 2001, Milburn filed a motion to dismiss the appeal in this court. In that motion, Milburn alleges that the notice of appeal is untimely with respect to the class-certification order and the order approving the class-action notice. Milburn also asserts in her motion that the appeal from the partial summary-judgment order should be dismissed, as that ruling by the circuit court is not a final order, and it was not certified as final pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure. U.S. Bank responded to the motion, contending first that the partial summary-judgment order was final because the only remaining issues were "collateral and ministerial." Moreover, U.S. Bank suggested that both the class-certification order and the order approving the class-action notice were appealable as intermediate orders. Finally, in its reply brief filed on April 26, 2002, U.S. Bank conceded that the partial summary-judgment order is not a final appealable order. However, U.S. Bank continued to assert its "impact theory" as a basis for the appeal.

In order for a judgment to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992). We have on numerous occasions held that a judgment or order is not final and appealable if the issue of damages remains to be decided. *Sevenprop*

Assoc. v. Harrison, 295 Ark. 35, 746 S.W.2d 51 (1998); *John Cheeseman Trucking, Inc. v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991); *Mueller v. Killam*, 295 Ark. 270, 748 S.W.2d 338 (1998); *Kilgore v. Viner*, 293 Ark. 187, 735 S.W.2d 1 (1987).

From the record before this court, it appears that U.S. Bank was arguing on appeal that the partial summary-judgment order was final, while at the same time arguing in the circuit court that no final order had been entered. Additionally, Milburn, through her motion to dismiss the appeal, notified U.S. Bank as early as September 17, 2001, that the appeal was not properly before this court. Because U.S. Bank continued to prosecute the instant appeal, we conclude that sanctions may be appropriate. Pursuant to Ark. R. App. P.—Civ. 11(d), we order U.S. Bank and its counsel to show cause in writing why a sanction should not be imposed against them. Such writing shall be filed no later than seven days after the date of this opinion. If U.S. Bank files a writing, Milburn shall have four days to respond.

Appeal dismissed; motion to dismiss appeal moot.

Supplemental Opinion Imposing Rule 11 Sanctions

100 S.W.3d 674

Delivered April 10, 2003

The Rose Law Firm, by: *Herbert C. Rule III, Garland Garrett*, and *Stephen Joiner*, for appellant.

Joe Holifield and *McMath, Vehik, Drummond, Harrison & Lebdetter, P.A.*, by: *Mart Vehik*, for appellee.

PER CURIAM. In this appeal, we issued our opinion on February 28, 2003, wherein we dismissed a set of interlocutory appeals by U.S. Bank stemming from a Rule 23 class-action proceeding. *U.S. Bank v. Milburn*, 352 Ark. 144, 100 S.W.3d 674. We did so because the notice of appeal filed by U.S. Bank was untimely with respect to the class-certification order and the order approving class notice, and U.S. Bank eventually conceded that the partial summary-judgment order was not a final order and, thus, not properly appealable. U.S. Bank also admitted that no appeal was taken from any ruling by the circuit court on its motion requesting reconsideration of the class-certification and partial summary-judgment orders. Finally, as to the appeal of an interlocutory order appointing a receiver, the untimely filing of the record procedurally barred U.S. Bank from pursuing that point on appeal.

Upon pointing out that U.S. Bank continued to prosecute the appeal, even though it appeared from the record before this court

that U.S. Bank was arguing on appeal that the partial summary-judgment order was final, while at the same time arguing in the circuit court that no final order had been entered, we concluded sanctions under Rule 11 of the Arkansas Rules of Appellate Procedure—Civil might be appropriate. Pursuant to Ark. R. App. P.—Civ. 11(d), we directed U.S. Bank and its counsel to show cause in writing why a sanction should not be imposed against them, and we also allowed Milburn to respond. Both U.S. Bank and Milburn have filed their writings.

In its response to the order to show cause, U.S. Bank posits three reasons why sanctions are inappropriate. First, U.S. Bank asserts that it had a good-faith belief that the partial summary-judgment order was final and appealable. Specifically, it maintains that a trial court's order need not always establish the amount of damages in order for the order to be final and appealable. U.S. Bank directs this court to *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991); *Ives Trucking Co. v. Pro Transportation*, 341 Ark. 735, 19 S.W.3d 600 (2002); *Hartwick v. Hill*, 77 Ark. App. 185, 73 S.W.3d 15 (2002); and *Smith v. Smith*, 51 Ark. App. 20, 907 S.W.2d 755 (1995). None of those cases, however, are apposite. In fact, we have on numerous occasions held that for an order to be final, it must establish the amount of damages. *Tri-State Delta Chemicals, Inc., v. Crow*, 347 Ark. 255, 61 S.W.3d 172 (2001); *Sevenprop Assocs. v. Harrison*, 295 Ark. 35, 746 S.W.2d 51 (1998); *String v. Kazi*, 312 Ark. 6, 846 S.W.2d 649 (1993).

The test of finality and appealability of an order is whether the order puts the court's directive into execution, ending the litigation or a separable branch of it. *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286. The *Pledger* case was a class action in which we concluded that the order at issue was appealable where it ended all issues except the amount of attorney's fees and the details of notice to the class of their rights to a refund. *Id.* The members of the class in *Pledger* asked for a declaration that certain provisions of the income tax laws of the state were unconstitutional, an injunction against using the funds illegally collected, a refund to the class, and attorney's fees. The trial court's order granted the prayer in favor of the members of the class on all of those issues. *Id.*

Here, the partial summary-judgment order is just what it says it is — partial. The order did not adjudicate all claims against all parties (the complaint as amended also alleged common-law fraud claims against

U.S. Bank, Real Estate Title & Services, Inc., and the other defendants), and the circuit court did not certify the partial summary judgment as final pursuant to Ark. R. Civ. P. 54(b). Furthermore, Milburn's Rule 23 class action sought relief in the form of monetary damages as provided by the usury laws of Arkansas. The partial summary-judgment order did not decide the issue of damages so as to make it enforceable by execution. In contrast, the class members in *Pledger v. Bosnick* sought the recovery of funds illegally collected by the State of Arkansas, not monetary damages.[1] Likewise, as we reiterated in *Ives Trucking Co. v. Pro Transportation*, 341 Ark. 735, 19 S.W.3d 600, the award of attorney's fees is a collateral matter that does not affect the appealability of the underlying order.

The *Hartwick* case involved a landowner's claim to a roadway across a neighbor's property. *Hartwick v. Hill*, 77 Ark. App. 185, 73 S.W.3d 15 (2002). The trial court's order adopted the report of the viewers who had been appointed to examine the land and lay out the location of the roadway, described the location of the roadway to be granted, ordered the Hills to conduct a survey of the land to determine the precise acreage of the roadway, and established that Hartwick would incur damages in the amount of $6,000 per acre due to the loss of the land for the roadway. *Id.* The Arkansas Court of Appeals held that the future action contemplated by the trial court's order (obtaining a survey reflecting the precise acreage in the roadway and applying the $6,000 per acre formula that was ordered by the court as damages) was collateral to the main issues decided by the court — that the Hills were entitled to a roadway across the Hartwick's land and the amount of damages to be paid. *Id.* Unlike the order in *Hartwick*, the order at issue here set out no formula or specifics as to the amount of damages.

Finally, in *Smith v. Smith*, 51 Ark. App. 20, 907 S.W.2d 755, the Arkansas Court of Appeals correctly characterized accrual of interest on a judgment as a collateral matter. The instant case does not concern an order to pay interest on a judgment.

In sum, none of the cases cited by U.S. Bank undermine our prior holdings that a judgment or order is not final and appealable if the issue of damages remains to be decided. *Tri-State Delta Chemicals, Inc. v. Crow*, 347 Ark. 255, 61 S.W.3d 172; *Sevenprop*

---

[1] "What is sought in an illegal-exaction case is return of taxes wrongfully collected. Relief may be an order that the taxes be refunded. A personal judgment is not entered." *Worth v. City of Rogers*, 351 Ark. 183, 192, 89 S.W.3d 875, 881 (2002)(citations omitted).

Assocs. v. Harrison, 295 Ark. 35, 746 S.W.2d 51; *John Cheeseman Trucking, Inc. v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991). Indeed, U.S. Bank eventually conceded that the partial summary-judgment order was not final. Accordingly, we must disagree with U.S. Bank's assertion that it acted in good faith, when in fact it waited until the last possible moment to abandon that point on appeal.[2]

Next, U.S. Bank asserts that it did not make inconsistent arguments before this court and the circuit court on the issue of finality. It points to three excerpts from pleadings filed in the circuit court after U.S. Bank filed its notice of appeal. However, in each of those excerpts, U.S. Bank suggests that the trial court had not entered a final judgment. The first excerpt states, "[t]here is no danger that [U.S. Bank] is going to hide its assets to put them beyond the reach of a final judgment." In the second excerpt, U.S. Bank states that all loan payments by class members should continue to be made to U.S. Bank "before a final determination of the amounts that might be due." Lastly, U.S. Bank directs us to the following language in its response to Milburn's motion for receiver filed in the circuit court:

> There has been no proof of fraud or insolvency on the part of U.S. Bank that would endanger its capacity to respond to any final judgment which may be entered in this case. *The plaintiff, by her motion for appointment of receiver, is, in effect, seeking to levy execution before final judgment in favor of class members, establishing whatever their rights and entitlements are, has been entered.*

(Emphasis added.) We find that this language is in accord with our opinion where we stated "it appears that U.S. Bank was arguing on appeal that the partial summary-judgment order was final, while at the same time arguing in the circuit court that no final order had been entered."

For its last argument against the imposition of Rule 11 sanctions, U.S. Bank maintains it acted in good faith in proposing

---

[2] With respect to the good-faith argument, U.S. Bank also asks this court to consider documents outside the record. Essentially, U.S. Bank suggests that Milburn made inconsistent arguments on the issue of finality before this court and the lower court, which caused U.S. Bank to continue prosecuting the appeal. We do not consider matters outside the record on appeal. *Black v. Steenwork*, 333 Ark. 629, 970 S.W.2d 280 (1998). In any event, nothing in the record indicates that Milburn argued to the circuit court that the partial summary judgment was a final order.

the so-called "impact theory" as the basis for the appeal. The bank states that making a good-faith argument and losing is not grounds for sanctions. Essentially, U.S. Bank contended on appeal that interlocutory orders — such as class-certification orders or orders approving class-action notices that are immediately appealable pursuant to Ark. R. App. P.—Civ. 2(a)(9) — may become appealable at a later time when the entry of any subsequent order "impacts" those prior orders. Under the "impact theory" proposed by U.S. Bank, the appeal is not from a ruling by the circuit court on the alleged "impact" of a subsequent order; rather, it is the mere assertion on appeal of such an "impact" that would automatically make a previous order appealable at any time. In other words, U.S. Bank attempted to prosecute an appeal before the circuit court had an opportunity to rule on the issue. Such a proposition is not supported by our Rules of Appellate Procedure—Civil. Moreover, our case law is clear that we will not address issues for the first time on appeal. *Jones v. Jones*, 347 Ark. 409, 64 S.W.3d 728 (2002). Thus, we cannot agree that U.S. Bank acted in good faith in proposing the so-called "impact theory."

Based on the foregoing, we agree with Milburn that U.S. Bank and its counsel should be sanctioned pursuant to Ark. R. App. P.—Civ. 11. The interlocutory set of appeals prosecuted by U.S. Bank has already been dismissed. *See U.S. Bank v. Milburn*, 352 Ark. 144, 100 S.W.3d 674. In addition, we determine a fair sanction in these circumstances would be the award of costs and reasonable attorney's fees to appellees for requiring them to go forward in defending this appeal. *See* Ark. R. App. P.—Civ. 11(c), *see also Stilley v. Hubbs*, 344 Ark. 1, 40 S.W.3d 209 (2001); *Jones v. Jones*, 329 Ark. 320, 947 S.W.2d 6 (1997). Therefore, we order that U.S. Bank and its counsel pay appellees attorney's fees in the amount of $3,000, plus costs for this appeal as provided by Ark. Sup. Ct. R. 6-7, and do so within twenty days from the issuance of this supplemental opinion.

Rule 11 sanctions issued.

THORNTON and HANNAH, JJ., dissent.

JIM HANNAH, Justice, dissenting. I respectfully dissent. I disagree with the majority's holding that Rule 11 sanctions should be imposed in this case.

The majority dismisses U.S. Bank's argument that it had a good-faith belief that the trial court's order granting summary judgment was a final and appealable order. The majority held that all the cases cited by the bank in support of its argument that a trial court need not always establish the amount of damages in order for the order to be final and appealable were inapposite.

The majority distinguishes the cited cases from the present case. It is common for this court to distinguish cases cited in the parties' brief from the case at hand. We often disagree with parties' contentions that the cases cited in their briefs are on point with the case before the court. Our disagreement with the parties' contentions does not warrant sanctions.

The majority also notes that the trial court did not certify the partial summary-judgment as final pursuant to Ark. R. Civ. P. 54(b). While it is true that the bank did not attempt to obtain partial certification from the trial court, a review of our case law indicates that we have not imposed Rule 11 sanctions when we have not addressed the merits of an appeal due to a party's failure to have a judgment certified pursuant to Rule 54(b). *See, e.g., Fisher v. Chavers*, 351 Ark. 318, 92 S.W.3d 30 (2002); *Chapman v. Wal-Mart Stores, Inc.*, 351 Ark. 1, 89 S.W.3d 906 (2002); *Dodge v. Lee*, 350 Ark. 480, 88 S.W.3d 843 (2002); *Sharp v. State*, 350 Ark. 529, 88 S.W.3d 848 (2002); *City of Corning v. Cochran*, 350 Ark. 12, 84 S.W.3d 439 (2002); *Cole v. Laws*, 349 Ark. 177, 76 S.W.3d 878 (2002); *Eason v. Flannigan*, 349 Ark. 1, 75 S.W.3d 702 (2002); *Tri-State Delta Chems., Inc. v. Crow*, 347 Ark. 255, 61 S.W.3d 172 (2001).

In addition, the majority states:

> Indeed, U.S. Bank *eventually* conceded that the partial summary-judgment order was not final. Accordingly, we must disagree with U.S. Bank's assertion that it acted in good faith, when in fact it waited until the last possible moment to abandon that point on appeal. (Emphasis added.)

The majority appears to be implying that if U.S. Bank had maintained until the end that it believed the partial summary judgment order was a final judgment, then there would be no Rule 11 sanctions.

Counsel for U.S. Bank was acting as an officer of the court in admitting in its reply brief that the partial summary judgment was not a final order. Are we imposing sanctions because counsel was

being honest and candid with this court and properly acting as an officer of the court? The majority is sending the wrong message to the bar.

It should be noted that Milburn previously filed a motion to dismiss the appeal because the partial summary judgment was not a final appealable order, and this court declined to rule on that motion. If the appeal was frivolous, and if it was so clear that the partial summary judgment order was not a final appealable order, would not this court have granted Milburn's motion to dismiss?

Rule 11 provides, in part:

> (a) The filing of a brief, motion or other paper in the Supreme Court . . . constitutes a certification of the party or attorney that, to the best of his knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact; is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and is not filed for an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party or an attorney who files a paper in violation of this rule, or party on whose behalf the paper is filed, is subject to a sanction in accordance with this rule.
>
> (c) Sanctions that may be imposed for violations of this rule include, but are not limited to, dismissal of the appeal; striking a brief, motion, or other paper; awarding actual costs and expenses, including reasonable attorneys' fees; imposing a penalty payable to the court; awarding damages attributable to the delay or misconduct; and, where there has been delay, advancing the case on the docket and affirming.
>
> (d) A party may by motion request that a sanction be imposed upon another party or attorney pursuant to this rule, or the court may impose a sanction on its own initiative. A motion shall be in the form required by Rule 2-1 of the Rules of the Supreme Court and Court of Appeals, with citations to the record where appropriate, and will be called for submission three weeks after the filing. . . . If the court on its own initiative determines that a sanction may be appropriate, the court shall order the party or attorney to show cause in writing why a sanction should not be imposed on the party or attorney or both.

Ark. R. App. P.—Civ. 11 (2002).

It should be noted that Milburn's counsel argued that sanctions should be imposed on the bank, *inter alia*, because the bank

violated procedural rules, i.e., failing to obtain the trial court's certification of the partial summary judgment order, pursuant to Rule 54(b); however, Milburn's counsel failed to follow procedure in requesting sanctions. Motions to request sanctions must comply with Rule 2-1. Rule 2-1 provides, in part, that "[a]ll motions must be in writing," and that "[i]n cases pending before the Supreme Court, eight (8) clearly legible copies must be filed . . . ." Ark. Sup. Ct. R. 2-1 (2002). While it is true that this court on its own initiative may determine that sanctions are appropriate and issue a show-cause order, there is nothing in the record to indicate that this court, prior to the oral request by Milburn's counsel, determined that sanctions may be appropriate.

At oral argument, the following colloquy took place between the court and counsel for Milburn:

> COUNSEL FOR MILBURN: . . . I would like to address one more thing before we leave. I think the act of claiming this to be a final judgment has caused me and my client great harm in this case. . . . What have they gained in the process? Number one, by claiming it is a final judgment, what they have gained is I had to respond to it. . . . They managed to get an appeal before this court. The next thing is, because summary judgment is crucial . . . . I spent a huge amount of time responding to that. . . . So, they have now heard what I am going to do. They have taken advantage of it, and they gain advantage by a false claim that this is a final judgment. I am going to ask the court to dismiss this case with appeal, or, in the alternative, that they be prohibited from raising any new arguments should they bring this case up again,[1] and to pay for the time and money I had to spend responding to something they

[1] I note that the majority's holding does not address the issue of whether U.S. Bank will be precluded from raising any new argument should the bank file a subsequent appeal.

knew they were going to drop when it was all over. . . .

JUSTICE BROWN: You seem to be raising a Rule 11 violation under the appellate rules.

COUNSEL FOR MILBURN: That is exactly what I am suggesting, but this court has inherent authority to do that, as well, I believe.

* * *

Later, the court requested a response from U.S. Bank's counsel.

JUSTICE BROWN: What is the response to that? He said that there is no question that you knew it was not a final order and there was not Rule 54(b) certification. That has put him to the expense of having to reply to an appeal.

COUNSEL FOR U.S. BANK: Well, I would first say, your honor, that I believe such a request would require a motion and an opportunity for presentation of a full explanation by both sides with us in response.

* * *

JUSTICE GLAZE: Your response on the sanction 11 rule, then, is this has not been posed to you prior to today?

COUNSEL FOR U.S. BANK: Yes, that is correct, I believe your honor.

* * *

Milburn requested that the court impose sanctions. As such, Milburn should have complied with Rule 2-1 and submitted a motion explaining why sanctions should be imposed on the bank. Instead, Milburn ignored Rule 2-1 and orally requested sanctions. After hearing Milburn's oral request, which was raised at oral argument without notice to the bank, the court, in *U.S. Bank, N.A., et al., v. Milburn*, 352 Ark. 144, 100 S.W.3d 674, ordered

U.S. Bank and its counsel to show cause in writing why a sanction should not be imposed against them.

In addition, the majority rejects the bank's argument that it acted in good faith in proposing the so-called "impact theory" as the basis for appeal. The bank argues that making a good-faith argument and losing is not grounds for sanctions. I agree. In *Crockett & Brown, P.A. v. Wilson*, 321 Ark. 150, 901 S.W.2d 826 (1995), the court discussed the requirements of Rule 11. We stated:

> . . . Rule 11 does not require that the legal theory espoused in a filing prevail. The essential issue is whether signatories of the document fulfilled their duty of reasonable inquiry into the relevant law, and the indicia of reasonable inquiry into the law include the plausibility of the legal theory espoused and the complexity of the issues raised. *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 989 F.2d 791 (5th Cir. 1993). The *CJC Holdings* decision admonished that a trial court should not impose Rule 11 sanctions for advocacy of a plausible legal theory, particularly when the law is arguably unclear. *Id.* at 794.

Crockett & Brown, 321 Ark. at 155-56.

The present case, a class action, involved complex issues. Throughout the appeal, the bank argued that there was a question about whether an appealable order had been entered by the trial court. At oral argument, the bank's counsel stated:

> . . . [W]e struggle with that question ourselves and with counsel for U.S. Bank from Minnesota, as to whether that was a final order. We talked . . . . Well, what we had in mind was, if it were a final order, we had better appeal it.

In its response to the order to show cause, the bank stated that, in determining that there was a final order, it reasonably relied on existing law and, that by appealing the order, "it . . . avoided the trap faced by U.S. Bank if it did not appeal — that it would be barred from litigating any further issues of law or fact by failing to appeal the order." The majority's determination that sanctions were proper in the present case could have a far-reaching effect on the attorney's role as an advocate for his or her client. In a case where an attorney is unsure about the finality of the order, is he or she now going to be faced with the choice of either: (1) filing an appeal of an order which may not be final,

thereby risking sanctions by this court; or (2) failing to file an appeal of an order which may indeed be final, thereby risking a malpractice action from a client who loses the right to an appeal?

In the present case, the bank's counsel acted as an advocate for his client. Of course, an attorney may not shield himself or herself from sanctions stating that he or she was merely acting as an advocate. Indeed, Rule 11 provides that sanctions may be imposed upon a party or counsel or both for taking or continuing a frivolous appeal. However, for the purposes of Rule 11, "a frivolous appeal or proceeding is one that has no reasonable legal or factual basis." The appeal in the present case was not frivolous. The issues were complex, and the record indicates that there was a reasonable question concerning the finality of the order. I agree with the bank that sanctions should not be imposed.

For the foregoing reasons, I respectfully dissent.

THORNTON, J., joins this dissent.

Chad GONDOLFI *v.* Honorable David S. CLINGER

CR 02-828 98 S.W.3d 812

Supreme Court of Arkansas
Opinion delivered February 28, 2003

Larry R. Froelich and *George D. Oleson*, for petitioner.

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

RAY THORNTON, Justice. Petitioner, Chad Gondolfi, brings a petition for a writ of prohibition on Benton County Circuit Court, naming Judge David S. Clinger as respondent. This petition arises from the trial court's order denying a motion to dismiss based upon violations of the speedy-trial provisions of Ark. R. Crim. P. 28 and the Interstate Detainer Act, codified at Ark. Code Ann. § 16-95-101 *et seq.* (1987). In his petition, petitioner seeks a writ of prohibition on his prosecution and a reversal of the trial court's denial of his motion to dismiss. Petitioner argues that the State has failed to bring him to trial within the 365 days required under Ark. R. Crim. P. 28.1, and that the State failed to bring him to trial within the 180 days required under the Interstate Agreement on Detainers. We find no merit in petitioner's argument and deny the writ of prohibition challenging the jurisdiction of the trial court.

I. Facts

Petitioner was charged by an amended felony information for having committed felonies in Arkansas on April 2, May 13, and June 6, 2000. The June 6 charges include the sale of a controlled substance and simultaneous possession of drugs and a firearm.

On June 26, 2000, and on July 12, 2000, petitioner failed to appear for his arraignment. On July 12, 2000, the trial court issued a bench warrant for his arrest. Sometime before August 22, 2000, petitioner fled the jurisdiction and was arrested in Chicago, Illinois on Illinois charges that were subsequently dismissed. Petitioner was arrested in Cook County, Illinois on August 22, 2000, on the bench warrant issued by the Benton County Circuit Court. Petitioner was released by the Illinois authorities.

On August 23, 2000, the Benton County Sheriff's Office notified the prosecutor's office that petitioner refused to waive extradition and that a Governor's warrant would have to be obtained. On September 21, 2000, the State amended the felony information on the April 2 charge to include the July 6 charge. On October 16, 2000, the State requested extradition. Petitioner signed a waiver of extradition on March 20, 2001, and later

returned to Arkansas. By March 27, 2001, petitioner was back in the Benton County jail.

On April 6, 2001, petitioner appeared in court represented by Mr. Louis Lim, a public defender. From April 16, 2001, to June 6, 2001, petitioner appeared with counsel at various pretrial hearings. On June 25, 2001, Mr. Lim was relieved as counsel because of a conflict of interest. The Public Defender Commission was appointed to substitute as counsel.

On July 23, 2001, at an attorney status hearing, petitioner appeared with Mr. Charles Duell, a public defender. The trial court was informed that no attorney had been appointed to represent petitioner. On August 2, 2001, the trial court entered an order, appointing Ms. Linda Schribner to replace Mr. Lim as counsel. After numerous status hearings where trial dates were set and reset, on May 24, 2002, Ms. Schribner was allowed to withdraw as counsel, and Mr. Larry Froelich was appointed.

On June 27, 2002, petitioner filed a motion to dismiss the June 6 charges on the basis that he had been denied a speedy trial. The State responded. A hearing on the speedy-trial issue was held on August 5, 2002.

On August 7, 2002, the trial court entered an order denying petitioner's motion to dismiss based upon allegations of violations of the speedy-trial provisions of Rule 28 of the Arkansas Rules of Criminal Procedure and the Interstate Detainer Act, codified at Ark. Code Ann. § 16-95-101 *et seq*. On August 9, 2002, petitioner filed a petition for writ of prohibition with our court alleging a speedy-trial violation.

II. Speedy trial

For his first point, petitioner seeks a writ of prohibition against Judge David S. Clinger to prohibit him from conducting a trial on the basis that he had been denied a speedy trial. We note that petitioner erroneously seeks the writ against Judge Clinger. That is incorrect. Prohibition lies to the circuit court and not to the individual judge. *Crump v. Ford*, 346 Ark. 156, 55 S.W.3d

295 (2001). Accordingly, we will treat the petition as one against the Benton County Circuit Court. *Id.*

Petitioner first argues that a writ of prohibition should issue. In *Doby v. Jefferson County Circuit Court*, 350 Ark. 505, 88 S.W.3d 824 (2002), we stated:

> Pursuant to Ark. R. Crim. P. 28.1(d), a defendant may bring a petition for a writ of prohibition when the trial court denies the defendant's motion for dismissal under the speedy-trial rules. A writ of prohibition is an extraordinary writ that is only appropriate when the court is wholly without jurisdiction.

Id. (citing *Gamble v. State*, 350 Ark. 168, 85 S.W.3d 520 (2002)). A writ of prohibition will not issue unless it is clearly warranted. *Id.*

Under Ark. R. Crim. P. 28.1, a defendant must be brought to trial within twelve months unless there are periods of delay which are excluded under Ark. R. Crim. P. 28.3. *Moody v. Arkansas County Circuit Court, Southern District*, 350 Ark. 176, 85 S.W.3d 534 (2002). If the defendant is not brought to trial within the requisite time, the defendant is entitled to have the charges dismissed with an absolute bar to prosecution. Ark. R. Crim. P. 30.1. If prior to that time the defendant has been continuously held in custody, or has been lawfully at liberty, the time for trial commences running from the date of arrest. Ark. R. Crim. P. 28.2. It is well settled that a defendant does not have a duty to bring himself to trial; rather, the burden is on the court and the prosecutor to see that the trial is held in a timely fashion. *Moody, supra.* Once a defendant establishes a *prima facie* case of a speedy-trial violation, the State bears the burden of showing that the delay was the result of the defendant's conduct or otherwise justified. *Id.*

In the present case, we first must determine when the speedy-trial period commenced. Petitioner asserts that the State failed to prosecute his case twelve months from his August 22, 2000, arrest date because he was released by Illinois officials and "lawfully at liberty," pursuant to Ark. R. Crim. P. 28.2. The State contends that the time for bringing him to trial began to run on March 20, 2001, when petitioner waived extradition.

Petitioner's argument is unavailing. On August 5, 2002, at the hearing on the speedy-trial motion, petitioner testified that he did not resist extradition and that he never refused to waive extradition. However, the trial court noted that petitioner failed to appear on pending Arkansas charges, fled the jurisdiction, went to Illinois, and was arrested in Illinois. We have no evidence before us, other than petitioner's testimony, about petitioner's circumstances in Illinois. In fact, the State produced as State's Exhibit 2 a faxed memo, dated August 23, 2000, from Brenda Larsen, a fugitive warrant secretary for Benton County, that petitioner refused to sign the waiver of extradition back to Arkansas.

We agree with the State's argument on this point. In *White v. State*, 310 Ark. 200, 833 S.W.2d 771 (1992), appellant was arrested in Texarkana, Texas for charges stemming in Arkansas and in Texas. He waived extradition to Miller County, Arkansas. We stated:

> We have held that an accused in prison in another state, for a different crime, must affirmatively request a trial in order to activate the speedy trial rule. Here, the state showed that the appellant signed the waiver of extradition on October 18, 1990, thus he was unavailable for trial before this date. . . . Thus, appellant's speedy trial period did not begin to run until he waived extradition on October 18, 1990, and his trial on July 22, 1991 was well within the twelve month speedy trial period.

Id. (citations omitted).

Under *White, supra*, we will use March 20, 2001, when petitioner waived extradition to Arkansas, as the date that commenced the speedy-trial period. We will also use June 27, 2002, as the end of the speedy-trial period, as that date is when petitioner filed his speedy-trial motion. We have said that the filing of the speedy-trial motion tolls the speedy-trial period. *Doby, supra*; *Moody, supra*. The time between March 20, 2001, and June 27, 2002 is 464 days. As this period exceeds the twelve-month requirement for a speedy trial, a *prima facie* case is established, and the State must show that the delay was the result of the defendant's conduct, or was otherwise justified. *Moody, supra*.

We now consider whether there are any periods of time to be excluded from the 464-day period between March 20, 2001, and June 16, 2002. First, we note that, in a pretrial order dated April 16, 2001, the trial court excluded June 26, 2000 to April 16, 2001. However, March 20, 2001, the day from which the speedy-trial period begins, falls within this excludable time period. The twenty-seven days from March 20, 2001 to April 16, 2001 is chargeable to the petitioner, as noted below.

In various pretrial, arraignment, and setting orders, the trial court excluded the following periods from the speedy-trial calculation:

Order	*Time Excluded*	*Number of days*
4/16/2001	June 26, 2000-April 16, 2001	27[1] (beginning at 3/20/01)
4/25/2001	April 25, 2001-April 26, 2001	1
5/24/2001	May 24, 2001-June 6, 2001	13
6/6/2001	June 6, 2001-June 25, 2001	19
6/25/2001	June 25, 2001-July 23, 2001	28
7/23/2001	July 23, 2001-Aug. 2, 2001	10
8/2/2001	Aug. 2, 2001-Aug. 9, 2001	7
8/10/2001	Aug. 10, 2001-Sept. 25, 2001	46
9/20/2001	Sept. 25, 2001-Nov. 27, 2001	63
11/27/2001	Nov. 27, 2001-Feb. 14, 2002	79
5/2/2002	May 2, 2002-May 6, 2002	4
5/24/2002	May 7, 2002-July 23, 2002	51 (ending at 6/27/02)

Therefore, the total number of excludable days found by the trial court to be chargeable to the petitioner equals 348 days. After subtracting 348 days of the excludable periods from the total

[1] Pursuant to Ark. R. Crim. P. 1.4, we will not count the first day of each excludable period.

period of time of 464 days, the balance is 116 days, which is well within the twelve-month requirement for speedy trial.

In his brief, petitioner only challenges three excludable periods: (1) March 20, 2001 to April 16, 2001, (2) June 25, 2001 to July 23, 2001, and (2) July 23, 2001 to August 2, 2001. The first period involves the time when petitioner was in Chicago after he waived extradition. The second period was when his attorney appeared for the purpose of withdrawing as counsel due to a conflict in interest. The third period of ten days involved the appointment of the Public Defender Commission, and petitioner argues that consideration of this period as excludable was inappropriate because he was without counsel. We note that even if petitioner were to prevail on his argument that these three periods, which aggregate sixty-five days, should not have been excluded, only 181 days of nonexcludable time have elapsed within the 365 days allowed by Rule 28.1. However, we do not reach petitioner's argument concerning the March 20, 2001 to April 16, 2001 exclusion or the June 25, 2001 to July 23, 2001 exclusion because the issue of those exclusions was not preserved for appellate review because no contemporaneous objection was made at the hearings. A contemporaneous objection to the excluded period is necessary to preserve the argument in a subsequent speedy-trial motion. *Dean v. State*, 339 Ark. 105, 3 S.W.3d 328 (1999); *Tanner v. State*, 324 Ark. 37, 918 S.W.2d 166 (1996); *Mack v. State*, 321 Ark. 547, 905 S.W.2d 842 (1995).

Because the time elapsed between petitioner's waiver of extradition and his motion to dismiss for violation of our requirement for a speedy trial is less than twelve months after proper exclusions of chargeable times, we hold that no violation of our speedy-trial rule occurred. Therefore, we find no error in the trial court's denial of petitioner's motion to dismiss because the time for bringing petitioner to trial has not expired. Accordingly, petitioner is not entitled to a writ of prohibition on the basis of a speedy-trial violation.

III. Interstate Agreement on Detainers

For his second point, petitioner argues that the trial court erred in denying petitioner's motion to dismiss based upon violations of the Interstate Agreement on Detainers, codified at Ark. Code Ann. § 16-95-101 *et seq.* (1987). Specifically, petitioner argues that he was not brought to trial within the 180-day period allowed in that agreement.

The Interstate Agreement on Detainers, found at Ark. Code Ann. § 16-95-101, provides in pertinent part of Article III:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Id.

In the present case, petitioner cites subsection (a) for the purposes of his argument that he shall be brought to trial within 180 days. However, petitioner was not returned to Arkansas pursuant to the Interstate Agreement on Detainers, but upon signing a waiver of extradition. Extraditions are governed by the Uniform Criminal Extradition Act, codified at Ark. Code Ann. § 16-94-201 *et seq.* (1987).

In order to comply with the Interstate Agreement on Detainers, a prosecutor must file a detainer upon learning that an accused is imprisoned elsewhere and must request that the official having custody of the accused advise the prisoner of the filing of the detainer and of the prisoner's right to demand trial. Ark. R. Crim. P. 29.1(b); *Dukes v. State*, 271 Ark. 674, 609

S.W.2d 924 (1981). The prisoner then has the right to demand trial, and such trial must be had within 180 days unless there is good cause for a delay. *Id.* Here, there is no showing in the record that the State filed a detainer or that petitioner was served with a detainer while incarcerated in Illinois. Therefore, we hold that the Interstate Agreement on Detainers was never triggered and is inapplicable.

Petition for writ of prohibition denied.

IMBER, J., not participating.

Anthony Tyrone MATTHEWS *v.* STATE of Arkansas

CR 01-1135 99 S.W.3d 403

Supreme Court of Arkansas
Opinion delivered March 6, 2003

[redacted]

C. Scott Nance, for appellant.

J. Leon Johnson, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

W. H. "DUB" ARNOLD, Chief Justice. Appellant, Anthony Tyrone Matthews, brings this appeal from his conviction of first-degree murder and life sentence imposed in connection with the shooting death of Alfredo Resendiz, which occurred on October 27, 2000, in Newport, Arkansas. Appellant asserts the following three points on appeal:

1) The trial court erred when it denied the appellant's motion in limine to exclude overly prejudicial photographs of the crime scene;

2) The trial court erred when it denied the appellant's objection to overly prejudicial evidence being admitted into evidence;

3) The trial court erred when it allowed the use of an uncertified interpreter at the trial.

Finding no error, we affirm.

I. Photographs

For his first point on appeal, appellant asserts that the trial court abused its discretion in admitting certain photographs of the victim that he alleges were more prejudicial than probative. In *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001), this Court discussed the admission of photographs.

> The admission of photographs is a matter left to the sound discretion of the trial court. *Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999). When photographs are helpful to explain testimony, they are ordinarily admissible. *Id.* (citing *Williams v. State*, 322 Ark. 38, 907 S.W.2d 120 (1995)). Further, the mere fact that a photograph is inflammatory or is cumulative is not, standing alone, sufficient reason to exclude it. *Weger v. State*, 315 Ark. 555, 869 S.W.2d 688 (1994). Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: by shedding light on some issue, by proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony, or by enabling jurors to better understand the testimony. *Id.* Other acceptable purposes are to show the condition of the victims' bodies, the probable type or location of the injuries, and the position in which the bodies were discovered. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000). Absent an abuse of discretion, this court will not reverse a trial court for admitting photographs into evidence. *Id.*

Barnes, 346 Ark. at 104, 55 S.W.3d at 281.

In the instant case, the State was allowed to introduce photographs that depicted the deceased victim in various manners or views. These photographs were the subject of a pretrial hearing on the appellant's motion in limine seeking their exclusion. At the hearing, defense counsel raised various objections to photographs he anticipated would be proffered by the State. The State proffered eleven photographs. State's Exhibit No. 1 (admitted at trial as State's Exhibit No. 16), was an overhead view of the crime

scene to which defense counsel offered no objection. State's Exhibits Nos. 2-6 were various views of the victim, and State's Exhibits Nos. 7-11 were photographs taken during the autopsy of the victim, Alfredo Resendiz. The trial court examined each of the photographs and heard arguments of counsel. The trial court subsequently excluded State's Exhibits Nos. 3, 9, and 11, finding that these photographs were duplicative of remaining photographs.

At trial, the State sought to prove that the appellant shot and killed the victim during the course or in furtherance of a robbery. To that end, the State called witnesses familiar with the scene of the crime and the discovery of the victim as well as the medical findings of the autopsy. The State called James Duvall, a lieutenant with the Newport Police Department, who testified that he was the supervising officer of the investigation surrounding the death of the victim.

Duvall testified that, on the night of the shooting, he arrived at the scene at approximately 9:30 p.m. and, as part of his duties, photographed the crime scene with the body of the victim present and, subsequently, took additional photographs after the victim's body had been moved to the funeral home to await transport to the Arkansas State Crime Lab for an autopsy. Duvall described State's Exhibit No. 12 as a photograph of the victim as he lay in the street, where the shooting occurred. Duvall further described State's Exhibits Nos. 13, 14, and 15 as photographs depicting wounds to the victim's head and the bagged hands of the victim.

Duvall explained that, in the course of the investigation, the appellant had indicated that he had struggled with the victim and that his gun had accidentally discharged. According to Duvall, the victim's hands were bagged in order to preserve evidence that might have indicated signs of a struggle. Duvall also testified that when he interviewed the appellant, he had incorrectly assumed that the smaller bullet wound to the victim's forehead had been the entry wound and that the large wound to the back of the victim's head had been the exit wound. Duvall said that, during the course of several interviews, the appellant first denied involvement, then accused another person of the shooting, and, finally,

admitted participation, but maintained that his gun accidentally discharged during his struggle with the victim.

Dr. Stephen Erickson, qualified as an expert in the area of forensic pathology to give his opinion as to the cause and manner of death of the victim, testified that he performed an autopsy on the body of the victim, whom he identified as Alfredo Resendiz, a twenty-two-year-old Hispanic male. He testified that, prior to his external examination of the victim, he learned that the victim had been involved in a shooting. Consequently, his external examination of the body took this into account and was part of his testimony. Erickson said he noted a small abrasion on the back of the victim's right elbow and a small abrasion and contusion on the mid-forehead, from which he concluded that the victim had fallen to the ground after having been rendered unconscious by the gunshot wound to the head.

Erickson further testified that his examination revealed a through-and-through gunshot from the back of the head, in the hairline, with an exit wound located at the left forehead. In order to further examine and document his findings, Erickson said that the area around the wound was shaved and photographed. Erickson described State's Exhibit No. 19 as a photograph of the face and forehead of the victim that included an area that had been shaved to reveal the exit wound with a ruler placed in the photo to indicate the correct scale of the depiction. Erickson identified State's Exhibit No. 20 as a photo of the bullet entry-wound to the victim after having been cleaned and shaved to reveal the physical characteristics of the wound. State's Exhibit No. 21 was identified by Erickson as a photo of the victim's upper back and head with the bullet wound to the back of his head as he initially observed it.

Erickson said that after his examination of the physical characteristics of the head wound (depicted in the photos), he proceeded to determine the distance between the victim and the weapon when the weapon was fired. Erickson explained that firearm distance is classified in three categories: contact; close range, where powder from the firearm comes out and marks the skin; or distant, where the powder has lost its energy and does not reach to the skin of the target. With regard to the victim's wound, he

stated that it was consistent with that of a contact wound, in that the muzzle appeared to have created a seal against the skin and that, together with the projectile, gases associated with the firearm's discharge go underneath the scalp and deposit soot into the adjoining tissue.

Appellant principally relies on the case of *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1996), for the proposition that the introduction of photographs depicting the victim and his wounds was more unfairly prejudicial than probative. Appellant's reliance on *Berry* is misplaced. In *Berry*, there was clearly more of a "carte blanche acceptance" of graphic and repetitive pictures of the victim and the crime scene. *Id.* at 227, 718 S.W.2d at 450. This Court observed, in *Berry*, that the only real issue at trial was whether the defendant had helped plan the crime. We further described the use of photographs, which clearly distinguishes the instant case, as follows:

> [T]he probative value of the photographs in this case was limited to the cause and nature of death and would easily have been satisfied by introduction of a reasonable number of photographs depicting the injury to the victim and showing the crime scene.

Id. at 233, 718 S.W.2d 453.

In the instant case, the trial court exercised its discretion in excluding three of the ten photographs objected to as being cumulative or repetitive. Even if the remaining photos could be characterized as "inflammatory," they are admissible at the discretion of the trial judge if they tend to shed light on any issue or are useful to enable a witness to better describe the objects portrayed or the jury to better understand the testimony, or to corroborate testimony. *Perry v. Smith*, 255 Ark. 378, 500 S.W.2d 387 (1973). The testimony at trial revealed that, initially, the police believed (incorrectly, as it turned out) that the bullet that had killed the victim had struck him from front to back. Additionally, the police had taken various statements from the appellant, who had given varying accounts of the shooting and his participation therein. The seven remaining photos depicted what the police initially observed, the steps they took in their investiga-

tion, and what, ultimately, the medical examiner determined had happened.

In short, the photos of the victim's wounds clearly served to corroborate the testimony of Dr. Erickson and served to explain the course of the police's investigation. Based upon these accepted purposes for the photographs, the trial court was within its discretion in admitting them. We, therefore, affirm the trial court's admission of the photographs in question.

II. Testimony Regarding Location of Appellant's Arrest

The appellant's next point on appeal is that the trial court abused its discretion in allowing testimony that he was arrested on the night of the shooting at a Newport liquor store with another suspect and in possession of several bottles of wine. The State contends that the testimony was offered, and is properly admissible as such, to demonstrate the appellant's state of mind, *i.e.*, his motive or intent. The State further points out that, although appellant did object to the testimony in this regard, he failed to request a limiting instruction with regard to the jury's consideration of this evidence and, as such, the trial court should be affirmed. We agree.

The appellant was initially charged with capital murder, in that he, or an accomplice, caused the death of the victim during the commission of a robbery. Ark. Code Ann. § 5-10-101 (Repl. 1997). The underlying felony of robbery requires that the actor must act "with the purpose of committing a felony or misdemeanor theft[.]" Ark. Code Ann. § 5-12-102(a) (Repl. 1997). As part of its case-in-chief, the State sought to demonstrate the appellant's motive and intent for the commission of the offense. The admission of evidence showing motive is a matter left to the discretion of the trial court, which will be reversed only for an abuse of that discretion. *E.g., Martin v. State*, 328 Ark. 420, 944 S.W.2d 512 (1997). In *Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002), we reiterated the long-held rule that where the purpose of evidence is to disclose a motive for killing, anything and everything that might have influenced the commission of the act may, as a rule, be shown. *Id.* at 494, 79 S.W.3d at 287.

At trial, the State adduced evidence regarding the planning and commission of the robbery and shooting death of Alfredo Resendiz. This evidence came largely from the statements made by appellant to the police. The evidence established that, after learning that the victim carried money, appellant's motive was to rob the victim. However, appellant claimed that the victim was shot as the result of his firearm accidentally discharging. The appellant claims that evidence that he was apprehended outside a liquor store after having just made a purchase was more unfairly prejudicial than probative. While the appellant claims that evidence of the circumstance of his arrest was not "narrowly" drawn, the State submits otherwise. We agree with the State.

Testimony indicated that the victim was shot on the night of October 27, 2000, and that police responded at approximately 9:30 p.m. After interviewing witnesses at the scene, the appellant was sought in connection with the shooting. Scott Bridgeman, an officer with the Newport Police Department, testified that he apprehended appellant in the company of another person also sought, as the two, on that same night, were leaving a Newport liquor store where they had just purchased several bottles of wine.

[redacted] The purchase of wine being a legal act in Newport, Arkansas, the appellant's assertion begs the question of how his apprehension there could be deemed prejudicial. That he would be making such a purchase on the same night that he had robbed and gunned down his victim in the middle of a city street, however, is highly probative of his intent to rob and his motive for doing so. The circumstances that tie a defendant to the crime or raise a possible motive for the crime are independently relevant and admissible as evidence. *E.g., McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999). It is far-fetched to suggest that a jury would convict a defendant of first-degree murder solely on the ground that he was a wine addict. Had there been the remotest possibility that the jury would have based the appellant's conviction solely on the location of his arrest, he could have requested that an instruction be given, instructing the jury as to the purposes for which it could consider the admitted evidence. Appellant requested no such instruction. As such, we find no error with regard to any testimony about the location of appellant's arrest.

III. Interpreter

The appellant's final point on appeal is whether the trial court erred in employing a noncertified foreign-language interpreter to assist in translating some of the responses of family members of the victim during the sentencing phase of his trial. Based upon this fact alone, appellant contends that his sentence should be reversed and remanded for a new sentencing hearing. We disagree.

The appellant was found guilty of first-degree murder, and the trial proceeded to sentencing, at which time, the State called Jose Resendiz, brother of the victim. Resendiz testified in English and served as the representative of the family. In that capacity, Resendiz proffered a document, written in Spanish, by family members that corresponded to a written English translation. Both the document written in Spanish and the one in English (State's Exhibits Nos. 29 and 30) were admitted *without objection* from appellant. Prior to Resendiz reading from the victim-impact statement, the trial court summoned Ms. Isaac to the witness stand in order for her to affirm the translation of the written responses. At that time, defense counsel waived reading of the oath to Ms. Isaac; however, the trial court subsequently placed Ms. Isaac under oath and received an affirmation from her that her translation accurately reflected the responses of the witness(es).

It does not appear that the prosecutor proffered Ms. Isaac as a certified interpreter or that the trial court qualified her as a noncertified court interpreter pursuant to this Court's directives. It does appear, however, that Ms. Isaac's principal role was to explain court proceedings to members of the victim's family. It does not appear that Ms. Isaac was called upon to translate in the usual question-and-answer format normally conducted during direct and cross-examination of witnesses. As such, we find no error in her limited participation.

In short, Ms. Isaac was not called upon to translate in the usual question-and-answer format; moreover, both the document written in Spanish and the one in English were admitted *without objection* by appellant; as such, we affirm the trial court's admission of such documents and find no error in Ms. Isaac simply

affirming that her translation accurately reflected the responses of the witness(es)' statements offered in written documents to which no objection was made.

IV. Rule 4-3(h) Compliance

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

Affirmed.

Raymond Earl CLAMPET *v.* STATE of Arkansas

CR 02-387 99 S.W.3d 414

Supreme Court of Arkansas
Opinion delivered March 6, 2003

Kristin Pawlik, for appellant.

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

TOM GLAZE, Justice. This appeal was certified to us from the court of appeals so that we can once again address a trial court's authority to modify a defendant's probation under Act 346 of 1975. Appellant Raymond Clampet was charged with

first-degree criminal mischief, a Class C felony, on October 9, 1996, after he smashed out the windows on his wife's truck with a tire iron. In April of 1997, Clampet entered a plea of guilty to this charge, and the trial court sentenced him to three years' probation pursuant to Act 346 of 1975; the court also imposed $500.00 "restitution in lieu of a fine," and $1,124.10 in victim restitution. The order of probation was entered on April 24, 1997.

On February 11, 1999, the State filed a petition for revocation of Clampet's probation, alleging that he had failed (1) to report to his probation officer, (2) to pay court costs and restitution as ordered, and (3) to report a change of address. On May 10, 1999, the trial court held a hearing at which it found Clampet in violation of his probation, but declined to revoke his probation. The judge stated, "However, *your Act 346 status will be revoked* and your plea of guilty accepted. You'll be found in contempt for violating the court's orders and sentenced to 120 days in jail with credit for 12 days served." (Emphasis added.) In addition, the court extended Clampet's period of probation for twenty-four additional months, and ordered him to pay the balance of what he owed on his restitution.

On July 2, 2001, the State filed another petition for revocation of probation, alleging that Clampet had failed (1) to report to his probation officer, (2) to remain in his treatment program, and (3) to report his change of address. This petition was amended in August of 2001 to add an additional allegation of committing the offenses of driving while intoxicated and driving on a suspended license. Clampet moved to dismiss the petition, based on lack of subject-matter jurisdiction, because on May 10, 1999, the court had revoked his Act 346 status and accepted his guilty plea. At a hearing on August 13, 2001, the trial court denied Clampet's motion to dismiss.

At a subsequent revocation hearing, held on August 27, 2001, Clampet admitted to part of the factual allegations contained in the revocation petition, and the trial court found him in violation of his probation, revoked it, and sentenced him to 42 months in the Department of Correction, with an additional 30

months suspended. The court gave Clampet credit for 160 days and directed that he complete a substance abuse program. From this order, Clampet brings his appeal, arguing that the trial court erred in denying his motion to dismiss the 2001 petition to revoke his probation. He argues that the court lost subject-matter jurisdiction when it previously revoked his Act 346 status.

Because Clampet was charged and placed on probation in 1996, this case is governed by the sentencing law in effect prior to the passage of Act 1569 of 1999. That Act changed the statutes governing a trial court's authority to modify or amend the terms and conditions of a defendant's probation. However, in *Bagwell v. State*, 346 Ark. 18, 53 S.W.3d 520 (2001), we declined to apply that Act retroactively, and therefore, our prior case law on the subject — including *Pike v. State*, 344 Ark. 478, 40 S.W.3d 795 (2000), and *McGhee v. State*, 334 Ark. 543, 975 S.W.2d 834 (1998) — controls.

This court has consistently held that a trial court loses jurisdiction to modify or amend an original sentence once a valid sentence is put into execution. *See, e.g.*, *McGhee*, *supra*; *Harmon v. State*, 317 Ark. 47, 876 S.W.2d 240 (1994); *DeHart v. State*, 312 Ark. 323, 849 S.W.2d 497 (1993); *Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989). We have also held that a plea of guilty, coupled with a fine and either probation or a suspended imposition of sentence, constitutes a conviction, thereby depriving the trial court of jurisdiction to amend or modify a sentence that has been executed. *Pike*, *supra*; *McGhee*, *supra*. In the present case, the State urges that the trial court never lost jurisdiction because it never imposed a "fine," and therefore, *Pike* should not control in this case.

It is true that Judge Keith ordered Clampet to make a payment designated as a "restitution in lieu of a fine" to the Benton County Restitution fund, as well as making full restitution to the victim. However, the only statutory authority for imposing restitution in this fashion is found in Ark. Code Ann. § 16-90-307 (1987), which reads, in pertinent part, as follows:

> (a) The circuit judges of each judicial district may establish a restitution fund to be administered by the circuit judge, the prosecuting attorney, or probationary agency, whichever the circuit judge shall designate.
>
> * * * *
>
> (c)(1) The *circuit judges may levy additional fines against criminal defendants and place the additional fine money in the restitution fund of the judicial district.*
>
> (2) The *additional fines* shall be in an amount not to exceed the amount of the criminal penalty fine provided by law for the offense.
>
> (3) The *additional fine money* shall be remitted to the fund, to be deposited in a depository other than the county treasurer or State Treasury.

(Emphasis added.) Although we have not previously interpreted this statute, it is clear from the emphasized language that this kind of "restitution" is comprised solely of fine money and is used to establish a "restitution fund" maintained by "additional fines." *Pike* is directly on point, and involved the same trial judge as we have before us here. In *Pike*, Eric Pike pled guilty to four counts of forgery in November of 1993; his plea was deferred under Act 346, and he was placed on three years' supervised probation. In January of 1995, the State filed a petition to revoke Pike's probation, alleging he had failed to report to his probation officer and failed to pay fines, fees, and costs. On January 30, 1995, the trial court held a probation-revocation hearing, wherein Pike admitted the allegations. The court found Pike in contempt of court and sentenced him to eighteen days in jail, with credit for eighteen days served. However, the trial court did not accept Pike's initial guilty plea or revoke his Act 346 status. The court also extended Pike's probation by two years.

In October of 1996, the State filed a second petition to revoke Pike's probation, again alleging he had violated several terms of his probation. The trial court held a second revocation hearing in September of 1997, and Pike again admitted the violations. At that time, the trial court revoked Pike's Act 346 status,

accepted his initial guilty plea on the forgery charges, ordered him to pay the balance of his fines, fees, and court costs, and found him in contempt of court, ordering him to serve 120 days in the Arkansas Department of Community Punishment. The court also extended Pike's probation for another twenty-four months.

In June of 1998, the State filed a third petition to revoke Pike's probation. This time, Pike filed a motion to dismiss the petition, citing *McGhee v. State*, 334 Ark. 543, 975 S.W.2d 834 (1998), and *Harmon v. State*, 317 Ark. 46, 876 S.W.2d 240 (1994), and arguing that the trial court had lost jurisdiction over him by entering its September 1997 order that accepted his guilty plea, revoked his Act 346 status, and executed his sentence by ordering him to pay the balance of his fines, fees, and court costs. The trial court denied Pike's motion to dismiss, and then held a third probation-revocation hearing. The court denied the State's petition to revoke, but found Pike in contempt for violating the conditions of his probation and sentenced him to 150 days in the Benton County jail.

On appeal, Pike argued that the trial court erred in finding him in contempt of court at the third revocation hearing because the court lost jurisdiction over him when it executed his sentence at the second revocation hearing by accepting his guilty plea and ordering him to pay the balance of his fines. This court agreed, holding as follows:

> We have made it clear that a trial court loses jurisdiction to modify or amend an original sentence once a valid sentence is put into execution. *E.g.*, *McGhee v. State*, 334 Ark. 543, 975 S.W.2d 834 (1998); *Harmon v. State*, 317 Ark. 47, 876 S.W.2d 240 (1994); *DeHart v. State*, 312 Ark. 323, 849 S.W.2d 497 (1993); *Jones v. State*, 297 Ark. 485, 763 S.W.2d 81 (1989). We have also held that a plea of guilty, coupled with a fine and either probation or a suspended imposition of sentence, constitutes a conviction, thereby depriving the trial court of jurisdiction to amend or modify a sentence that has been executed. *McGhee, supra*; *Harmon, supra*; *Jones, supra.*
>
> In *McGhee, supra*, the State urged us to overrule *Harmon, supra*, but we declined to do so and reversed the trial court,

> adhering to our long-standing case law, which holds that a plea of guilty, coupled with a fine and a suspension of imposition of sentence of imprisonment, constitutes a conviction, and that, therefore, the court loses power to modify the original order. *McGhee, supra* (citing *Jones, supra*).
>
> Similarly, in the present case, by the time of the third revocation hearing, the trial court had lost subject-matter jurisdiction to modify the sentence that had already been executed by the trial court's actions in revoking [Pike's] Act 346 of 1975 status, accepting his guilty plea, and ordering him to pay the balance of $866.25 in fines, fees, and court costs.

Pike, 344 Ark. at 484.

What Judge Keith did at Pike's second revocation hearing is identical to what he did in Clampet's first revocation hearing: the judge revoked Clampet's Act 346 status, accepted his initial guilty plea, and ordered him to pay the balance of his "restitution in lieu of a fine." Because that "restitution" was comprised of money that in reality constituted a fine, given the language of § 16-90-307, the judge's actions at the May 1999 revocation hearing amounted to executing Clampet's sentence. The plea of guilty, coupled with a fine and probation, constitutes a conviction, thereby depriving the trial court of jurisdiction to amend or modify a sentence that has been executed. *See Pike, supra*; *McGhee, supra*; *Baker v. State*, 318 Ark. 223, 884 S.W.2d 603 (1994) (trial court enters a conviction judgment if it sentences the defendant to pay a fine *and* places the defendant on probation); *Harmon, supra*; *Jones, supra* (interpreting § 5-4-301(d)(1) to mean that a guilty plea, a fine, and suspension of imposition of sentence amounts to a conviction, which, in turn, entails execution).

Because the valid sentence was put into execution at the May 1999 hearing, the trial court was without jurisdiction, in August of 2001, to amend or modify Clampet's sentence, and the court thus erred in denying Clampet's motion to dismiss the State's petition to revoke his probation. The trial court's denial of Clampet's motion to dismiss is therefore reversed.

Vicki WHITE, Executrix of the Estate of Noel Baker, Jr. *v.* Daryl DAVIS, Kevin Davis, and Gary Davis, d/b/a Davis Dairy, d/b/a Davis Brothers Dairy, and d/b/a Davis Dairy Farm

02-1092 99 S.W.3d 409

Supreme Court of Arkansas
Opinion delivered March 6, 2003

Jerry D. Patterson, for appellant.

Jones, Jackson & Moll, PLC, by: *Mark A. Moll* and *Jay W. Kutchka*; and *Courtway & Osment, PLC*, by: *Pamela Osment*, for appellee.

TOM GLAZE, Justice. This case is before us on petition for review from the court of appeals. We granted the appellee Gary Davis's petition because the issue presented on appeal called for an interpretation of Ark. Code Ann. § 16-13-317 (Repl. 1997); however, we conclude that the issue was not properly preserved for our review, and therefore, we affirm the trial court.

In November of 1994, Noel Baker, the appellant, selected eighty Holstein heifers from Gary Davis and Davis's brothers' dairy farm, residents of Missouri, agreeing to pay $104,000 for the cows, and an additional $2,634 for twenty-six tons of alfalfa hay. After Davis delivered the cattle to Baker in December of 1994, Baker discovered that the cattle delivered and paid for were not the same animals that he had selected from Davis's dairy. Baker notified Davis that the cattle were not the ones he had selected and demanded the return of the money he had paid. Davis refused to return the money, and as a result, Baker filed suit against Davis in Searcy County.[1]

Davis subsequently moved to dismiss, alleging that Baker's complaint failed to set forth facts that would support a finding that Davis had contact with Arkansas, as is required to confer personal jurisdiction over him. The Searcy County Chancery Judge signed a decree on December 30, 2000, finding that the Arkansas courts had personal jurisdiction over Davis. The judge went on to find that Davis had defrauded Baker, and awarded damages totaling $360,657.93. The decree was filed and entered with the court clerk on January 19, 2001.

---

[1] At some point during the proceedings, Mr. Baker died, and Vicki White, executrix of his estate, was substituted as plaintiff. In addition, the original complaint also named Gary Davis's brothers, Daryl Davis and Kevin Davis, along with the brothers' business, variously called Davis Bros., Davis Bros. Dairy, and Davis Dairy Farm. Criminal charges were filed against all three Davises; Daryl eventually pled guilty to theft of property, and he and Kevin settled and were dismissed from the instant case. The civil case proceeded to trial against only Gary Davis. In writing this opinion, we merely refer to Noel Baker.

After the decree was entered, Davis filed a motion for new trial on January 26, 2001, reasserting his argument that the trial judge did not have personal jurisdiction over him, and raising a claim that the award of money damages was not supported by the evidence. Baker filed a response to Davis's motion for new trial on February 6, 2001.

On February 13, 2001, a hearing was held on the motion for new trial before a newly-elected chancery judge, Michael Maggio,[2] in Faulkner County, which is in the same judicial district as Searcy County. At the outset of the hearing, Judge Maggio noted that he was "at a little bit of a disadvantage [because he did] not have the complete file; that is up in Searcy County." Noel Baker's counsel noted that the case had been tried in Searcy County, but the motion was being heard in Faulkner County. Counsel stated that "we are here because of the moving party, and not by agreement. We do not agree to the hearing. It is our position that this is outside the venue of the court action. The original court file . . . is not here, and neither is the docket." The judge replied, "All righty. All righty." The parties then went on to present their arguments, and the judge eventually granted Davis's motion for new trial, finding that Davis was not subject to the personal jurisdiction of the court. The judge then vacated the decree and dismissed Baker's complaint without prejudice.

Baker appealed, challenging the chancellor's authority to hold the hearing in Faulkner County over Baker's objection. In response, Davis argued that Baker never obtained a ruling on the venue question below, and therefore, the issue was not preserved for appeal. In a split decision, the court of appeals agreed with Baker, concluding that the issue was directed to the chancellor's attention when Baker objected to the hearing and his objection was resolved by the chancellor's continuing on with the hearing. *Estate of Baker v. Davis*, 79 Ark. App. 188, 191, 85 S.W.3d 553 (2002).

In reaching this conclusion, the court of appeals relied on *McMahan v. Berry*, 319 Ark. 88, 890 S.W.2d 242 (1994). In that case, McMahan objected to a proposed jury instruction, but the

---

[2] The original chancellor, Judge Karen Baker, was elected to the court of appeals in November of 2000.

trial court gave the instruction anyway. In reaching McMahan's arguments about the propriety of the instruction, this court held that the giving of the instruction "effectively became the ruling, and we can see no sound reason why more should be required." *McMahan*, 319 Ark. at 93-94.

McMahan, however, appears to be an unusual decision, and our case law otherwise overwhelmingly requires a party to obtain a ruling on an objection in order to preserve the issue for appellate review. In *McDonald v. Wilcox*, 300 Ark. 445, 780 S.W.2d 17 (1989), we explained the reason for this rule as follows:

> We have held many times that the burden of obtaining a ruling is on the movant, and objections and questions left unresolved are waived and may not be relied upon on appeal. *Richardson v. State*, 292 Ark. 140, 728 S.W.2d 510 (1987); *Britton v. Floyd*, 293 Ark. 397, 738 S.W.2d 408 (1987); *Williams v. State*, 289 Ark. 69, 709 S.W.2d 80 (1986). By appellant's [McDonald's] failure to include any record of a ruling, we are faced with essentially the same situation on review.
>
> We have no way of determining from the record that the trial court did in fact make a ruling, nor, assuming one was made, the nature or extent of the ruling. It may be that the trial court reserved a ruling until the evidence was more fully developed and that the issue was left unresolved. It may be that depending on the ruling, appellant [McDonald] waived any objection on appeal, because it was he who elicited proof of the convictions during his case in chief. The point is that with no record of a ruling we can only speculate as to whether a ruling was made and what the particulars of the ruling may have been. Obviously, for an accurate and fair review of the question, that information is critical.

McDonald, 300 Ark. at 447-48. *See also Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999); *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997); *McElroy v. Grisham*, 306 Ark. 4, 810 S.W.2d 933 (1991).

Here, Noel Baker's counsel told the judge that he did not agree to the hearing, and it was counsel's position that venue was in Searcy County, not Faulkner County. However, counsel made no mention of the venue statute, § 16-13-317, he now attempts to argue on appeal. Although the statute authorized the judge to hold the hearing in Faulkner County to render "appropriate

orders" with respect to the pending cause in Searcy County, counsel failed to point out to the judge that only "contested cases" may not be tried outside the county of venue of the case without agreement of the parties.[3] *See Henderson v. Dudley*, 264 Ark. 697, 574 S.W.2d 568 (1978), and *Gibbons v. Bradley*, 239 Ark. 816, 394 S.W.2d 489 (1965). Despite this failure, Noel Baker now raises those specific venue issues in this appeal, although those issues were never brought to the trial judge's attention for a ruling below.

Consistency requires that we follow our long-standing rule that a moving party bears the burden of obtaining a ruling on any objection, and in the absence of such a ruling, the issues are not preserved for our review.[4] Because Baker did not properly obtain a ruling on his objection to venue being in Faulkner County, we are unable to reach the merits of this appeal, and the decision of the trial court is affirmed.

BROWN and HANNAH, JJ., disssent.

THORNTON, J., not participating.

ROBERT L. BROWN, Justice, dissenting. The majority today returns to the tired practice of the past and decides this case on an asserted procedural defect. Based on this

---

[3] Section 16-13-317 provides in full as follows:

> At any time while mentally and physically competent and physically present in the geographical area of the judicial district which he serves as chancellor, the judge of a chancery court may hear, adjudicate, or render any appropriate order with respect to any cause or matter pending in any chancery court over which he presides, subject to such notice of the time, place, and nature of the hearing being given as may be required by law or by rule or order of the court. However, no contested case can be tried outside the county of the venue of the case, except upon the agreement of the parties interested.

[4] The dissenting opinion in the court of appeals' decision pointed out that this court's rules have, in the past, been amended in response to "unreasonable results." *See Estate of Baker v. Davis*, 79 Ark. App. 188, 194, 85 S.W.3d 533 (2002) (Vaught, J., dissenting) (citing *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996) (leading to change in Ark. R. Crim. P. 33.1); and *City of Monticello v. Kimbro*, 206 Ark. 503, 176 S.W.2d 152 (1943) (leading to amendment of Ark. R. Civ. P. 59(b)). Indeed, even those "frustrating procedural pitfalls" recited by the dissent were corrected by changing the rules of procedure. If this long-standing rule is to be altered, the change should first occur in our procedural rules, as it has been done before.

analysis, it refuses to address the legal issue raised in this case. I am convinced that the trial judge effectively ruled on the issue at hand. For that reason, I would decide the legal point of whether a hearing on a new-trial motion is a contested matter for purposes of determining proper venue.

The fact that the trial court effectively ruled on the appellant's venue objection is clear on the face of the record. The appellant objected to the proceeding going forward in Faulkner County, because the trial had taken place in Searcy County. Following the venue objection, the trial judge said, "All righty," and proceeded to hear the new-trial motion where he was — in Faulkner County.

According to the majority, there was no ruling on the appellant's objection to the hearing taking place in Faulkner County. I ask the rhetorical question: What could be more of a ruling than proceeding with the hearing in Faulkner County when that was the basis for the objection? Holding that no ruling was made under these circumstances elevates the importance of uttering one word — "denied" — to dizzying heights.

Over the past decade, a trend has been established in this court to eliminate procedural pitfalls that resulted in no decision on the merits of a case. Those pitfalls were frustrating to both the bench and bar. *See, e.g.*, Leon Holmes, *Pitfalls of the Appellate Practice: Avoiding the Serbonian Bog*, ARKANSAS LAWYER (Summer 2000). Some of the more obvious examples have been corrected: (1) the elimination of an absolute affirmance for abstract deficiencies (Ark. Sup. Ct. R. 4-2(b)); (2) providing that a notice of appeal filed before entry of judgment would be considered filed the day after that entry (Ark. R. App. P.—Civ. 4(a)); (3) providing that a notice of appeal filed before an order disposing of posttrial motions shall also be deemed filed the day after the entry of that order (Ark. R. App. P.—Civ. 4(b)(2)); (4) providing that in a criminal trial, a motion for directed verdict at the close of all the evidence will be deemed denied when the trial proceeded ahead (Ark. R. Crim. P. 33.1(c)).

With respect to the precise issue confronting this court today, we decided an analogous case in 1994 in a unanimous opinion

where we held that instructing a jury with a contested instruction was an effective ruling on the objection. We said:

> However, counsel objected to the agency instruction, stating correctly why it should not be given. The trial court then proceeded to give the errant instruction. The giving of the instruction effectively became the ruling and we can see no sound reason why more should be required.

McMahan v. Berry, 319 Ark. 88, 94, 890 S.W.2d 242, 246 (1994). In the *McMahan* case, as in the case before us, the issue was whether the action of the trial court in proceeding with the trial constituted a ruling. This court held that it did, even though the trial judge had not uttered the word, "Denied." A majority of the court now holds that the *McMahan* case was an aberration, and that we should, in effect, pretend the case is not there. In holding as it does, the majority wants to retrench and decide cases based on an outmoded procedural pitfall.

The majority cites two post-*McMahan* decisions in support of the uncontroverted rule that we will not decide issues raised on motion or objection when the trial court has not ruled. *See Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999); *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997). That rule is not the issue in this case. The issue here, as in *McMahan*, is whether the judge *effectively* ruled on the venue motion by his actions in beginning the trial. It is obvious that he did.[1]

I would hear this case on the merits, and, for that reason, I respectfully dissent.

HANNAH, J., joins.

---

[1] The majority opinion contains one paragraph about lack of specificity in the appellant's venue objection. Specificity of the objection was not raised or contested by the parties before the trial court or in this appeal. The sole contention is the question of whether a ruling was obtained from the circuit judge.

Gary T. CLOIRD, *a/k/a* Saba Ka Makkali,
a/k/a Simba Kali *v.* STATE of Arkansas

CR 93-284 99 S.W.3d 419

Supreme Court of Arkansas
Opinion delivered March 6, 2003

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Jeff Rosenzweig, for petitioner.

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

DONALD L. CORBIN, Justice. Petitioner Gary Cloird, also known as Saba Ka Makkali and Simba Kali, was convicted in the Jefferson County Circuit Court of the crimes of rape and theft of property, which occurred on January 25, 1992, and was sentenced to a total of thirty-five years' imprisonment. This court affirmed his convictions and sentence in *Cloird v. State*, 314 Ark. 296, 862 S.W.2d 211 (1993) (*Cloird I*). Following our decision, Cloird filed a petition for postconviction relief in the trial court, pursuant to Ark. R. Crim. P. 37. The trial court dismissed the petition on the ground that it was untimely, and this court affirmed the dismissal in an unpublished opinion. *See Cloird v. State*, CR 95-7, slip op. (Ark. February 27, 1995) (*per curiam*) (*Cloird II*). Cloird subsequently filed a petition for a writ of *habeas corpus* in the Lincoln County Circuit Court, the county in which he is incarcerated. He asserted in his petition that the Jefferson County Circuit Court lacked jurisdiction to try him on the charge

of rape, because the trailer where the rape occurred was actually located in Arkansas County. The trial court dismissed the petition on the ground that Cloird had not met his burden of proof. This court summarily affirmed the trial court's ruling on the ground that Cloird's abstract was flagrantly deficient. *See Cloird v. State*, 00-166, slip op. (Ark. October 11, 2001) (*per curiam*) (*Cloird III*).

Four months after our decision, Cloird filed the instant petition in this court, seeking a writ of *habeas corpus*, as well as permission for leave to file a petition for writ of error *coram nobis* in the trial court. This court has original jurisdiction to hear petitions for extraordinary writs, pursuant to Ark. Const. Amend. 80, § 2(E). *See also Simpson v. Sheriff of Dallas County*, 333 Ark. 277, 968 S.W.2d 614 (1998) (*per curiam*). We remanded the *habeas* matter to the trial court for a factual determination as to where the trailer in which the rape occurred was actually located. *See Cloird v. State*, 349 Ark. 33, 76 S.W.3d 813 (2002) (*per curiam*) (*Cloird IV*).[1] We stated in that opinion that once the trial court made its factual determination, we would render a final disposition on the *habeas* matter.

On remand, the parties stipulated that the trailer in question was located at 402-A Levinson Street, in the town of Humphrey, which is situated in both Jefferson and Arkansas Counties. The parties stipulated further that the address of the trailer was in that part of Humphrey that sits in Arkansas County. Based on that stipulation, the trial court entered an order finding that the rape at the trailer occurred in Arkansas County. For the reasons set out below, we now deny the writ.

Before we reach the merits of Cloird's jurisdiction claim, we must address the question raised by the trial court, on remand, as to why this court is entertaining Cloird's second *habeas* petition after having affirmed the denial of the first *habeas* petition. Both the trial court and the State felt that the first affirmance was the law of the case on this issue. In *Cloird IV*, we explained that the doctrine of law of the case was not applicable because the issue

[1] We also granted permission for Cloird to file a petition for a writ of error *coram nobis* in the trial court. This appeal involves only the *habeas* issue.

raised in the *habeas* petition was lack of jurisdiction, which, we pointed out, may be raised at any time. On remand, the trial court expressed considerable concern that our holding would effectively allow the jurisdiction issue to be raised repeatedly by the same prisoner in multiple *habeas* petitions. We now take this opportunity to clarify our position on this issue.

The doctrine of law of the case ordinarily arises in the case of a second appeal and requires that matters decided in the first appeal be considered concluded. *Camargo v. State*, 337 Ark. 105, 987 S.W.2d 680 (1999). Thus, the doctrine dictates that a decision made in a prior appeal may not be revisited in a subsequent appeal. *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000). The purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single, continuing lawsuit. *Id.* However, matters that have not been decided, explicitly or implicitly, do not become law of the case merely because they could have been decided. *Camargo*, 337 Ark. 105, 987 S.W.2d 680. An example of when a matter has not been decided is when it is procedurally barred from appellate review. *See Colbert v. State*, 346 Ark. 144, 55 S.W.3d 268 (2001); *Green*, 343 Ark. 244, 33 S.W.3d 485.

In *Colbert*, this court rejected the State's assertion that the evidentiary issue raised by the appellant was barred by the law-of-the-case doctrine. This court explained: "Mr. Colbert was procedurally barred in his first appeal from challenging the admission of evidence that supported his simultaneous-possession conviction. Thus, because that issue was not before this court in the first appeal, it was not expressly or implicitly determined in *Colbert I*." 346 Ark. at 147, 55 S.W.3d at 271 (fn 1).

Similarly, in *Green*, 343 Ark. 244, 33 S.W.3d 485, this court concluded that the doctrine of law of the case did not apply where, in the previous appeal, this court held that the appellant's challenge to the trial court's comment on a witness's credibility was procedurally barred because the appellant failed to raise an objection at trial. This court explained:

> Therefore, this court's holding did not turn on the trial court's comment but upon failure to preserve. The court's decision

> would have been the same in the absence of the statement characterizing the trial judge's comments. *The opinion did not reach the issue of the trial court's comment and hence was not actually decided. No adjudication took place that would bind this court now.* Consequently, we hold that the law-of-the-case doctrine does not apply to this appeal.

Id. at 251-52, 33 S.W.3d at 490 (emphasis added).

Here, this court did not reach the merits of Cloird's jurisdiction argument in the first appeal of the *habeas* petition. We stated that we could not decide the jurisdiction issue because Cloird had failed to supply us with the pleadings, documents, and testimony necessary to review the issue. We explained that due to the flagrantly deficient abstract, we were "*unable* to determine whether the trial court lacked jurisdiction over the cause of rape." *Cloird III*, slip op. at 2 (emphasis added). No adjudication took place on the issue of jurisdiction that would prohibit us from considering the issue now. Accordingly, the doctrine of law of the case does not apply.

Before we leave this issue, we must address the holding in *McAdams v. Automotive Rentals, Inc.*, 324 Ark. 332, 924 S.W.2d 464, *cert. denied*, 519 U.S. 1013 (1996), which runs contrary to the holdings in *Colbert* and *Green*. In *McAdams*, this court held that the prior appeal to this court, which was summarily affirmed due to a flagrantly deficient abstract, was the law of the case and barred relitigation of any of the issues that were or could have been addressed in the first appeal. We believe that the more sound reasoning dictates that we apply the principle set out in *Colbert* and *Green*, that the doctrine of law of the case does not bar our consideration of an issue unless there has been an adjudication of that issue in the first appeal. Accordingly, we overrule *McAdams* to the extent that it conflicts with this principle. We turn now to the merits of Cloird's claim.

Cloird argues that because the rape for which he was charged occurred in Arkansas County and because he was not convicted of the charge of kidnapping that occurred at the nightclub in Jefferson County, the Jefferson County Circuit Court lacked jurisdiction to try him. To fully understand the issue, we must examine

the facts of the case, which reveal a continuous criminal episode that began in Jefferson County and continued into Arkansas County.

The record reflects that on the evening of January 24, 1992, the Pine Bluff Police Department received a report that a van had been stolen from a local car dealership. Later that same evening, Barbara Smith met Kurt Morris and Roosevelt Burton at a Pine Bluff nightclub called P.J.'s. As they were leaving, Ms. Smith accepted a ride from Morris and Burton to another nightclub, called Bad Bob's. Burton would later tell police that one of the guys he was with told him that they intended "to run a train on her." Morris went to get the car, while Ms. Smith and Burton waited outside the club's front door. When Morris pulled up, Burton opened the door to allow Ms. Smith to get in the backseat. Burton then surprisingly slid into the backseat next to her. Ms. Smith sensed that something was wrong, and she immediately attempted to open the other door and get out of the car. By that time, however, Morris was pulling out of the parking lot. To prevent her from getting out of the car, Burton took hold of Ms. Smith by the hair and pushed her down into the seat. Ms. Smith then began screaming.

Ms. Smith continued to scream and struggle with Burton, as Morris drove the car. At one point, Ms. Smith opened the door and attempted to jump out of the car, but the door slammed shut due to the speed that the car was traveling. Burton again took hold of her hair and pulled her back down into the seat. This time, however, Burton forced her to perform oral sex on him. When Burton became angry because she was not doing it right, Morris pulled the car off onto a dark, dirt road and stopped. The two men then took turns forcing her to have oral, vaginal, and anal sex.

They then drove from Jefferson County into that part of the city of Humphrey that is located in Arkansas County, specifically to Morris's trailer. The two men then dragged her inside the trailer, where she was physically and sexually assaulted. Ms. Smith recounted numerous instances of rape, committed by several individuals in three different rooms of the trailer. Among those she

identified as her rapists was Cloird. Throughout her confinement, Ms. Smith begged the men to let her go or take her home, but they refused. Instead, they continued to terrorize her by raping her, making her perform oral sex until she vomited, and then making her drink her own vomit. At one point, one of the men put a gun to Ms. Smith's head and pulled the trigger. Fortunately, there was no round in the chamber. Finally, the men released Ms. Smith the next day, and Morris drove her back to the city limits of Pine Bluff and released her.

Cloird was charged by information in the Jefferson County Circuit Court with having committed the crimes of kidnapping, rape, and theft of property. The amended information specifically reflected that Cloird was charged as an accomplice, along with Morris, Burton, and Bobby Foster, to the crimes of rape and kidnapping. Cloird does not deny the evidence that placed him at the scene of the trailer, where Ms. Smith was held against her will and repeatedly raped. However, he asserts that there was no evidence placing him at the scene of her abduction in Jefferson County. Thus, he contends that Jefferson County had no jurisdiction to try him as an accomplice to rape and kidnapping. He is wrong for two reasons.

First, Cloird is legally mistaken when he contends that he cannot be charged as an accomplice if he was not physically present at the crime scene. A person is an accomplice when he or she renders the requisite aid or encouragement to the principal with regard to the offense at issue. *See Davis v. State*, 350 Ark. 22, 86 S.W.3d 872 (2002) (*substituted opinion on denial of rehearing*). It is not necessary that the accomplice actually be present at the scene of the crime or physically commit the crime, so long as the accomplice aided, assisted, or encouraged the crime. *Id.* "A participant cannot disclaim responsibility because he did not personally take part in every act that went to make up the crime as a whole." *Id.* at 31, 86 S.W.3d at 878 (citing *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991), and *Parker v. State*, 265 Ark. 315, 578 S.W.2d 206 (1979)).

Second, Cloird is factually mistaken when he asserts that there is no evidence placing him at the scene of the victim's

abduction in Jefferson County. The record reflects that during the night in question, Cloird and Foster stole a van from Smart Chevrolet in Pine Bluff and drove it to the trailer in Humphrey. Pine Bluff Detective Susie Powell testified that Cloird admitted to her that he and Foster had stolen the van from the dealership and drove it to a trailer in Humphrey. The victim, Ms. Smith, testified that when she was abducted by Morris and Burton from the parking lot of P.J.'s, she noticed a van behind Morris's car. Tremaine Parker, a very reluctant witness for the State, testified that Cloird told him that he stole the van and drove it first to P.J.'s, and then to the trailer in Humphrey. Based on these facts, Jefferson County had jurisdiction to try Cloird.

In Arkansas, jurisdiction is statutorily provided for in Ark. Code Ann. § 16-88-105(b) (1987), which states: "The local jurisdiction of circuit courts and justices' courts shall be of offenses committed within the respective counties in which they are held." *See also* Ark. Const. art. 2, § 10 (providing in part that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury of the county in which the crime shall have been committed[.]") An offense that occurs in more than one county is governed by Ark. Code Ann. § 16-88-108(c) (1987), which provides: "Where the offense is committed partly in one county and partly in another, or the acts, or effects thereof, requisite to the consummation of the offense occur in two (2) or more counties, the jurisdiction is in either county." The purpose of this section is to prevent miscarriages of justice by extending the lines of jurisdiction beyond the limits prescribed by the common law; thus, this section is remedial in nature and must be liberally construed. *State v. Osborn*, 345 Ark. 196, 45 S.W.3d 373 (2001) (citing *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972)). Moreover, the crime of kidnapping is governed by its own jurisdictional provision, Ark. Code Ann. § 16-88-110(a) (1987), which provides that where a kidnapping occurs in more than one county, "the jurisdiction shall be in the county in which the kidnapping, seizing, or confining was committed, or in any county in which it was continued."

Our cases have consistently recognized that when a crime begins in one county and proceeds to culmination in

another county, both counties have jurisdiction to prosecute the crime. For example, in *Ellis v. State*, 291 Ark. 72, 722 S.W.2d 575 (1987) (*per curiam*), this court denied relief under Rule 37 where the defendant alleged that Jefferson County lacked jurisdiction to try him for kidnapping and aggravated robbery. Relying on Ark. Stat. Ann § 43-1414, now codified as section 16-88-108(c), this court held: "The offense of kidnapping in this case occurred in Jefferson County and culminated in the aggravated robbery of the victim in Pulaski County. Under these facts, Jefferson County had jurisdiction to try the petitioner for both offenses." *Id.* at 73, 722 S.W.2d at 576 (citing *Cozzaglio v. State*, 289 Ark. 33, 709 S.W.2d 70 (1986)).

The facts in *Cozzaglio*, 289 Ark. 33, 709 S.W.2d 70, upon which this court relied in *Ellis*, were similar to those in the present case. There, the kidnapping occurred in Washington County, continued into Madison County, and culminated with the victim's rape in Madison County. The defendant was tried and convicted of the kidnapping in Washington County, and then tried and convicted of the rape in Madison County. On appeal, the defendant argued that the first trial court had erred in refusing to join the offenses in one trial. This court agreed and reversed, on the ground that both counties had jurisdiction over both offenses. *See also Wilson v. State*, 298 Ark. 608, 770 S.W.2d 123 (1989) (reiterating the law that separate crimes committed in one continuous episode in more than one county may be tried in either county and require joinder in one county if the defendant requests it).

Similarly, in *Patterson v. State*, 306 Ark. 385, 815 S.W.2d 377 (1991), this court held that although the murder occurred in Greene County, Craighead County had jurisdiction to try the appellant because some of the acts requisite to the murder occurred in Craighead County. *See also Pilcher v. State*, 303 Ark. 335, 796 S.W.2d 845 (1990) (holding that both Saline County and Grant County had jurisdiction to try the appellant for murder, where the actual killing occurred in one county, but the acts requisite to the consummation of the murder and the subsequent disposal of the body occurred in the other county); *Thrash v. State*, 291 Ark. 575, 726 S.W.2d 283 (1987) (holding that where the

murder and robbery occurred in one county, but the plan was hatched in another county and the body was subsequently returned to that other county, both counties had jurisdiction to try the appellant); *Bottom v. State*, 155 Ark. 113, 244 S.W. 334 (1922) (holding that the State has the right to elect in which county the offense may be prosecuted where the jurisdiction is concurrent under the statutes, and until the final judgment, which operates as a bar to further prosecution in either county, the State's right of selection of the forum continues).

Here, the facts clearly establish that Ms. Smith was kidnapped from the parking lot of P.J.'s, a nightclub in Jefferson County, and eventually driven to a trailer in Arkansas County. Along the way, Ms. Smith was repeatedly raped by Morris and Burton. After she was abducted by Morris and Burton, Ms. Smith noticed a van behind Morris's car. Cloird confessed to police that he and Foster stole a van that night from a Pine Bluff dealership and drove it to Humphrey. Cloird also told Tremaine Parker that after he and Foster stole the van, they drove it to P.J.'s and then to Morris's trailer in Humphrey. Once at the trailer, the perpetrators continued to restrain Ms. Smith against her will, and Morris, Burton, and Cloird repeatedly raped her. This evidence clearly demonstrates that the crimes against Ms. Smith were committed in a single criminal episode that began in Jefferson County and culminated in Arkansas County. Under our statutes and case law, either county had jurisdiction to try Cloird.

Finally, we disagree with Cloird's argument that because he was acquitted of the crime of kidnapping, Jefferson County lacked jurisdiction to try him for the rape. As set out above, the evidence established that both counties had jurisdiction to try him for the crimes. The fact that the jury ultimately concluded that Cloird was not guilty of the offense of kidnapping has no bearing on the trial court's power to try him. We thus deny the writ of *habeas corpus*.

IMBER, J., not participating.

Chan HOLCOMBE *v.* Steve MARTS, d/b/a Steve's Imports and Ray Hodnett and Dona Hodnett

02-1023 99 S.W.3d 401

Supreme Court of Arkansas
Opinion delivered March 6, 2003

Joel W. Price, for appellant.

Hal W. Davis, for appellees.

JIM HANNAH, Justice. Appellant Chan Holcombe appeals a judgment and order of dismissal entered on May 8, 2002. Holcombe alleges that the trial court erred in denying his February 21, 2002, motion to proceed *pro se*, and in permitting discharged counsel to sign and approve the judgment and order dismissing the case. Holcombe provides no convincing authority for his argument that once he informed the trial court that he had discharged his attorney, the trial court erred as a matter of law in denying his motion to proceed *pro se* and to enter an order relieving his attorney of any further responsibility to this case. This assignment of error will not be considered by the court.

We do not reach the issue of whether the trial court was clearly erroneous in denying Holcombe's motion to proceed *pro se* because no transcripts of hearings or evidence of any form showing why the trial court denied the motion has been provided by Holcombe. We further hold that no objection was made below to Holcombe's counsel signing and approving the judgment and order of dismissal. Because the issue was not objected to or raised below, it will not be heard on appeal.

Facts

On February 21, 2002, Holcombe filed a motion to proceed *pro se*, informing the trial court that he had discharged his attorney and requesting the trial court to enter an order relieving his attorney. On March 4, 2002, the trial court entered an order denying the motion to proceed *pro se* and relieve counsel. No hearing was held on the motion to proceed *pro se*. On April 15, 2002, a joint motion of dismissal with prejudice was signed and filed by counsel for the appellee and the counsel Holcombe asserts he had discharged.

[redacted] This case was settled and dismissed by the parties. No trial was held; therefore, no jury was empaneled. All matters at issue were heard by the trial court alone. The standard of review on appeal is whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Shelter Mut. Ins. Co. v. Kennedy*, 347 Ark. 184, 60 S.W.3d 458 (2001); *Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702 (1997).

Holcombe alleges that the trial court erred when it summarily denied his motion to relieve his counsel and proceed *pro se*. He cites the commentary to Model Rule of Professional Conduct 1.16, which provides that "a client has a right to discharge a lawyer at any time, with or without cause. . . ." Model Rule of Professional Conduct 1.16 (2002). Holcombe argues that this statement in the commentary supports his argument that he has the right to discharge his attorney and proceed *pro se*, and that the trial court erred as a matter of law when it denied his motion.

Holcombe acknowledges Ark. R. Civ. P. 64 (2002), which controls addition and withdrawal of counsel and provides that counsel may not withdraw absent permission of the court. However, citing *Jones-Blair Co. v. Hammett*, 326 Ark. 74, 930 S.W.2d 335 (1996), Holcombe argues that under this court's interpretation, Rule 64 is aimed at protecting the client's interests, and the issue of withdrawal is to be viewed from the point of view of the client, not the attorney.

The issue presented is not whether Holcombe has a right to discharge his attorney or whether Rule 64 is to be interpreted from one viewpoint or another, but rather whether the trial court erred as a matter of law in denying Holcombe's motion to proceed *pro se* when he informed the court he had discharged his attorney. Holcombe simply offers no convincing authority to support his argument that a litigant must be allowed to proceed *pro se* when a litigant discharges his or her attorney and moves to proceed *pro se*. This court has repeatedly held that we do not consider assignments of error that are unsupported by convincing authority. *Bonds v. Carter*, 348 Ark. 591, 75 S.W.3d 192 (2002); *Hurst v. Holland*, 347 Ark. 235, 61 S.W.3d 180 (2001); *Ark. Pub. Defender Comm'n v. Greene County*, 343 Ark. 49, 32 S.W.3d 470 (2000).

Holcombe, however, further argues that the trial court also erred in denying his motion because he provided the trial court proof that he had previously represented himself successfully in this suit *pro se* and that he wished to again proceed *pro se* because his counsel was not adequately pursuing his case. Holcombe's motion makes no assertion that his counsel was performing inade-

quately. Nothing in the abstract shows that the issue of adequacy of counsel was raised before the trial court. An issue cannot be raised for the first time on appeal. *Coles v. Laws*, 349 Ark. 177, 76 S.W.3d 878 (2002).

Additionally, Holcombe is arguing that the trial court was clearly erroneous in denying his motion to proceed *pro se*. We cannot reach this issue because the record and abstract are devoid of any proceedings or pleadings that show why the trial court denied the motion. Without a record of some form, we cannot conduct a meaningful review of Holcombe's argument. This court has repeatedly stated that it is the appellant's burden to produce a record sufficient to support his arguments on appeal. *Miller v. State*, 328 Ark. 121, 942 S.W.2d 825 (1997).

Finally, Holcombe argues that the trial court erred in permitting his counsel to sign and approve the judgment and order of dismissal. The motion to proceed *pro se* was denied by an order entered March 4, 2002. The judgment and order of dismissal was entered May 8, 2002, in other words, some eight weeks after the trial court denied Holcombe's motion to proceed *pro se*. Based on the trial court's denial of the motion to proceed *pro se*, Holcombe's attorney was not relieved and was still serving as Holcombe's attorney. In any event, Holcombe does not argue, and the abstract does not reveal that Holcombe objected or ever brought this issue to the attention of the trial court. The trial court was never given an opportunity to consider the issue. It is settled law that for a trial court to have committed reversible error, timely and accurate objections must have been made, so that the trial court was given the opportunity to correct the error. *John Cheeseman Trucking, Inc. v. Dougan*, 313 Ark. 229, 853 S.W.2d 278 (1993); *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (1980). There is no indication this issue was raised below, and it will not be considered on appeal for the first time.

Affirmed.

Joe COPELAND *v.* STATE of Arkansas

CR 03-180 99 S.W.3d 426

Supreme Court of Arkansas
Opinion delivered March 6, 2003

Norman G. Co, for appellant.

No response.

PER CURIAM. Appellant Joe Copeland, by and through his attorney, has filed a motion for a belated appeal and request for new counsel. His attorney, Norman G. 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 for a belated appeal is granted. The motion requesting new counsel is denied. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Alisa D. EFURD *v.* STATE of Arkansas

CR 03-140 99 S.W.3d 418

Supreme Court of Arkansas
Opinion delivered March 6, 2003

J. F. Atkinson, Jr., for appellant.

No response.

PER CURIAM. Attorney J. F. Atkinson, Jr., represents appellant Alisa Danieal Efurd, who was convicted of first-degree murder by a jury in the Sebastian County Circuit Court and was sentenced to twenty-five years in the Arkansas Department of Correction. On February 23, 1999, the Arkansas Court of Appeals issued a mandate affirming Efurd's conviction; and, on March 19, 1999, Efurd filed a timely *pro se* Rule 37 petition, a petition to proceed *in forma pauperis*, and a motion for appointment of counsel. On April 9, 1999, the trial court issued an order to appoint J. F. Atkinson, Jr., to represent Efurd in her Rule 37 proceeding; and, on April 12, 1999, the trial court sent a notice to counsel stating, "Please find an order appointing you (Jeff Atkinson) to represent Ms. Efurd in her Rule 37 Petition. No hearing has been scheduled as of this date." On August 31, 1999, Efurd's Rule 37 petition was summarily denied without making written findings specifying the parts of the files and records relied upon in denying the petition.

On September 9, 1999, the trial court entered an order awarding attorney fees to J. F. Atkinson, Jr. Efurd notified Atkinson of her desire to appeal; and, on November 10, 1999, Atkinson filed Efurd's notice of appeal and designation of record. The court

reporter filed the transcript with the Sebastian County Circuit Court Clerk and tendered to counsel the transcript on or about February 10, 2000.

Atkinson thereafter failed to timely file the transcript with the clerk of this court, due to the file and transcript sitting therein, having been misfiled or lost and forgotten about according to Atkinson. Atkinson asserts that while searching for another file which was misfiled, Atkinson came across Efurd's file. Then, on February 7, 2003, Atkinson filed a motion to file belated appeal and rule on the clerk.

Based on the circumstances described above, we order J. F. Atkinson, Jr., to appear before this court on March 20, 2003, at 9:00 a.m., to show cause why he should not be held in contempt for failing to timely perfect the appeal.

LONGVIEW PRODUCTION COMPANY *v.*
Dub DUBBERLY, *et al.*

03-156 99 S.W.3d 427

Supreme Court of Arkansas
Opinion delivered March 10, 2003

PER CURIAM. On February 11, 2003, the United States District Court for the Western District of Louisiana filed with this court a motion to certify a question of law and certification order pursuant to Rule 6-8 of the Rules of the Supreme Court and Court of Appeals. Rule 6-8 was adopted in 2002 pursuant to Section 2 (D) (3) of Amendment 80 to the Arkansas Constitution: "The Supreme Court shall have original jurisdiction to answer questions of state law certified by a court of the United States which may be exercised pursuant to Supreme Court rule." The pending motion is the first filed pursuant to this provision and presents the first opportunity for this court to consider its application.

At the outset, we note observations made by other courts concerning the certification process.

> The growth of the Uniform Certification of Questions of Law Act has largely been a response to the Abstention Doctrine, which was a necessary outgrowth of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). In *Erie*, the Court held that in diversity cases federal courts were no longer "free to exercise an independent judgment as to what the common law of the State is or

> should be; . . ." but must apply the substantive law as evolved by the state either through its statutes or its court decisions.

Morningstar v. Black and Decker Manufacturing, 162 W. Va. 857, 253 S. E. 2d 666, 669 (W. Va. 1979).

> Many commentators have noted the benefits of certification. The procedure: (i) allows federal courts to avoid mischaracterizing state law (thereby avoiding a misstatement that might produce an injustice in the particular case and potentially mislead other federal and state courts until the state supreme court finally, in other litigation, corrects the error); (ii) strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to conclusively decide an issue; (iii) avoids conflicts between federal and state courts, and forestalls needless litigation; and (iv) protects the sovereignty of state courts. (*See, e.g.*, Braun, *A Certification Rule for California* (1996) 36 Santa Clara L.Rev. 935, 937-942; Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law* (1995) 41 Wayne L.Rev. 273, 299-301; see also Goldschmidt, *Certification of Questions of Law: Federalism in Practice* (1995 Amer. Judicature Soc'y.) pp. 3-10.)

Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal. 4th 352, 993 P. 2d 334, 338 (Cal. 2000).

[redacted] Certification will only be necessary when our substantive law is unclear on an issue "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." Rule 6-8(a)(2).

> [O]ur sister-state high courts overwhelmingly have rejected contentions that in answering a certified question a court issues an improper advisory opinion. The weight of authority holds that a high court's answer to a certified question is *not* an improper advisory opinion so long as (i) a court addresses only issues that are truly contested by the parties and are presented on a factual record; and (ii) the court's opinion on the certified question will be dispositive of the issue, and *res judicata* between the parties. (See, e.g., *Schlieter v. Carlos* (1989) 108 N.M. 507, 775 P.2d 709, 710; *Wolner v. Mahaska Industries, Inc.* (Minn.1982) 325 N.W.2d 39, 41; *Elliott, supra,* 74 Wash.2d 600, 446 P.2d 347, 354-355; *see generally* Braun, *supra,* 36 Santa Clara L.Rev. 935, 947.)

Los Angeles Alliance, 993 P. 2d at 338-39.

[redacted] Acceptance of certification is a matter of judicial discretion, and this court will accept certification of a question of Arkansas law only where all facts material to the question of law to be determined are undisputed, and there are special and important reasons therefor, including, but not limited to, any of the following:

> 1. The question of law is one of first impression and is of such substantial public importance as to require a prompt and definitive resolution by this court.
>
> 2. The question of law is one with respect to which there are conflicting decisions in other courts.
>
> 3. The question of law concerns an unsettled issue of the constitutionality or construction of a statute of this State.

See Pennsylvania Supreme Court's *Internal Operating Procedures Regarding Certification of Questions of Law.*

[redacted] As to the pending motion before the court, it concerns an unsettled issue of the construction of a statute. Therefore, we accept the certification. As stated by the federal district court, the question is: "Does the phrase 'person or persons' in Ark. Code Ann. § 18-44-211 ('Act 513') include a limited liability company, in light of Ark. Code Ann. § 18-44-202 ('Act 615'), the language of which clearly provides a lien to a 'person, corporation, firm, association, partnership, materialman, artisan, laborer, or mechanic?'" To that statement of the issue, we note that the certifying court points out that in 1837 the Arkansas General Assembly enacted a provision for construction of Arkansas Acts that states the following: "[w]hen any subject matter, party, or person, is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included." Ark. Code Ann. § 1-2-203(a). The federal district court points out that this rule of construction applies "in all cases," Ark. Code Ann. § 1-2-201, and asserts that the conflict presented by these statutes, viewed collectively, is as follows: whether the general rule of statutory construction applies, or whether the Arkansas General Assembly intended to carve out

an exception to this rule by its use of the phrase "person or persons" in Act 513 and its contemporaneous use of the phrase "person, corporation, firm, association, partnership, materialman, artisan, laborer, or mechanic" in Act 615? This *per curiam* order constitutes notice of our acceptance of the certification as herein reformulated. No portion of the record is to be filed at this time.

In considering this motion, we have concluded that Rule 6-8 may need to be supplemented to provide additional procedural details, but the prudent course of action appears to be to have further experience with this new procedure before considering amendments to the rule. A Rule 6-8 matter is an original action involving questions of law only. For purposes of the pending proceeding, the following requirements are imposed:

> A. Time limits under Rule 4-4 will be calculated from the date of this *per curiam* order accepting certification. The plaintiff in the underlying action, Longview Production Company, is designated the moving party and will be denoted as the "Petitioner," and its brief is due 30 days from the date hereof; the defendants, Oil Field, *et al.*, shall be denoted as the "Respondent," and its brief shall be due 30 days after the filing of Longview's brief, and Petitioner may file a reply brief within 15 days of Respondent's filing. The Attorney General and any other interested parties filing *amicus curiae* briefs (see D, below) shall file briefs at the same time as the Respondent's brief.
>
> B. The briefs shall be as in other cases except for the content. Only the following items required in Rule 4-2(a) shall be included:
>
> (3) Point on appeal which shall correspond to the "certified question of law to be answered" in the federal district court's certification order, as reformulated.
>
> (4) Table of authorities.
>
> (6) Statement of the case which shall correspond to the "facts relevant to the certified question of law" as stated in the federal district court's certification order.
>
> (7) Argument.
>
> (8) Addendum, if necessary and appropriate.
>
> (9) Cover for briefs.

C. Oral argument will only be permitted if the court concludes that it will be helpful for presentation of the issue.

D. Rule 4-6 with respect to *amicus curiae* briefs will apply. Because the certified question involves statutory interpretation, a copy of this *per curiam* order accepting the certification will be sent to the Arkansas Attorney General, and that office shall prepare an *amicus curiae* brief on the issue.

E. This matter will be processed as any case on appeal and will not be given any special priority.

F. Rule XIV of the Rules Governing Admission to the Bar shall apply to the attorneys for the Petitioner and Respondents.

CORBIN, J., not participating.

Dan UTLEY *v.* The CITY OF DOVER, Arkansas

02-243 101 S.W.3d 191

Supreme Court of Arkansas
Opinion delivered March 13, 2003

[redacted]

The Rose Law Firm, A Professional Association, by: *Michael N. Shannon*, for appellant.

David H. McCormack, for appellee.

W. H. "Dub" Arnold, Chief Justice. This appeal involves the interpretation of a statute allowing for annexation of lands contiguous to municipalities and the exceptions thereto. The appellant, Dan Utley, challenged an annexation approved by a majority of voters in a special election held by the City of Dover, on April 10, 2001; appellant complained that the annexation violated Arkansas law set forth in Ark. Code Ann. §§ 14-40-301 to 304 (Repl. 1998 and Supp. 2001). The trial court upheld the annexation. We affirm.

On February 6, 2001, appellee, the City of Dover (hereafter "Dover"), adopted its Ordinance 2001-2, entitled "An Ordinance Submitting to the Voters of the City of Dover, Arkansas, and Other Affected Persons, the Questions of Annexation to the City

of Dover, Arkansas, Certain Contiguous Territory" (hereafter the "Ordinance"). A special election was held by Dover on April 10, 2001, in which a majority of the voters participating approved the annexation.

Appellant is the co-owner of property within the city limits of Dover. He also is a 25 percent shareholder in an entity that owns property within the proposed area to be annexed. On May 2, 2001, appellant filed suit in the Circuit Court of Pope County, challenging the annexation. The complaint alleged that annexation violated Arkansas law set forth in Ark. Code Ann. §§ 14-40-301 to 304.

A trial was held before the Pope County Circuit Court on October 3, 2002, after which the court issued a ruling dismissing appellant's complaint and upholding the annexation election. It is from that ruling that appellant brings the instant appeal. Appellant asserts the following eight points on appeal:

1) The trial court erred in finding that the lands in the annexed area were platted and held for sale or use as municipal lots pursuant to Ark. Code Ann. § 14-40-302(a)(1);

2) The trial court erred in finding that the lands in the annexed area, whether platted or not, were held to be sold as suburban property pursuant to Ark. Code Ann. § 14-40-302(a)(2);

3) The trial court erred in finding that the lands in the annexed area represented the actual growth of the City of Dover beyond its legal boundaries pursuant to Ark. Code Ann. § 14-40-302(a)(3);

4) The trial court erred in finding that the lands in the annexed area were needed for proper municipal purposes pursuant to Ark. Code Ann. § 14-40-302(a)(4);

5) The trial court erred in finding that the lands were valuable by reason of their adaptability for prospective municipal uses pursuant to Ark. Code Ann. § 14-40-302(a)(5);

6) The trial court erred in finding that appellant failed to establish that the highest and best use of any parcel within the subject area is horticultural or agricultural pursuant to Ark. Code Ann. § 14-40-302(b);

7) The trial court erred in failing to grant appellant's motion to amend final judgment wherein appellant requested that the trial court void the annexation pursuant to Ark. Code Ann. § 14-40-304(b) because the City of Dover had failed to use the proper standards outlined in Ark. Code Ann. § 14-40-302 when determining the lands to be annexed;

8) The trial court erred in denying appellant's motion to disqualify counsel for the City of Dover.

Appellee, Dover, cross-appeals, asserting simply that the trial court erred in failing to dismiss the complaint of the appellant since the same was untimely. Appellee maintains that, pursuant to Ark. Code Ann. § 14-40-304(a), any challenge to an annexation should have been filed within thirty days after the election and that appellant failed to properly bring such action in a timely manner. The trial court disagreed with this and refused to dismiss appellant's complaint. Appellee asserts that this was error.

[redacted] This case is governed by Ark. Code Ann. §§ 14-40-301 to 304 concerning municipal annexation of contiguous lands through election. Our standard of review in annexation cases is that the order of the circuit court will be upheld unless it is clearly erroneous. *Holmes v. City of Little Rock*, 285 Ark. 296, 686 S.W.2d 425 (1985). Section 14-40-302(a) sets forth five acceptable bases upon which an annexation by election may be based. Specifically, section 14-40-302(a) states as follows:

> (a) By vote of two-thirds (2/3) of the total number of members making up its governing body, any municipality may adopt an ordinance to annex lands contiguous to the municipality if the lands are any of the following:
>
> (1) Platted and held for sale or use as municipal lots;
>
> (2) Whether platted or not, if the lands are held to be sold as suburban property;
>
> (3) When the lands furnish the abode for a densely settled community or represent the actual growth of the municipality beyond its legal boundary;
>
> (4) When the lands are needed for any proper municipal purposes such as for the extension of needed police regulation; or

(5) When they are valuable by reason of their adaptability for prospective municipal uses.

These bases have been referred to as the *Vestal* criteria after this Court's decision in *Vestal v. Little Rock*, 54 Ark. 321, 15 S.W. 891 (1891), from which they originate. It is not necessary that all five criteria be met. Rather, the lands must meet only one of the five. *See Town of Houston v. Carden*, 332 Ark. 340, 965 S.W.2d 131 (1998). However, this Court has also made it clear that if a part of the proposed area does not meet one of the five requirements, the annexation of the entire area is void *in toto*. *Id.*; *see also Gay v. City of Springdale*, 298 Ark. 554, 769 S.W.2d 740 (1989)(holding that if one of several tracts is found to be improperly included, the entire annexation must fail).

Further, § 14-40-302(b) sets forth certain types of land that cannot be annexed, regardless of whether they might meet one or more of the criteria set out in subsection (a). Relevant to this case is the language in subsection (b)(1)(A), which prevents annexation of lands that "[h]ave a fair market value at the time of the adoption of the ordinance of lands used only for agricultural or horticultural purposes and the highest and best use of the lands is for agricultural or horticultural purposes." *Town of Houston*, 332 Ark. at 348, 965 S.W.2d at 135 (1998)(holding that agricultural and horticultural lands are not to be annexed when their highest and best use is for agricultural and horticultural purposes).

I. Platted and Held for Use as Municipal Lots — Ark. Code Ann. § 14-40-302(a)(1)

Appellant asserts that in its final judgment, the trial court found that appellant "did not prove that none of the lands in the annexed area were platted and held for sale or use as municipal lots as required by Ark. Code Ann. § 14-40-302(a)(1)." Appellant maintains that this was error and references several reasons to support his position. However, when looking at the actual final judgment entered by the trial court, it actually reads as follows:

The court specifically finds that the plaintiff [appellant] *did prove* that none of the lands in the annexed area were platted and

> held for sale or use as municipal lots as required by Ark. Code Ann. § 14-40-302(a)(1). [Emphasis added.]

It appears, from the reading of the judgment, that the trial court actually ruled in appellant's favor on this point, and appellant obviously misread the judgment to read that he "did *not* prove . . . ." As such, it is unnecessary for us to address this point, as appellant prevailed on the matter in the trial court and no cross-appeal was brought on this point.

II. Whether Platted or Not, Held to be Sold as Suburban Property — Ark. Code Ann. § 14-40-302(a)(2)

In its final judgment, the trial court found that appellant "failed to offer sufficient evidence that the lands in question, whether platted or not, were not held to be sold as suburban property." To support its finding, the trial court stated that "[t]he testimony established that the lands in question met the definition of 'suburban' because they are in close proximity to the city limits of the City of Dover, Arkansas, and the City of Russellville, Arkansas, and there are utilities, businesses, a shopping center, a church and residences in the area which are indicative of a 'suburban' area." Appellant asserts that this finding was erroneous for several reasons.

First, appellant asserts that the trial court misapplied appellant's burden of proof by requiring appellant to prove that all of "the lands in question" in the annexed area were not held to be sold as suburban property, when he was actually only required to prove that a part of the lands did not meet the criteria. Appellee claims that appellant has mischaracterized the trial court's opinion and that the final judgment makes clear that the court was well aware of the statutory requirements for annexing property and of the appellant's burden of proof. We agree. There is simply no language contained in the final judgment from which it can be said that the trial court ruled as appellant argues.

Next, appellant asserts that the trial judge erred because he determined that the lands in the area met the definition of the word "suburban," rather than finding that the lands in the annexed area were "held to be sold as suburban property," as referenced in

the statute. Appellant maintains that the trial court's definition of the word "suburban" is irrelevant under the statute and that that was not the appropriate standard. We disagree. Defining the word "suburban" is clearly relevant to a determination of whether the lands in the area being annexed were "held to be sold as suburban property."

Appellant further argues that in regard to whether the lands were "held to be sold as suburban property," the court completely ignored the testimony of appellant and Ms. Hendrickson (who owns six acres within the annexed area) that each of their properties were not held to be sold as suburban and that appellee's witnesses provided no guidance on this subject. We find no merit to this argument. First, the trial court is in the best position to judge the credibility of witnesses. Next, both appellant and Ms. Hendrickson were interested parties. This Court has long held 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. *See Cadillac Cowboy, Inc. v. Jackson*, 347 Ark. 963, 69 S.W.3d 383 (2002). Furthermore, such testimony does not prohibit a finding by the trial court in regard to other properties within the area to be annexed meeting this criteria. The law only requires that a tract meet one of the five criteria and merely because the property of appellant and Ms. Hendrickson may not meet this criteria does not mean that no other properties meet the criteria.

In regard to the appellant's assertion that none of appellee's witnesses provided guidance to the court on this subject, it appears to the contrary. Mayor Waldo testified that he had spoken with "three of the landowners that have major portions of the property to be annexed" and that "they had indicated to me that they were going to — that they wanted all of their land in the city limits if we did annex and that they were going to be subdividing that and selling lots for residential and commercial." While appellant may now say that he disagrees with such testimony, it was solicited by his own attorney during direct examination of Mayor Waldo. Such testimony clearly constitutes a basis for the trial court's decision on this point.

We further find it notable that appellant's present assertion is inconsistent with certain answers to interrogatories he gave prior to trial and was asked about during trial. One of those interrogatories asked appellant to identify any tracts which did not meet any of the five criteria. He acknowledged that his answer to this interrogatory was that he was "in the process of determining and compiling the list of specific tracts that do not meet the criteria in the statute," and that he further answered by stating that the response would be supplemented when such information was available. Appellant then admitted that he had not supplemented his answer and identified each tract and the criteria which that tract did not meet.

Moreover, during cross-examination, appellant admitted that in his deposition, he had testified that at some point it was possible that his property could be developed for residential or commercial use. He further acknowledged that directly across the road from his property was a cemetery and some commercial development. In fact, although he now criticizes the decision of the trial court and the fact that appellee's witnesses had not been on each tract of land within the area being annexed, appellant admitted that he had not sat down and looked at each of the areas being annexed and determined which could possibly be developed for residential or commercial purposes.

While appellant contends that the decision of the trial court was erroneous, such an argument ignores substantial testimony to the contrary. Specifically, upon examination of the testimony of Mayor Waldo in appellee's case-in-chief, the mayor testified that he was familiar with the five criteria and that he had reviewed the area to be annexed and, in his opinion, the area met the criteria under the statute.

Possibly the most compelling testimony presented from the viewpoint of the appellee was the testimony of Jim Von Tungeln, an urban planning consultant certified by the American Institute of Certified Planners, which is the professional arm of the American Planning Association. Von Tungeln testified that he had worked as the city planner on a consulting basis for the cities of Russellville, Searcy, Cabot, El Dorado, Harrison, and, on a less

frequent basis, for some ten other cities. He testified that an urban planner generally looks at the planning boundary of a city which can extend beyond the city limits and within that plan for orderly growth. He testified that he is familiar with the five criteria that are involved in annexation issues. He further testified that he had looked at appellant's Exhibit No. 2, which consisted of a map of the area being annexed and that he had generated a map of his own. Von Tungeln then gave a very detailed list of all actions that he had taken in arriving at an opinion as to whether the area being annexed met the five statutory criteria.

It was his opinion that every parcel of land in the area being annexed was held to be sold as suburban property. While the fact that Mr. Von Tungeln may not have personally visited with each property owner in the area might go to the weight to be given his testimony, he was qualified as an expert witness and certainly demonstrated a thorough familiarity with the area over an extended period of time.

Appellant argues that the only way to determine whether lands were actually being held for sale as suburban property was to ask the actual landowners themselves. Appellant seems to be forgetting that it was he who actually had the burden of proving that the lands being annexed did not meet one of the criteria. His argument also ignores the fact that the case law is clear that a majority of electors voting in favor of annexation makes a *prima facie* case for annexation, and the burden rests on the plaintiff [appellant here] to produce sufficient evidence to defeat the *prima facie* case. *Gay v. City of Springdale*, 298 Ark. 554, 769 S.W.2d 740 (1989). If appellant believed that tracts other than his and Ms. Hendrickson's did not meet this criteria, appellant should have called those landowners as witnesses; he chose, however, not to do so.

In short, the record reflects that both appellant and Ms. Hendrickson testified that their property was not being held to be sold as suburban property, while Mr. Von Tungeln and Mayor Waldo testified that all the property in the area being annexed met this criteria. Under our standard of review of an

annexation contest, appellant has failed to demonstrate that the trial court's ruling was clearly erroneous on this point.

III. Actual Growth of the City of Dover Beyond its Legal Boundaries — Ark. Code Ann. § 14-40-302(a)(3)

The trial court found that the annexed area represented "the actual growth of the area of the City of Dover beyond its legal boundary." Appellant asserts that this finding was not supported by the evidence. Appellant maintains that the trial court misapplied the statute on this point in that, rather than basing its decision on whether there was any "actual" growth, the trial court impermissibly based its opinion on testimony that the annexed area was going to be a growth area in the future.

Appellant's argument seems to be that, before this criteria can be met, there must have already been substantial growth of a city into an area before that area can be annexed. Appellant cites no authority for this proposition. This Court has said on numerous occasions that it 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. *See Stilley v. James*, 347 Ark. 74, 60 S.W.3d 410 (2001).

Appellee contends, and we agree, that the requirement that an area being annexed represents the actual growth of a municipality does not mean that the municipality must have already grown into the area prior to annexation. One of the primary purposes of annexation by a municipality is to have *orderly* growth. If this Court were to accept the argument of appellant, such a purpose would be thwarted.

Even if appellant's argument had merit and this Court accepted same, there was testimony from which the trial court could have determined that the area being annexed represented the actual growth area of the appellee. Specifically, Mr. Hamilton (called by appellant and qualified as an expert in the field of certified general appraisers) testified that the commercial development

of Dover would go south and that south of the city was the actual growth of the commercial area of Dover as it extends.

The testimony of Mr. Von Tungeln on this criteria also clearly supports the decision reached by the trial judge. Although appellant asserts that because some of the property being annexed is within a flood plain, this means that it cannot be developed or meet any of the five criteria, Von Tungeln's testimony was to the contrary. In fact, he even gave specific examples of properties within flood plains being developed to generate income.

As with appellant's other points in this appeal, the record contains testimony that is favorable to both parties. When there is testimony that supports the decision of the trial court, there can be no demonstration that the decision reached was clearly erroneous. We, therefore, affirm the trial court on this point, as well.

IV. Needed for Proper Municipal Purposes — Ark. Code Ann. § 14-40-302(a)(4)

The trial court found that this element of the statute had been met because "the lands in question are needed for the purpose of municipal growth and expansion." Appellant asserts that the sheer size of the annexed area attempted by Dover belies this finding and supports the contrary finding that the annexation was actually a "land grab." Appellant cites *Town of Houston, supra.*, in which the annexation was held improper where the town in that case had no real need for the additional acres and persons within the annexed area. Appellant further maintains that this additional alleged municipal purpose was not listed or described in any manner in the ordinance in question and that, for this reason, appellee should be estopped from relying upon this alleged municipal purpose to uphold its annexation.

The primary problem with appellant's arguments on this point is that they were not made to the trial court and are being raised for the first time on appeal. We have clearly held that argument, even constitutional arguments, are improperly raised for the first time on appeal. *Jones v. Jones*, 347 Ark. 409, 64 S.W.3d

728 (2002). Appellant has simply failed to preserve the arguments it now makes on this point for appeal.

Appellant further argues that, to expand the definition of "municipal purposes" as far as the trial court did, essentially reads subsections (a)(1), (a)(2), and (a)(3) out of the statute. This argument seems to ignore the fact that the *Vestal* criteria are in the disjunctive, as discussed earlier. *Gay v. City of Springdale, supra.* If property meets *any* of the criteria, then it does not matter that it may not meet any of the others. In addition, appellant cites no authority for his argument that the desire for a city to grow is not a "proper municipal purpose." Appellant simply notes that the language "proper municipal purpose" is broad.

Mayor Waldo testified that there were very few residential sites within the city limits of Dover; that the population of Dover had grown 20 to 25 percent in the last ten years; that the City of Dover was already providing utility service to a number of people in the area being annexed and that the city had a lot of infrastructure already in place; and, that there were a number of businesses and lands in the area being developed, divided, and subdivided. Finally, he testified that all of the lands in the annexed area were valuable by reason of their adaptability for prospective municipal purposes.

The testimony of Mr. Von Tungeln was similarly instructive on the issue. He testified that his expertise was in zoning or annexation for cities. As in prior points discussed above, Mr. Von Tungeln gave extensive testimony as to his knowledge of the lands in question and that, in his opinion, all of the lands met this criteria.

The trial court specifically found that appellee was very limited in any areas for expansion within its present city boundaries and that the expansion of a city's boundaries to facilitate new areas for new construction of businesses and homes was a legitimate municipal purpose. The trial court obviously relied heavily on Von Tungeln's testimony in this regard. The court also noted that appellee has extended water and sewer lines to the lands in question, as well as fire hydrants, and further found that maintenance and expansion of these services to people in the affected lands was proof that the lands were valuable by reason of their

adaptability for these prospective municipal purposes. Appellant has, in short, failed to demonstrate that the trial court's decision on this issue was clearly erroneous.

V. Valuable by Reason of Their Adaptability for Prospective Municipal Uses — Ark. Code Ann. § 14-40-302(a)(5)

The trial court found that the land was valuable by reason of its adaptability for the prospective municipal use of extending water and sewer lines to the lands in question, as well as fire hydrants. Appellant asserts that the trial court and appellee's "expanded reading" of this portion of the statute is unsupported; further, appellant maintains that the trial court's ruling is "nonsensical," in that the lands themselves are not "valuable" to the city simply because Dover might be able to extend water and sewer services outside its city limits. Appellant again cites *Town of Houston* for the proposition that the proper focus is not on what is needed by the annexed area but rather on what benefits would be reaped by the original city. Appellant maintains that the extension of water and sewer lines and fire hydrants to the annexed area simply does not fit within subsection (a)(5) because these facts do not make the land "valuable" to the city itself.

Appellant asserts that even if this could be properly described as a benefit for the City of Dover, the land was not "needed" for the purpose of placing sewer and water lines through the area because that had been done twenty years ago. Appellant suggests that if this is the law, then any time a small city might want to extend water or sewer lines and connect these lines to those of another larger city, the smaller city could automatically annex all of the land between the cities.

Appellant acknowledges that if a portion of the land had been needed by Dover for the construction of a sewer treatment plant, for example, then this would be the precise kind of prospective municipal use envisioned by the statute. Other prospective municipal uses might be city parks or other publicly-owned facilities. Appellant directs the Court, however, to the testimony of Mayor Waldo, who testified that no such plans were in place and that he could not detail which lands would be valuable by reason of their adaptability for prospective municipal uses. Appellant, therefore, claims that the trial court erred in that it did not focus

on the value of the lands to the existing city but on the value to the lands to be annexed.

While appellant has only referenced the testimony of Mayor Waldo, he has apparently ignored the fact that Mr. Von Tungeln had also testified in regard to this requirement. Von Tungeln testified that the lands had developed from a basic vacant land along a quiet Arkansas scenic highway to land along a highly-traveled, four-lane facility between two growing cities in a growing county. He further testified that he knew of no tract of land in the annexed area that did not meet this criteria.

Obviously, from the testimony of Mr. Von Tungeln, the trial court was able to draw a finding that the lands met this criteria, and the appellant has done nothing more than attempt to point to evidence that he feels contradicts the court's finding rather than demonstrate that the record contained *no* evidence to support the trial court's findings. Regardless of appellant's argument or the evidence to which he points, the testimony of Mr. Von Tungeln on this criteria clearly supports the trial court's decision; therefore, we cannot say that the trial court's finding on this point was clearly erroneous.

VI. Highest and Best Use of Any Parcel Within the Subject Area is Horticultural or Agricultural — Ark. Code Ann. § 14-40-302(b)

The trial court found that appellant had failed to prove that the highest and best use of any parcel within the annexed area was horticultural or agricultural. Appellant again asserts that the trial court misapplied the statute and used the wrong standard in determining if any of the annexed lands met this criteria. We disagree.

Subsection (b)(1)(A) of § 14-40-302 states that contiguous lands shall not be annexed when they "[h]ave a fair market value *at the time of the adoption of the ordinance*, of lands used only for agricultural or horticultural purposes and the highest and best use of the lands is for agricultural or horticultural purposes." [Emphasis added.] Appellant asserts that the trial court ignored the phrase "at the time of the adoption of the ordinance," and, as it did with other criteria, applied a "potential" use or "future-use" standard. Appellant further maintains that the court ignored the testimony of landowners and experts that the land was actually

being used for agricultural purposes and had a highest and best use as such.

Appellant seems to be arguing both sides of this issue. On the one hand, he argues that the court should be looking at what the land was being used for *at the time of the adoption of the ordinance*; then, in the next paragraph of his brief, he claims that the court ignored the testimony of landowners and experts regarding what the land was currently being used for *at the time of the trial.* If the statute requires the value to be placed "at the time of the adoption of the ordinance," which appellant correctly states that it does, then what difference would any testimony from landowners or experts regarding its *current* use make? For example, the testimony of the appellant, Mr. Hamilton, and Mayor Waldo, cited by appellant, refers only to the current use being made of certain properties. Appellant has not referred to any testimony from any of these witnesses as to whether such use was in fact the highest and best use of these lands at the time the annexation ordinance was passed.

Appellant also seems to misconstrue the testimony of Mr. Von Tungeln. His testimony, as to the basis for determination of the highest and best use of property, was based upon a use that he felt was presently physically possible for the lands. He did not state that this possibility was what might happen in the future, as the appellant argues.

[redacted] Appellant contends that the trial court ignored unrebutted testimony that much of the land was located in a flood plain and that the fair market value of the land in the flood plain would be set based upon its use for agricultural purposes. While there was such testimony, it was not *unrebutted.* Mr. Von Tungeln testified at several different points that merely because property was located in a flood plain did not prevent it from being developed for purposes other than agricultural in nature. Thus, at best, the testimony on this point is conflicting, and merely because appellant disagrees with the testimony of Mr. Von Tungeln and can point to conflicting testimony does not demonstrate reversible error.

VII. Appellant's Motion to Amend Final Judgment and Void the Annexation

Appellant asserts that the trial court should have amended its final judgment to include a finding that the annexation was void because the City of Dover made no considerable effort to determine whether the lands in the annexed area met the five criteria set forth in the ordinance as the bases for annexation. Appellant begins this argument by contending that the reason appellee was attempting to annex the property in question was because "it wanted to beat the City of Russellville to the land south on Highway 7." Even if such a statement were supported by any testimony or evidence of record, the motive of the appellee is irrelevant. Appellant has cited no case law or statutory law nor does he make any convincing arguments that motive was entitled to any consideration by either the trial court or by this Court. Again, we have repeatedly held that arguments unsupported by authority or convincing argument will not be considered. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

Appellant further argues that if a majority of the voters approve an election that a *prima facie* case has been made and that this is "contrary to the statute" and "promotes haphazard planning and 'land grabs' designed merely to benefit the city through increased tax revenues or other irresponsible goals." Interestingly enough, however, this argument fails to mention or attempt to distinguish *Gay v. City of Springdale*, 287 Ark. 55, 696 S.W.2d 723 (1985), which held:

> The procedural rules are well settled to determine whether any one of the criteria is met: A majority of electors voting in favor of annexation *makes* a *prima facie* case. *City of Crossett v. Anthony*, 250 Ark. 660, 466 S.W.2d 481 (1971).

Gay v. City of Springdale, 287 Ark. at 58. [Emphasis added.]

Appellant's argument appears to be in direct contrast to the statutory scheme for challenging an annexation election. The appellant must prove that the lands do not meet the statutory requirements. The manner by which the lands being annexed were determined to be included or excluded or the manner used to determine whether they met the statutory requirements prior to annexation have been resolved by the election. The making of

a *prima facie* case as a result of the election had the effect of shifting the burden of proof to the appellant.

Appellant's argument is simply at odds with the statutory scheme and applicable case law in regard to annexations. There is simply no basis for delving into what may have transpired *prior* to the adoption of the annexation ordinance and election once the election was successful. At that point, the party attacking the election must prove that the lands do *not* meet the applicable criteria or that there was some irregularity in the election itself. Appellant has simply failed to demonstrate error in the actions of the trial court.

VIII. Motion to Disqualify Counsel for Appellee

Appellant filed in the trial court a motion to disqualify counsel for the City of Dover, Mr. David McCormick, asserting that because he served as Dover's city attorney and actually drafted the ordinance in question, in addition to serving as trial counsel for appellee, his service as trial counsel created a conflict of interest and prejudiced appellant in violation of Rule 3.7 of the Arkansas Rules of Professional Conduct. The trial court rejected these arguments. We affirm the trial court.

Appellant has correctly noted that Rule 3.7 of the Arkansas Rules of Professional Conduct prevents an attorney from being an advocate in a case in which he is likely to be a *necessary* witness. However, merely because the appellant thinks that the attorney for the appellee is a "likely witness" is insufficient to justify appellant's effort to disqualify him in this action.

It is undisputed that appellee's attorney drafted the ordinance that called for the election, which appellant is challenging. However, an examination of the pleadings filed by appellant reveals that his attack is upon the lands within the area being annexed not meeting the statutory requirements, *not* the manner in which the ordinance was drafted nor the manner in which the ordinance was passed.

Appellant's brief asserts that Mr. McCormick's "testimony is certain to relate to highly-contested matters concerning the attempted annexation in this case" without ever setting forth what those "highly-contested matters" are, and, of which, Mr. McCor-

mick is supposed to have knowledge. Here, as in the trial court, the brief and argument of appellant make only vague and general allegations that Mr. McCormick has knowledge of certain matters that will be contested. At the very least, the appellant had the duty to advise the trial court and this Court of the exact matters about which Mr. McCormick will be expected to testify. Furthermore, appellant had the duty to demonstrate to the trial court that such testimony could not be gained from any other witness or source.

Most importantly is the fact that the manner in which the City of Dover Ordinance 2001-2 was enacted was not challenged in the trial court by appellant and is not relevant to the issues contained in appellant's pleadings. *Lee v. City of Pine Bluff*, 289 Ark. 204, 710 S.W.2d 205 (1986), holds that a majority of electors voting in favor of annexation makes a *prima facie* case for annexation, and the burden rests on those objecting to produce sufficient evidence to defeat the *prima facie* case. The facts surrounding the enactment of the annexation ordinance are simply not relevant. Appellant's brief fails to set forth any facts or law that gives this Court any legitimate basis for disqualification of Mr. McCormick. Appellant has simply failed to demonstrate that the trial court's decision to deny his motion to disqualify appellee's counsel was erroneous or that he was prejudiced as a result.

IX. Cross-Appeal — Appellee's Motion to Dismiss Complaint

Appellee maintains that, pursuant to Ark. Code Ann. § 14-40-304(a), any challenge to an annexation should have been filed within thirty days after the election and that appellant failed to properly bring such action in a timely manner. The trial court disagreed with this and refused to dismiss appellant's complaint. Appellee asserts that this was error. We hold that, as a result of our affirmance of the trial court in regard to appellant's points on appeal, appellee's cross-appeal has become moot.

Affirmed.

John DODGE, Jim Bolt, Dr. Tim Brooker, and Francis J. Hart *v.* Andy LEE and Nelson Erdmann

02-521 100 S.W.3d 707

Supreme Court of Arkansas
Opinion delivered March 13, 2003

John Dodge; and *Clark & Spence*, by: *George R. Spence*, for appellants.

Jim Rose III, for appellees/cross-appellants.

DONALD L. CORBIN, Justice. This case arose when Appellees Andy Lee and Nelson Erdmann filed a suit for defamation and libel in the Benton County Circuit Court against Appellants John Dodge, Jim Bolt, Dr. Tim Brooker, Francis J. Hart, and thirteen other defendants. Many of the defendants, including these Appellants, filed counterclaims, alleging that Appellees' suit was frivolous and constituted a malicious prosecution. The suit was eventually dismissed pursuant to Appellees' motion for voluntary nonsuit. Thereafter, the trial court struck Appellants' counterclaims, and they appealed. On appeal, we determined that we could not reach the merits of Appellants' claims, due to an insufficient addendum, and we gave Appellants additional time to provide the necessary information. *See Dodge v. Lee*, 350 Ark. 480, 88 S.W.3d 843 (2002).[1] With that information now before us, we reverse the trial court's order striking the counterclaims of Appellants Dodge, Bolt, and Brooker.

We must, however, affirm the trial court's ruling as to Appellant Hart, as the record does not contain a counterclaim filed on his behalf. In the prior appeal, we observed that a copy of Hart's counterclaim was absent from the addendum. Thereafter, it was discovered that Hart's counterclaim had been omitted from the record. Prior to submitting the new addendum, Appellants filed a motion to supplement the record with the missing counterclaim. We denied that motion. Accordingly, we cannot review Hart's claim on appeal, based on this court's long adherence to the

[1] In that case, we also affirmed the appeal of seven defendants, wherein they sought attorney's fees from Appellees, as well as the appeal brought by Appellees, wherein they sought to overturn the default judgment granted in favor of one of the defendants.

rule that matters outside the record will not be considered on appeal. *See, e.g., Rothbaum v. Arkansas Local Police & Fire Ret. Sys.*, 346 Ark. 171, 55 S.W.3d 760 (2001); *Greene v. Pack*, 343 Ark. 97, 32 S.W.3d 482 (2000); *Warnock v. Warnock*, 336 Ark. 506, 988 S.W.2d 7 (1999). The burden is on the appellant to bring up a record sufficient to demonstrate that the trial court was in error, and where the appellant fails to meet this burden, we have no choice but to affirm the trial court. *Id.* We now discuss the claims of the remaining three Appellants.

The record reflects that Appellees filed their complaint for defamation and libel on November 21, 2000, alleging that Appellants Dodge, Bolt, and Brooker had, for the past several years, "engaged in a concentrated effort to defame the character and professional standing of the [Appellees] herein by repeated publications of slander and libel with no basis in fact." The complaint sought actual damages of $500,000 and punitive damages of $1,500,000 on behalf of each Appellee, for a total amount of $4,000,000.

The following day, Appellant Bolt filed a pleading titled "*CROSS-COMPLAINT*," charging that Appellees' complaint was frivolous and constituted a malicious prosecution. Bolt sought actual damages to be determined by the court and punitive damages of $5,000,000. One week later, on November 28, Appellants filed an answer, which reflected an assertion that the complaint was frivolous, and it sought dismissal of the complaint with an award of expenses, attorney's fees, and punitive damages.

On December 7, Appellants Dodge and Brooker each filed a document titled "*CROSS-COMPLAINT*," alleging that Appellees' suit was frivolous and constituted a malicious prosecution. Brooker, like Bolt, sought unspecified actual damages and punitive damages of $5,000,000, while Dodge did not specify any amount of damages. Also on December 7, Appellant Bolt filed an amended cross-complaint, again, seeking punitive damages of $5,000,000.

On December 12, Appellees filed a motion to strike the foregoing cross-complaints, on the ground that such a pleading is not recognized under the Arkansas Rules of Civil Procedure, particularly Rule 7(a). On December 18, Appellants filed a response to

the motion to strike, asserting that the foregoing pleadings were inadvertently styled as cross-complaints due to a scrivener's error on Dodge's secretary's part. The response asserted that the pleadings were actually counterclaims. The response also asserted that their claims were sufficient under Ark. R. Civ. P. 8. They asserted further that Appellees' motion to strike should be denied because the intent of the pleadings was clear.

Also on December 18, Appellants Dodge, Bolt, and Brooker filed new pleadings titled "*AMENDED COUNTERCLAIM.*" The allegations were the same as those previously styled as cross-complaints; however, the amount of punitive damages sought by each increased from $5,000,000 to $6,000,000.

During the hearing on August 31, 2001, counsel for Appellees argued that the trial court should strike the cross-complaints because the rules of civil procedure do not recognize such a pleading. Appellees' counsel argued that the amended counterclaims were also improper because there had been no prior counterclaims to amend. Thus, in essence, counsel asked the trial court to strike the counterclaims merely because they were styled as *amended* counterclaims. Appellants' counsel, on the other hand, argued that granting the motion to strike would be putting form over substance, against this court's rules.

The trial court ultimately agreed with Appellees and struck the pleadings and the claims stated therein. In an order entered on October 29, 2001, the trial court found that the cross-complaints were improper pleadings. The trial court found further that the amended counterclaims were also improper because no counterclaims had ever been filed. The trial court reasoned: "Without a Counter-Claim there can be no Amended Counter-Claim." Appellants argue that these rulings are erroneous under the rules of civil procedure and this court's cases. We agree.

Rule 7(a) provides for the types of pleadings allowed, specifically complaints, answers, counterclaims, answers to counterclaims, cross-claims, third-party complaints, and third-party answers. It then provides that no other pleadings will be allowed. Rule 8(f), however, provides: "All pleadings shall be liberally construed so as to do substantial justice." This court has repeatedly relied on this rule of liberal construction in looking to

the substance of a pleading, beyond its actual form. *See, e.g., Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997); *Wise Co., Inc. v. Clay County Circuit Court*, 315 Ark. 333, 869 S.W.2d 6 (1993); *Cornett v. Prather*, 293 Ark. 108, 737 S.W.2d 159 (1987); *Fort Smith Symphony Orchestra, Inc. v. Fort Smith Symphony Ass'n, Inc.*, 285 Ark. 284, 686 S.W.2d 418 (1985). The holding in *Cornett* succinctly reflects our position:

> Courts should not be guided blindly by titles but should look to the substance of motions to ascertain what they seek. It would not be in the interest of justice and fair play to be blindly guided by the title of a motion or pleading. We continue to abide by the well-established rule that a pleading will not be judged entirely by what it is labeled but also by what it contains.

293 Ark. at 111, 737 S.W.2d at 160-61. *See also O'Guinn Volkswagen, Inc. v. Lawson*, 256 Ark. 23, 505 S.W.2d 213 (1974) (holding that substance, rather than form, has been the watchword in matters pertaining to pleading and procedure in Arkansas); *Home Ins. Co. v. Williams*, 252 Ark. 1012, 1015, 482 S.W.2d 626, 628 (1972) (holding that "a liberal construction requires that every reasonable intendment should be indulged in favor of the pleader and effect should be given to substance rather than form regardless of the name of the pleading").

Under the foregoing law, the trial court's order striking Appellants' counterclaims must be reversed, as it directly contradicts Rule 8(f) and our holdings. It is clear from the record before us that the trial judge did just what our cases caution against — he construed the pleadings strictly, looking only to their style or form, with no regard for their substance. Construing the pleadings liberally, as we must, it is clear that the claims made by Appellants were counterclaims, seeking damages against Appellees for filing a frivolous complaint and for malicious prosecution. As such, the counterclaims should not have been stricken merely because they were styled as cross-complaints. We thus reverse the trial court's ruling as it pertains to Appellants Dodge, Bolt, and Brooker, and we remand this matter for further proceedings consistent with this opinion.

Affirmed in part; reversed and remanded in part.

The COCA-COLA BOTTLING COMPANY of Memphis, Tennessee, *d/b/a* Coca-Cola Bottling Company of Arkansas *v.* Fred and Retta GILL

01-768 100 S.W.3d 715

Supreme Court of Arkansas
Opinion delivered March 13, 2003

[Petition for rehearing denied April 17, 2003.*]

* THORNTON and HANNAH, JJ., would grant.

[redacted]

[redacted]

Hill, Gilstrap, Perkins & Trotter, by: *G. Alan Perkins* and *Julie DeWoody Greathouse*; and *Barrett & Deacon, A Professional Association*, by: *D.P. Marshall Jr.* and *Leigh M. Chiles*, for appellant.

Whetstone Law Firm, by: *Bud Whetstone*; and *Law Offices of James F. Swindoll*, by: *James F. Swindoll*, for appellees.

ROBERT L. BROWN, Justice. Appellant, The Coca-Cola Bottling Company of Memphis, Tennessee, d/b/a Coca-Cola Bottling Company of Arkansas, appeals a judgment in the amount of $1,341,666.67 in favor of appellee Fred Gill and a $182,500 verdict in favor of appellee Retta Gill. The total judgment of $1,524,166.67 was reduced by $100,000 due to the Gills' settlement with Waymatic, Inc., making the total judgment $1,424,166.67. Coca-Cola raises three grounds for reversal: (1) Coca-Cola did not violate its duty of ordinary care owed to Fred Gill; (2) the circuit court abused its discretion in barring Coca-Cola from using the Gills' nonsuited allegations against Waymatic, Inc.; and (3) the circuit court abused its discretion in qualifying Jimmy Clark as an expert witness and in admitting into evidence his opinion regarding the cause of Mr. Gill's injuries. We affirm the judgment and the order denying Coca-Cola's posttrial motions.

The facts are gleaned from the testimony at trial. On April 7, 1998, Fordyce High School requested a Coca-Cola concession

trailer for use at the Redbug Relays track meet to be held at the high school. Coca-Cola owns a small fleet of portable concession trailers which it loans to customers, including Fordyce High School, for use at various events and which are towed behind vehicles to their various destinations. Coca-Cola delivered concession trailer #308 to the high school on the date of the accident and left it at a place where the high school principal, Steve Daniel, instructed it to do so. A 120-foot, 15-amp cord, which was permanently attached to the trailer, was plugged into a receptacle in the field shed with a three-prong plug for grounding. The receptacle ground wire in the shed had been disconnected. No auxiliary grounding system in the form of an eight-foot metal rod beside the trailer was used. School employees set up the trailer, and while doing so, Fred Gill, who was then age 70 and a custodian at the high school, was injured by an electrical shock when he raised the windows of the concession trailer. Steve Daniels heard Mr. Gill make a strangled noise when he plugged in the trailer. He then tried to help Mr. Gill, and was shocked with enough force to knock him to the ground when he touched him. He then touched the trailer and felt current go through his hand. He immediately unplugged the trailer. Mr. Gill fell to the ground. The shock broke both of Mr. Gill's shoulders and burned his hands and feet. Mr. Daniel testified that Mr. Gill was unconscious and stopped breathing for a period of time. He suffered permanent injuries as a result and, according to his brothers' testimony, he is confined to a wheelchair.

On January 6, 1999, the Gills filed suit against Waymatic, Inc., the manufacturer of the trailer at issue in this case, and Coca-Cola. The complaint alleged that "a Coca-Cola vending trailer manufactured by . . . Waymatic, Inc. electrically shorted to ground through plaintiff Fred Gill's body and as a direct and proximate result, caused damages." The Gills asserted a two-part products-liability cause of action against Waymatic. They asserted that the trailer had been manufactured in a defective and unreasonably dangerous condition. Specifically, they alleged:

- that the trailer had no "self-sufficient or ground fault system;"
- that the trailer had "inadequate wiring precautions" during the design and manufacture of the trailer;

- that the trailer had inadequate warnings to users that it did not have a sufficient grounding system;
- that Waymatic knew that the electrical system in the trailer was inadequate and failed to recall it;
- that Waymatic failed to adequately warn users against the dangers of the trailer's electrical system.

The Gills' second allegation against Waymatic was that it had negligently designed the electrical system in the trailer.

The complaint further alleged that Coca-Cola "negligently failed to maintain or monitor the decaying electrical system or negligently failed to inspect said trailer, all of which were the proximate cause of the injuries of [the] plaintiff . . . ." The complaint asserted joint and several liability against Waymatic and Coca-Cola and asked for compensatory damages against Coca-Cola and both compensatory and punitive damages against Waymatic.

On July 11, 2000, the Gills filed their first amended complaint. In the amended complaint, the Gills added two allegations to its negligence claim against Coca-Cola: (1) Coca-Cola negligently removed the lug nut from the trailer through which a wire could be threaded to attach to a metal rod as part of an auxiliary grounding system; and (2) Coca-Cola negligently failed to warn users of how to use the trailer safely. The Gills' claims against Waymatic were left unchanged. On October 6, 2000, the Gills filed their second amended complaint and added two allegations to support their strict-liability claims against Waymatic: (1) Waymatic failed to instruct users on grounding the trailer and in the use of the auxiliary grounding system, and (2) Waymatic failed to inform users that use of the auxiliary grounding system was necessary for the trailer's safe operation. In this pleading, the Gills dropped their punitive damages claim against Waymatic.

Just before trial, the Gills settled their complaint against Waymatic for $100,000. On February 1, 2001, the circuit court granted the Gills' oral motion to nonsuit their lawsuit against Waymatic. On February 2, 2001, the circuit court held a pretrial motions hearing on both Coca-Cola's motion for summary judgment and its motion *in limine* to allow admission of the Gills' alle-

gations against Waymatic contained in the nonsuited portions of their complaint. The circuit court denied both motions.

On February 5, 2002, the trial began and lasted two days. Mike Easterwood, the president and CEO of Waymatic, testified for the Gills via deposition. He testified generally about Waymatic's "S" type of concession-stand trailer, of which trailer #308 is an example and described the auxiliary grounding system that Waymatic provides with them. The grounding system, according to Mr. Easterwood, is simply a lug nut with a hole in it, mounted on the tongue of the trailer. The grounding system is operated by threading a piece of copper wire through the hole and the other end of the wire to a grounding rod — an eight-foot metal pole which is driven into the ground. He described the auxiliary grounding system as a safety measure that assures that the trailer is always grounded. He testified that he considered such lug nut grounding systems standard in the industry and that he assumed that customers who bought the trailers would realize the purpose of the lug nut. On cross examination, Mr. Easterwood admitted that Waymatic does not supply a grounding wire or rod with the trailers, only the lug nut; nor does Waymatic provide its customers with instructions on how to use the lug nut.

Several witnesses testified and gave their opinions about what caused Mr. Gill's injuries. Mr. Edward McMillan testified that he worked for Ledbetter Electric as an electrician and was dispatched the day of the accident to the high school at the request of the high school, where he examined the trailer which was still "hot." His most definitive statement on causation came during cross-examination: "It's my opinion that the cause of the accident as it was described to me was the disconnected ground wire in the shed." He agreed with the Gills' theory of the accident when he was asked in a hypothetical question about cord shorting and then moving the cord. On cross-examination, however, Mr. McMillan disagreed with the assumption of the hypothetical and stated that he did not think there was a problem with the cord based on his testing of the shed receptacle and the trailer.

Mr. Jimmy Clark testified as an expert and fact witness for the Gills and blamed wiring in the cord and trailer as causes of the accident. He testified on re-direct examination:

> [I]f you're wanting to talk about probabilities, I think it's a 100% probability that the fault that caused the incident that hurt Mr. Gill was in the cord or the concession stand. If you want to consider that whole thing as a package, it's 100% in my opinion that that's what happened. . . . Had it been grounded, Mr. Gill would not have been hurt.

He further testified on re-cross examination that even if the shed receptacle had been grounded, it would not have guaranteed Mr. Gill's safety:

> It could have been grounded at the receptacle in the shed, but that doesn't necessarily mean that it wouldn't have done the same thing. I'm telling this jury that a ground wire on the receptacle in the shed that is required by the National Electrical Code would not necessarily have protected someone touching the trailer even if it was electrified.

Mr. Clark further testified that a new cord had replaced the older cord by the time he examined the trailer four months after the accident. He said that "it was 95% probable that it was the cord" that caused the accident. He described the percentage as a "wild guess." He opined that had the cord been grounded by an auxiliary system, the accident would not have occurred.

Mr. Peter Reynolds testified as an electricity expert for the Gills and concluded that the combination of an ungrounded receptacle in the shed, the lack of an auxiliary grounding system with a ground rod, and electricity from the cord coming in contact with the trailer caused the accident:

> As I said earlier, at least three things had to go wrong . . . . They had not connected the ground connection in the shed. We also know the second thing going wrong that day was that the external grounding connection, the ground rod and the lug, had not been used. The third thing that occurred was that somehow the electricity that was coming in on the wire from the shed got connected to the frame of the trailer.

Mr. Reynolds based his expert opinion on tests that he performed on the shed after the accident and on Mr. Clark's testimony. He further testified that in his experience it was "prudent" to have an auxiliary grounding system and that invariably this was done. He added that when he worked with trailers with a former employer, they required that all their trailers be grounded while they were in the field and operational.

Mr. Lonnie Buie testified as an electricity expert for Coca-Cola. Mr. Buie tested the trailer at the Camden service center a year after the accident. He testified that he found no problems with the cord attached to the trailer at that time. He also had trouble finding conductivity between the power cord to the window that Mr. Gill touched when he was injured. His opinion was that the receptacle and grounding system in the shed did not comply with the National Electrical Code. He concluded that what caused the accident could not be determined with certainty but that having a ground in the shed receptacle would have undoubtably prevented the accident:

> I cannot say exactly how the accident happened. There are too many conflicting eyewitnesses, and accounts to be able to determine exactly what happened out there. I don't know that anybody, and several people have tried, can come up with any logical conclusion of how this happened. There's been a lot of speculation and a lot of guesses, but really we don't know. Mr. Reynolds, Mr. McMillan, and I all agree, however, that if the receptacle in the shed had been grounded, the accident wouldn't have happened.

Mr. Buie was impeached by a memo written by a Coca-Cola attorney following a telephone conversation with a "John Harrell," identified as an employee of the Camden warehouse where trailer #308 was housed. That memo read in part: "Harrell did say that these trailers had a place for a ground to be connected. Apparently, we never utilized this because it involved a stake that if it was not pulled up and the drivers attempted to haul the trailer away, the stake would be run over and would puncture a tire. This causes me some concern."

Mr. Harrell, identified in the memo, is actually, John Harold. He testified as follows on cross-examination:

GILLS' ATTORNEY. Did you not tell that lawyer that you never utilized this grounding system because it involved a stake that if it was not pulled up the drivers attempted to haul the trailer away, the stake would be run over and would puncture a tire?

HAROLD. I told the lawyer when we were doing a what if for a better word, what we could have done, and after the fact, and I found out that there was a — some kind of system that could be used, but it's just not practical. I could have said that. I don't recall really the total conversation, it was on the telephone and it was several months after the incident occurred and we were talking about what if, what could have been done.

GILLS' ATTORNEY. Said that meaning that "You never utilized this stake because if not pulled up the drivers attempted to haul the trailer away the stake would be run over and would puncture a tire."

HAROLD. I could have made that statement when we were talking why we wouldn't use it. Just doing a what if after the fact.

The jury returned a judgment for $1,341,666.67 for Fred Gill and in the amount of $182,500.00 for Retta Gill for loss of consortium. The circuit court credited the amount of the Waymatic settlement in the amount of $100,000.00 against the Fred Gill verdict, for a total judgment of $1,424,166.67. In a motion for a new trial or judgment notwithstanding the verdict, Coca-Cola raised essentially the same issues that are before this court in this appeal, but also requested a remittitur of the judgment amount. The circuit court denied that motion.

I: Duty Owed

Coca-Cola's first argument is that it owed only a duty of ordinary care to Mr. Gill and that it was entitled to assume that the shed at Fordyce High School had a properly grounded receptacle. Because of this, Coca-Cola contends that the circuit court erred when it denied its motion for a directed verdict. The Gills initially counter this assertion with a procedural argument. They contend that Coca-Cola failed to preserve its duty argument. We disagree.

The Gills claim that when Coca-Cola moved for a directed verdict at the close of their case, it argued that an intervening cause, the faulty receptacle in the shed, broke the chain of proximate causation. The Gills claim, however, that Coca-Cola did not mount the argument that it owed no duty to Mr. Gill based on the fact that he was not a foreseeable plaintiff. Thus, they contend, Coca-Cola is foreclosed from arguing lack of foreseeability on appeal to this court, because the issue is not preserved.

We turn then to the motion for directed verdict. In its motion, Coca-Cola initially stated that it was entitled to rely on its assumption that Fordyce High School would abide by the National Electrical Code in connection with the receptacle in the shed, because everyone is assumed to know and obey the law. Because it relied on this assumption that the shed's receptacle was adequately grounded, it could not be negligent, according to Coca-Cola, even assuming, *arguendo*, that there was a problem with the trailer. The Gills responded to this motion by stating that irrespective of whether a faulty ground in the field shed was an intervening cause, "Coca-Cola had a duty to foresee that if they removed the safety system that would have provided protection to Fred Gill . . . the courts could go back [and find negligence.]" Coca-Cola responded that the Gills had mischaracterized its argument as an intervening-cause argument, when really the question was one of duty: "Your Honor, I think [Gills' counsel is] mixing up two areas of the law. . . It's part of the definition of the duty of Coca-Cola. If [Coca-Cola] has the right to assume that someone acts a certain way and if action upon that is not negligence there's no question about intervening cause. . . ." The circuit court ruled: "Whether or not Coca-Cola was negligent in its handling

of the cord and whether or not it was negligent in the removal of the redundant safety system . . . would be question [sic] of fact for the jury and there's sufficient evidence at this time to allow those two issues to go to the jury."

When the motion for directed verdict was renewed, Coca-Cola continued to argue that it proved the standard duty of ordinary care to Mr. Gill and could assume the receptacle in the field shed was adequately grounded. The Gills contended that Coca-Cola failed in its duty, by removing or not installing, the auxiliary system that would have protected Mr. Gill.

We conclude that the issue of a duty owed to foreseeable victims was raised by counsel for the parties and ruled upon by the circuit court. It appears that it was initially the Gills' counsel who redirected the circuit court to the issue of duty based on foreseeability. Coca-Cola then shifted its focus to the duty owed. In doing so, Coca-Cola clarified for the court that its objection was not about intervening causation, but about the duty owed to Mr. Gill in light of the high school's failure to ground the receptacle in the shed. The circuit court concluded that the issue of Coca-Cola's negligence was one for the jury. That ruling necessarily encompassed the issue of breach of the duty that was owed. *See* W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* § 30 at 164 (5th ed. 1984) ("[Duty and breach] go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.").

Turning to the merits of the duty issue, when reviewing a denial of a motion for a directed verdict, this court assesses whether the jury's verdict is supported by substantial evidence. *See Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002); *State Auto Prop. & Cas. Ins. Co. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999); *Dodson v. Charter Behavioral Health Sys. of Northwest Arkansas, Inc.*, 335 Ark. 96, 983 S.W.2d 98 (1998). 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 Wal-Mart Stores, Inc. v. Lee, supra; State Auto Prop. & Cas. Ins. Co. v. Swaim, supra; City of Little Rock v. Cameron*, 320 Ark. 444, 897 S.W.2d 562 (1995). When determining the sufficiency of the evidence, this court reviews the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *See Wal-Mart Stores, Inc. v. Lee, supra; State Auto Prop. & 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).

Coca-Cola argues that the following facts demonstrate that Mr. Gill's shock was not reasonably foreseeable for several reasons: the trailers had been used for almost twenty years without mishap; the manufacturer, Waymatic, did not provide the wiring or eight-foot grounding rod for an auxiliary grounding system for the trailers, and never told Coca-Cola what the purpose of the lug nut on the trailer tongue was; and Coca-Cola had never encountered a problem with an ungrounded power source in all of its history of using these trailers. Moreover, Coca-Cola contends that it knew nothing about the condition of the electrical outlet at the Fordyce High School field shed and nothing in the long history of using that outlet alerted it to the fact that a problem was even possible, let alone reasonably foreseeable. In sum, Coca-Cola's argument is that "[t]he uneventful history with these concession trailers showed that Mr. Gill's accident was extraordinary."

The Gills respond that as a vendor of concession trailers, Coca-Cola is charged with the knowledge of common industry practices, and there was testimony at trial that vendors such as Coca-Cola generally knew about auxiliary grounding systems and how to use them. The Gills argue that the record also shows that vendors do not usually allow their customers to set up the trailers; rather, they take that responsibility on themselves. They further maintain that the facts support a jury conclusion that Coca-Cola had removed the lug nut for an auxiliary grounding system, because the trailer was shipped to Coca-Cola with the nut, and by the day of the accident, the nut was gone. Moreover, they contend that the original electrical cord for the. trailer had been replaced. The original trailer cord had plugs at each end and was a

50-amp cord, as opposed to the replacement cord that was permanently attached to the trailer and was a 15-amp cord. According to the Gills, the replacement cord being moved through a metal hole placed more wear and tear on the cord. They conclude that the facts support the conclusion that "Coca-Cola had a duty to ensure the proper installation of its trailers or at a minimum, provide its users with instructions and/or warnings regarding the serious risk of shock which it had itself created by removing the safety ground system."

This court has succinctly described what constitutes a question of law and what constitutes a question of fact in the negligence analysis:

> The threshold question is whether the appellee owed a duty of any kind to the [appellant]. Whether a duty is owed between the parties is a question of law. . . . [T]he question of foreseeability and causation may be a question of fact, depending on the circumstances. Proximate causation is ordinarily a question of fact.

Stacks v. Arkansas Power & Light Co., 299 Ark. 136, 138-139, 771 S.W.2d 754, 756 (1989) (citations omitted). *See also Cash v. Lim*, 322 Ark. 359, 362, 908 S.W.2d 655, 657 (1995); *Keck v. American Employment Agency*, 279 Ark. 294, 652 S.W.2d 2 (1983); *Missouri Pac. R.R. Co. v. Harrelson*, 238 Ark. 452, 382 S.W.2d 900 (1964). This court has added: "If the court finds that no duty of care is owed, the negligence count is decided as a matter of law." *Mans v. Peoples Bank of Imboden*, 340 Ark. 518, 524, 10 S.W.3d 885, 888 (2000). We have said that "[t]o constitute negligence, an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner." *Ethyl Corp. v. Johnson*, 345 Ark. 476, 481, 49 S.W.3d 644, 648 (2001) (quoting *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998)).

However, a defendant is under no duty to guard against risks it cannot reasonably foresee. *Ethyl Corp.*, 345 Ark. at 481, 49 S.W.3d at 648. ("[N]egligence cannot be predicated on a failure to anticipate the unforeseen.") (quoting *Keck v. American Emp. Agency*, 279 Ark. 294, 652 S.W.2d 2 (1983)). Proof of an

accident, with nothing more, is not sufficient to make out a claim for negligence, *see Mahan v. Hall*, 320 Ark. 473, 897 S.W.2d 571 (1995), and harm that is merely possible is not necessarily reasonably foreseeable. *Boren v. Worthen Nat. Bank*, 324 Ark. 416, 427, 921 S.W.2d 934, 941 (1996) ("[C]onceivability is not the equivalent of foreseeability.") (quotations and citations omitted). In Judge Cardozo's immortal words: "Negligence in the air, so to speak, will not do." *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928); *see also Hill v. Wilson*, 216 Ark. 179, 183, 224 S.W.2d 797, 800 (1949) ("There is no such thing as 'negligence in the air'. Conduct without relation to others cannot be negligent; it becomes negligent only as it gives rise to an appreciable risk of harm to others.").

The question, however, is not whether a defendant could have reasonably foreseen the exact or precise harm that occurred, or the specific victim of the harm. *See Wallace v. Broyles, supra.* It is only necessary that the defendant be able to reasonably foresee an appreciable risk of harm to others. *Id.* An example of this distinction is contained in a landmark case cited by this court in *Broyles*. *See Jordan v. Adams*, 259 Ark. 407, 533 S.W.2d 210 (1976). In *Jordan*, Adams sued for injuries sustained when Jordan, enraged by an argument that he had with a man who was talking to his female companion, threw his companion's purse across a crowded bar dining room, causing a pistol inside the purse to discharge and hit Adams in the leg. Jordan argued that Adams was not a foreseeable plaintiff, because he did not know that the pistol was inside the purse when he threw it. The circuit court disagreed, and this court affirmed. We said: "if the act is one which the party in the exercise of ordinary care ought to have anticipated was likely to result in injury to others, then such person is liable for the injury proximately resulting therefrom although he may not have foreseen the particular injury which did happen." *Jordan*, 259 Ark. at 411, 537 S.W.2d at 212. In agreeing that Adams was a foreseeable plaintiff, we said that even assuming that Jordan did not know that the pistol was in the purse, "it was a culpably negligent act for him to throw a purse (large enough to hold a pistol and other things a woman carries therein) 26 feet across an area where people were dining and drinking." *Id.* at

412, 533 S.W.2d at 213. Citing *Palsgraf v. Long Island R.R. Co., supra*, we held that Adams was a foreseeable plaintiff: "Mrs. Adams was certainly within the foreseeable group of persons who might be injured by Jordan's negligence, and it was not necessary that he foresee the exact manner in which the injury would be caused." *Id.*

Under the *Jordan* reasoning, Mr. Gill was unquestionably a foreseeable plaintiff. Employees setting up the concession stand, as well as members of the public, would certainly be expected to come into contact with the concession trailer. There was, further, evidence that Coca-Cola had significantly changed the trailer's electrical system that first had the two-plug, 50-amp cord and additional evidence that Coca-Cola had chosen not to install an auxiliary ground system using the eight-foot metal rod and, indeed, had removed the lug nut on the trailer's tongue. Mr. Easterwood testified that the use of an auxiliary grounding system was standard practice in his industry. There was also testimony, including that of Peter Reynolds, that a permanently attached cord inside the trailer that had to be threaded through a metal hole could cause more wear and tear to the cord itself, conceivably causing it to short out. Mr. Reynolds, in his expert testimony, expressly concluded that three things had to go wrong to cause the accident: (1) no ground connection in the shed; (2) no secondary grounding system using the lug nut; and (3) electricity transferred from the shed to the trailer by means of the cord. We conclude that this evidence easily qualified as substantial on the foreseeability point regarding Mr. Gill as well as on causation. *Ethyl Corp. v. Johnson, supra.*

Coca-Cola's history of no accidents in the past does not defeat this analysis. An abundance of good luck does not shield a defendant from guarding against foreseeable risks. *Accord Advance Chemical Co. v. Harter*, 478 So.2d 444, 448 (Fla. Dist. Ct. App. 1985) ("if the injury is reasonably foreseeable, even if rare, the seller cannot rely on its history of good fortune to exempt itself from liability."). As in *Jordan*, where the defendant's asserted lack of knowledge of the contents of the purse that he tossed across a crowded room did not exempt him from owing a duty of ordinary care to the patrons of the bar, Coca-Cola's lack of

knowledge that Fordyce High School's electrical outlet in the shed was defectively grounded does not defeat its duty, under these facts, to take ordinary, prudent precautions to protect Mr. Gill, including an auxiliary grounding system. Not only did Coca-Cola fail to install an auxiliary grounding system for the trailer, but it failed to test the grounding system in the shed to assure that it was operational.

[redacted] Coca-Cola owed a duty of ordinary care to Mr. Gill. But, in addition, the fact that Mr. Gill and members of the public would be coming into contact with the trailer and would be harmed if the trailer was not properly grounded was a foreseeable risk. We affirm the circuit court on this point.

II: Waymatic Allegations

Coca-Cola next argues that it should have been allowed to use at trial the Gills' allegations against Waymatic contained in their first and second amended complaints. It argues that the Gills' specific and detailed products-liability claims against Waymatic, when contrasted with the "bare allegations" of negligence against Coca-Cola, established Waymatic as the primary tortfeasor early on. Coca-Cola argues that the circuit court misunderstood the governing precedents and, thus, erred in deciding this question. It cites *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001), in support of its argument.

The Gills answer that it named both Coca-Cola and Waymatic as defendants in its complaint, and that neither party was clearly the "target defendant" in the first lawsuit so as to prejudice Coca-Cola when it was tried alone. They also point out that Coca-Cola received credit, $100,000, from the Waymatic settlement, which means no prejudice was visited on Coca-Cola by the court's disallowance of this impeachment. Finally, they emphasize that the *Dodson* case was handed down several months after the circuit court ruled on the admissibility of the complaints.

Coca-Cola is correct that the circuit court relied on the wrong line of cases, including *Razorback Cab of Fort Smith*, 304 Ark. 323, 802 S.W2d 444 (1991), in excluding use of the allegations made in the Gills' complaint for impeachment purposes.

The question presented in *Razorback Cab* was "whether a *complaint* may be properly introduced in evidence to sustain the plaintiff's case." *Razorback Cab*, 304 Ark. at 325, 802 S.W.2d at 445 (emphasis in original). This court held that it could not. That holding followed the earlier cases of *Wright v. Hullett*, 245 Ark. 152, 431 S.W.2d 486 (1968) and *Henry Wrape Co. v. Barrentine*, 129 Ark. 111, 195 S.W. 27 (1917). Thus, *Razorback Cab* is descended from cases that prohibit plaintiffs from using their own pleadings as evidence. The rule exists because complaints, which are "normally phrased in the most partisan language," are inadmissible because they are self-serving. *Razorback Cab,* 304 Ark. at 325, 802 S.W.2d at 445.

On the other hand, as Coca-Cola contends, *Dodson v. Allstate Ins. Co., supra*, and its predecessors hold that a party's complaint may be used as impeachment evidence against that party and the statements made in a complaint are admissions for impeachment purposes. *See Dodson, supra. Accord Jernigan v. State*, 38 Ark. App. 102, 828 S.W.2d 864 (1992) (allowing the use of a defendant's complaint filed in an earlier civil suit to impeach her at her criminal trial). *Cf. McDaniel v. State*, 291 Ark. 596, 726 S.W.2d 679 (1987) (use of a transcript of a plea agreement hearing admissible to impeach defendant). *But see Missouri Pac. R.R. Co. v. Zolliecoffer*, 209 Ark. 559, 563, 191 S.W.2d 587, 589 (1946) (holding that admissions in a complaint are not admissible where the complaint was not signed or verified, and the plaintiff testified that the allegations in the complaint were "entirely those of his attorneys.").

In *Dodson*, the circuit court had refused to allow Dodson, as plaintiff, to use as evidence withdrawn allegations in the defendants' counterclaim where they asserted that Dodson was performing illegal and fraudulent acts in providing physical-therapy treatment. This court reversed the circuit court and held that Dodson was entitled to use withdrawn allegations of Dodson's wrongdoing for impeachment purposes against defendant Allstate Insurance's stance at trial that it never asserted Dodson had done anything wrong.

We conclude that the circuit court ruled correctly, albeit it relied on the wrong line of cases in doing so. In reaching

our conclusion, we are persuaded in part by the reasoning of our court of appeals in *Belz-Burrows, L.P. v. Cameron Const. Co.*, 78 Ark. App. 84, 78 S.W.3d 126 (2002). In *Cameron*, the owner of a development sued its general contractor for constructing the project in an unworkmanlike manner. The general contractor, in turn, sued the owner's tenant for misuse of the premises, but then nonsuited its cause of action against the tenant. At trial, the owner sought to introduce proof of the nonsuit to show that if the contractor believed the tenant was to blame, it would not have nonsuited its cause of action. The court of appeals then drew a distinction between a withdrawn pleading such as occurred in *Dodson* and filing a nonsuit:

> [T]here is a significant difference between the admissibility of a withdrawn pleading and the admissibility of the fact that a nonsuit was taken. The admissibility of a withdrawn pleading rests on the fact that it is considered an admission and is inconsistent with the present position of the party who filed it. When a party states a fact in a pleading, he is averring that it is true; therefore, if at trial he takes a position contrary to the one taken in the pleading, a clear inconsistency is revealed. The same reasoning does not necessarily apply to the taking of a nonsuit. Unlike a pleading, a nonsuit is not defined by its content; it does not necessarily express a statement or assert a position. A pleader who takes a nonsuit does not necessarily admit that his suit has no basis; rather, a nonsuit is often taken for other reasons, such as settlement or trial strategy. In light of that fact, we are reluctant to accord a nonsuit the same impeachment value as a withdrawn pleading. We cannot say, therefore, that the trial court abused its discretion in excluding the nonsuit from evidence.

Cameron, 78 Ark. App. at 91-92, 78 S.W.3d at 131.

In the case at hand, the Gills and Waymatic settled, and the Gills nonsuited their complaint against Waymatic. We believe, as the court of appeals held in *Cameron*, that a nonsuit following settlement differs from a situation where allegations have been simply withdrawn. We are also reluctant, as was the circuit court, to permit the impeachment requested by Coca-Cola due to its potentially negative implications for parties who wish to settle. But, more significantly, in the instant case, Coca-Cola sought to use nonsuited allegations against a former party-defendant, Way-

matic, as evidence that Coca-Cola was not the primary tortfeasor. Coca-Cola cites us to *Dodson* and certain predecessors but adduces no authority for using a plaintiff's nonsuited allegations against a former party-defendant, and we know of none. We conclude that to allow this impeachment would ultimately have been confusing to the jury and suggestive of the fact that a settlement had occurred between the Gills and Waymatic. We hold that there was no abuse of discretion on the part of the circuit court in denying Coca-Cola the right to use the allegations made against Waymatic.

III: Expert Witness

Coca-Cola next questions (1) the circuit court's qualification of Jimmy Clark as an expert witness for the Gills on electricity, and (2) the circuit court's refusal to strike Mr. Clark's testimony as incompetent expert testimony. It urges that in both instances this was an abuse of discretion by the circuit court under our Rules of Evidence and our case law and adduces Ark. R. Evid. 702 and *Farm Bureau Mut. Ins. Co. of Ark. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000) in support of its argument.

We address the issue of Mr. Clark's qualifications first. He testified that he began working at one of ALCOA's Arkansas plants when he was seventeen years old and worked as a helper for the plant's chief electrical engineer, Robert McAdory. In this role, he became interested in Mr. McAdory's library of electrical engineering books, and with his encouragement, he studied them and eventually got a job in Mr. McAdory's department. Mr. Clark testified that although the ALCOA plant did not have an apprenticeship program for electricians, he took tests to become certified as an electrician, which he passed. At the same time, Mr. McAdory tutored him and allowed him to study the materials in an electrical engineering course he was taking. Mr. Clark added that he took correspondence courses in electrical engineering.

He eventually became a journeyman electrician and the head electrician at the ALCOA plant, a title he held for eighteen years. He testified that "head electrician" was an informal title but that he was good enough to be given work normally assigned to electrical engineers. He stated that his duties included design work on

electrical projects. Mr. Clark further testified that he started a house-wiring business on the side during his tenure at ALCOA, where he employed up to six people. He testified that, as part of this business, he became a master electrician for the state.

On *voir dire*, Mr. Clark admitted that he did not currently have an electrician's license or an electrical engineering license, and he stated that he did not consider himself an electrical engineer. He admitted that he had not worked actively in electrical matters since 1970 but that he did maintain an interest in the field and had kept abreast of developments. He further testified that, although the field had changed since 1970, the "elementary things stay the same." He also admitted that he was unfamiliar with the intricacies of the National Electrical Code.

The circuit court qualified Mr. Clark as an expert on the subject of electricity and as a fact witness, because he had inspected the trailer and been to the Coca-Cola plant with Gills' counsel. The court ruled:

> Let me sum up what we have here. We have a witness who has some expertise. His license is not current, but he is not a practicing electrician. So, he doesn't have to have a license. He possesses sufficient knowledge, skill, training, and education to testify about the subject matter before him, plus he is a fact witness to testify about what he saw and observed. So I will qualify him both as fact and expert. (sic) He may express opinions.

The Arkansas Rules of Evidence are helpful in resolving this issue. Rule 702 reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Ark. Rule Evid. 702. We review a circuit court's qualification of a witness as an expert for an abuse of discretion. *E.g., New Prospect Drilling Co. v. First Commercial Trust*, 332 Ark. 466, 966 S.W.2d 233 (1998). In 2000, this court adopted the seminal United States Supreme Court case interpreting Rule 702. *See Farm Bureau Mut. Ins. Co. of Ark. v. Foote, supra,* (adopting *Daubert v. Merrell Dow*

Pharm., Inc., 509 U.S. 579 (1993)). Under *Foote* and *Daubert*, the circuit court must make a preliminary assessment of whether the reasoning or methodology underlying expert testimony is valid and whether the reasoning and methodology used by the expert has been properly applied to the facts in the case. *See Foote*, 341 Ark. at 116, 14 S.W.3d at 519. Rule 702 guidelines apply equally to all types of expert testimony and not simply to scientific expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

Rule 702 does not condition the admissibility of an expert's testimony solely on the expert's professional accolades or lack thereof. *See Daubert, supra*; *John Parker Const. Co. v. Aldridge*, 312 Ark. 69, 847 S.W.2d 687 (1993) (experts may be qualified by experience, knowledge, or training, and need not be licensed professionals); *see also, e.g., Tank v. C.I.R.*, 270 F.2d 477 (6th Cir. 1959) (absence of certificates, memberships, and other professional honors does not in and of itself make a witness incompetent as an expert.); *Dickerson v. Cushman, Inc.*, 909 F.Supp 1467 (M.D. Ala. 1995) (lack of degree or license in professed area of expertise goes to weight of expert's testimony, not its admissibility).

Coca-Cola argues that "[a]t best, Clark had stale experience and a cavalier attitude about the qualifications necessary to be an electrician." We conclude, however, that questions surrounding the staleness of Mr. Clark's electrical experience affected the weight to be given his testimony, and not whether he should be qualified as an expert. The circuit court also had Mr. Clark's testimony that he was current with developments in his field. He certainly had considerable training and work experience in electricity, and he informed the jury about basic principles of conductivity and the grounding of electrical power. He was not required to have an electrician's license to testify. We hold that Mr. Clark's knowledge and experience were sufficient to assist the trier of fact in understanding the evidence and in determining the fact issues, which is the test under Rule 702. The circuit court did not abuse its discretion in qualifying Mr. Clark as an expert in electricity.

We turn next to Coca-Cola's assertion that Mr. Clark's testimony was incompetent expert testimony. According to Coca-Cola, under Rule 702, the circuit court must make certain that there is an adequate nexus between the expert's conclusions and the methodology used to arrive at those conclusions. Coca-Cola points out that the circuit court is under no obligation "to admit opinion evidence which is connected to the existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). In short, Coca-Cola urges that the expert must explain how his methodology, when applied to the actual facts of the case, leads ineluctably to the opinion offered. *See id.* Coca-Cola argues that Mr. Clark's methodology fell short. According to Coca-Cola, it consisted merely of walking around the accident site, which does not provide an adequate foundation for an opinion that the electrical cord caused the accident. Furthermore, Coca-Cola emphasizes that Mr. Clark conducted no tests on the electrical cord or on any other part of the trailer or on the field shed outlet.

In examining Mr. Clark's testimony, we ascertain that his principal points were (1) that a short in the field shed receptacle by itself was not the cause of the injury to Mr. Gill; (2) that the trailer should have been grounded with a metal rod; and (3) that what made the accident possible was a short in the trailer's power cord. With respect to the first two points, the testimony adduced at trial and by deposition gave him a sufficient basis of data upon which he could construct an expert opinion. *See* Ark. R. Evid. 703. Mr. Clark specifically mentioned in his testimony that he had read the depositions of Mr. McMillan, who examined the trailer immediately after the accident, Mr. Buie, and one of the officers of Waymatic. In addition, he had studied relevant photographs. His offered opinion was that, after applying general principles of electricity to these facts, he reached the conclusion that something in the electrical power supply to the trailer caused the accident. In our judgment, this constituted a satisfactory basis for rendering an expert opinion.

Regarding the third point, Mr. Clark personally observed the cord connected to the trailer when he and the Gills' counsel visited the Camden warehouse and saw trailer #308 some

four months after the accident. He concluded that the cord was shiny and new.[1] Mr. Clark testified that he had seen thousands of power cords during his career working at ALCOA and in his consulting business and that that experience gave him a sufficient basis for determining whether a power cord was new simply by looking at it. He concluded, based on this observation, that the cord had been replaced between the time of the accident and the time of his observation. He then went on to testify, as an expert witness who was qualified by virtue of his experience, that the old cord might have been damaged and that this might have caused the electrical short to the trailer. This testimony was corroborated by Peter Reynolds, who testified that the weakest part of any piece of portable electrical equipment is the cord. Other witnesses, including Coca-Cola's own expert, Mr. Buie, testified that the power cord might undergo significant wear and tear. We cannot say that Mr. Clark's opinion that the cord had been replaced and that an old, damaged cord could have caused the short was incompetent evidence. There was no error in allowing Mr. Clark's opinion in this regard.

[redacted] We note, as a final point, that Coca-Cola makes much of Mr. Clark's statement that his opinion that the cord was 95% the likely cause of the accident was a "wild guess" and speculation. But Mr. Clark added that he was 100% certain that an electrical failure in the cord or the trailer was the cause. We agree with the circuit court, which decided against striking Mr. Clark's testimony on this point, that Mr. Clark believed the original power cord was missing and that conditions on the day of the accident could not be replicated. Thus, by necessity, since the original cord could not be examined, his testimony about the percentage of causation due to a faulty cord was speculation. Mr. Clark's lack of certainty about the role of the cord in the accident goes to the weight of his opinion, not its admissibility. The circuit court's announced ruling was that Coca-Cola was free to cross-examine Mr. Clark about these statements. The circuit court did not err in this regard.

---

[1] There was no contention at trial or in this appeal that a replacement cord was a subsequent remedial measure subject to exclusion under Ark. R. Evid. 407.

Because we conclude that Mr. Clark's testimony was competent expert testimony, we need not address Coca-Cola's contention that his testimony tainted the entire trial.

Affirmed.

CORBIN, THORNTON, and HANNAH, JJ., dissent.

JIM HANNAH, Justice, dissenting. I must respectfully dissent because the majority affirms liability for negligence in the absence of any evidence that Coca-Cola was negligent. The majority's analysis of liability appears to be an application of a hybrid of strict liability, the doctrine of *res ipsa loquitur*, and general negligence.

Liability may not be based simply upon the existence of an injury. The majority appears to believe that Fred Gill's injuries could have been avoided simply by the inexpensive addition of a redundant grounding system. That may be true, but that is not how this case was pled, or tried, and further, no credible or admissible evidence exists in this case to show Coca-Cola was under a duty to provide a redundant grounding system.

This case against Coca-Cola was based in negligence and lacks substantial evidence of proximate cause. The case also fails for a lack of proof of a duty. I also must dissent from the holding that a pleading withdrawn by nonsuit is not admissible against the nonsuiting party for purposes of impeachment. A pleading withdrawn by nonsuit is no less credible than a pleading withdrawn for some other purpose.

Facts

There is no dispute that Gill was seriously injured when he suffered the electrical shock. Gill was asked to set up the trailer by Principal Steve Daniel. Gill had previously performed this task. Daniel testified he plugged in the electrical cord in the shed after Gill fed the cord out a hole in the trailer. According to Daniel's testimony, he later saw Gill, sensed Gill was in trouble, and went to his aid. By the time Daniel reached Gill, Gill was propped up against the trailer. Daniel testified that he was knocked on the ground by a shock when he touched Gill. Daniel then testified

that he touched the trailer and was again shocked, and he then unplugged the electrical cord. The evidence is that the electrical wiring in the shed was in very poor condition, did not meet code, and the that circuit used for the trailer was not grounded.

We know that Gill was shocked by current flowing from the trailer through him and into the ground. There is no evidence to show that the current could have come from anywhere but the cord plugged in by Daniel in the high school shed. However, there is no evidence of how the current was passed to the trailer body. There was no credible or admissible evidence to show that the electricity passed from the cord to the trailer body or that the electricity passed by some other means into the trailer body. The Gills did not plead or argue *res ipsa loquitur*. Neither *res ipsa loquitur* nor strict liability is applicable. Thus, the Gills had to prove what caused the electrical shock, but they did not do so.

Duty

The majority states that the question is not whether a defendant could have reasonably foreseen the exact or precise harm that occurred, or the specific harm, but rather it is only necessary that the defendant be able to reasonably foresee an appreciable risk of harm to others. The majority then states that Gill, as well as members of the public would be expected to come in contact with the trailer. That is all true and a correct statement of the law. However, the majority then states that there was evidence that Coca-Cola had changed the power cord from a two Plug 50 amp to a 15 amp cord. The majority does not state when that change was made or how it has any impact in this case. The majority then concludes:

> As in *Jordan*, where the defendant's asserted lack of knowledge of the contents of the purse that he tossed across a crowded room did not exempt him from owing a duty of ordinary care to the patrons of the bar, Coca-Cola's lack of knowledge that Fordyce High School's electrical outlet in the shed was defectively grounded does not defeat its duty, under these facts, to take ordinary, prudent precautions to protect Mr. Gill, including an auxiliary grounding system. Not only did Coca-Cola fail to install an

> auxiliary grounding system for the trailer, but it failed to test the grounding system in the shed to assure that it was operational.

The majority's reliance on *Jordan v. Adams*, 259 Ark. 407, 533 S.W.2d 210 (1976) is misplaced. In *Jordan*, this court found that it was a culpably negligent act to throw a purse 26 feet across an area where people were dining and drinking. The court also noted that Jordan had known his girlfriend for a year, and that he knew she often carried a pistol. Therefore, the jury could conclude Jordan was aware the purse might well contain a pistol. This court then went on to say that it was foreseeable that an injury might result from throwing the purse, and it noted that glasses were broken. The issue in *Jordan* was foreseeability, and this court concluded that injury from throwing the purse was foreseeable and that the tortfeasor need not foresee the exact manner of injury.

Apparently, *Jordan* is cited for the proposition that for liability to attach, it is only necessary that the tortfeasor foresee an appreciable risk of harm to others by his or her action. Thus, in the present case, the majority holds that providing the trailer was a negligent act and that the exact manner in which the electricity made its way into the trailer body need not be shown. In *Jordan,* there was a negligent act in throwing the purse. In the present case, there is no negligent act in providing the trailer. Trailers had been provided for many years. What the majority is really holding is that the trailer was a dangerous instrumentality and providing the trailer subjected Coca-Cola to strict liability. That theory was not pled or tried.

Although couched in terms of negligence, the majority actually applies strict liability. The majority wants Coca-Cola to be liable for injuries arising from the use of a dangerous instrumentality. There is a duty on the part of a person in charge of a dangerous instrumentality to protect against the danger if the person knew or should have known of the danger. *Benson v. Schuler Drilling Co.*, 316 Ark. 101, 871 S.W.2d 552 (1994). *Black's Law Dictionary* notes that a dangerous instrumentality may serve as the basis for strict liability where an instrument is:

> so inherently dangerous that it may cause serious bodily injury or death without human use or interference.

Black's Law Dictionary, 399 (7th ed. 1999). There is no doubt that the shed may have posed such a danger. The circuit that supplied the electricity to the trailer was ungrounded. Anyone touching an outlet in that circuit stood a danger of suffering injury. However, the trailer cannot be a dangerous instrumentality on its own. It took human involvement to bring about the injury. The trailer had to be plugged into the defective shed before the electricity found its way into the trailer. To hold, as the majority does, that the duty to provide ordinary care required testing the shed and supplying a redundant grounding system without any evidence that to failing to do so breached the standard of care in the industry is to apply strict liability. Strict liability is inapplicable in this case.

Negligence

Liability in this case was based upon negligence. To prove negligence in Arkansas, the plaintiff must show a failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances. *Shannon v. Wilson,* 329 Ark. 143, 947 S.W.2d 349 (1997). The plaintiff must also show that he or she suffered damages proximately caused by the defendant's negligence. *Callahan v. Clark,* 321 Ark. 376, 901 S.W.2d 842 (1995). Underlying negligence is the broad principle of law that states that where there is fault there is liability, but where there is no fault there is no liability. *Missouri Pacific R.R. Co. v. Horner,* 179 Ark. 321, 15 S.W.2d 994 (1929); *Choctaw, O. & G. R. Co. v. Jones,* 77 Ark. 367, 92 S.W. 244 (1906). Long ago in *Missouri Pacific,* this court stated:

> There are many injuries to persons and property for which the law furnishes no redress, and proof of injury alone, without proof of negligence causing the injury, does not entitle one to recover. One is entitled to recover for negligence only when the negligence complained of causes the injury.

Missouri Pacific, 179 Ark. at 325.

Two acts of negligence are alleged. The first relates to the cord. The second relates to a back-up grounding system. In asserting both alleged acts of negligence, the Gills rely upon the testimony of Jimmy Clark as an expert witness and as a lay witness.

The Gills rely heavily on Clark's testimony in attempting to establish the alleged negligent act in supplying a defective cord. They also rely upon Clark to establish that providing a trailer with a defective cord would be a negligent act. That may be an appropriate question for an expert on electricity. However, the Gills also rely on Clark's testimony to establish that the cord was defective, which is nothing more than speculation. Clark had no knowledge of the trailer or the cord at the time of the injury.

An examination of Clark's testimony makes it immediately clear that he has utterly no evidence to offer on the state of the cord or trailer at the time Gill suffered the electrical shock. Clark did not see the trailer while it was still at the school and cannot offer any testimony as to its condition at the time of the injury. Clark could testify as to the condition at the time he later saw the trailer. The only testimony with regard to the condition of the cord at the time of the injury came from Edward McMillan, the electrician called to the scene by Fordyce High School. Mr. Macmillan testified that he examined the cord and tested it, finding there was no problem. The next best testimony to Mr. Macmillan's testimony was the testimony of James Jordan of Coca-Cola's maintenance crew. Jordan's testimony was that cords in the trailers were changed when needed, and the cord in trailer #308 might have been changed at some time, but there was no testimony that it was changed, or most significantly, what the condition of the cord was on the day of the accident.

Clark only saw the trailer later, and based upon his observation of the cord, he concluded that the cord appeared new. Because he concluded the cord was new, Clark then concluded the cord had been changed after the accident. There was no evidence to show that the cord was changed after the accident. However, because Clark speculated that the cord was new, he then speculated further that the cord caused the accident. Clark's testimony is obviously nothing more than his musings about what likely happened. That is not evidence of anything. He stated:

> My feeling was at the time, and of course I said that nobody can tell for sure, but my feeling at the time that it most probably, and I said it at deposition that it was 95% probable that it was the cord. That something in the cord—those cords are run over by

> vehicles and if they're old and have been smashed a number of times, the insulation in them is going to give way.

Clark's testimony amounts to nothing more than assumptions based upon assumptions. He assumes that the cord was replaced where there are no facts showing that the cord was replaced after the accident. He assumes that the reason the cord was replaced was because it was old. Clark then further assumes that the old cord was frayed, and that it had been run over by vehicles and damaged. Clark in addition then assumes that the old cord was frayed to the point that the wires were uninsulated and bare. He then finally assumes those bare wires made contact with the trailer charging the trailer body with electricity. There is no evidence to support any of these conclusions. The evidence was the trailer body was charged when Gill touched it and suffered an electrical shock. There was no evidence of how the trailer body became charged with electricity. To the contrary, Macmillan, who was the only witness who examined the cord at the scene, testified that the cord was not defective. That is the only real evidence on the condition of the cord. The directed-verdict motion should have been granted on this issue rather than forcing the jury to impermissibly decide whether to accept Macmillan's testimony on the condition of the cord or Clark's speculation. A jury verdict may not be based on speculation. *First Elec. Coop. Corp. v. Pinon*, 277 Ark. 424, 642 S.W.2d 301 (1982).

Nonetheless, the majority buys into this rank speculation stating that Clark "went on to testify as an expert witness who was qualified by virtue of his experience, that the old cord might have been damaged and that this might have caused the electrical short to the trailer." Twice, the majority uses the word "might" in one sentence. That the majority is compelled to use "might" simply confirms that Clark's testimony is nothing more than inadmissible conjecture. What underlies the majority's opinion is the assumption that because the trailer belonged to Coca-Cola, and was provided by Coca-Cola, it is more likely that Coca-Cola was responsible for the condition that caused the trailer body to be charged with electricity than it was that Gill was responsible for the condition. In its reasoning, the majority slides into the temptation to apply "the thing speaks for itself doctrine." *See Gain v.*

Parker, 315 Ark. 107, 112, 865 S.W.2d 282 (1993). This is the *res ipsa loquitur* doctrine. *Res ipsa loquitur* was not pled or argued in this case.

However, a discussion of *res ipsa loquitur* also shows that the majority is in error because the doctrine supplies the sort of inference the majority stretches to find. The presumption supplied by *res ipsa loquitur* is limited to situations where the defendant's negligence has been substantially proven. *Barker v. Clark*, 343 Ark. 8, 33 S.W.3d 476 (2000). *See also Coca-Cola Bottling Co. v. Hicks*, 215 Ark. 803, 223 S.W.2d 762 (1949). Though not stated, the majority opinion assumes the negligence of Coca-Cola was substantially proven simply because they provided the trailer. The argument under *res ipsa loquitur* would be that Coca-Cola's liability is substantially proven because it would be most likely that Coca-Cola created whatever condition existed in the trailer that caused it to be charged. However, in this case, the thing does not speak for itself. To apply the doctrine of *res ipsa loquitur*, the event must be one which ordinarily does not occur in the absence of negligence, and one where all other possible causes of injury such as the conduct of the plaintiff or others are sufficiently eliminated. *Gain, supra.* To meet the requirements of *res ipsa loquitur*, the instrumentality, in this case the charged trailer, must be in the exclusive possession and control of the defendant. *Barker, supra.* That was not the case here where the trailer was delivered to the high school and Gill and others were setting up the trailer. Negligence had to be proven, and it was not.

The Gills offered no credible evidence of how the trailer body became charged. Macmillan testified that his examination and testing of the cord at the scene revealed no problems. The cord supplied the electricity to the trailer, but that alone does not mean that the cord itself charged the trailer body. The trailer body might have been charged by something Gill brought inside the trailer and plugged in that belonged to the school district. Was the district using hot plates or other electrical appliances? Was Gill using a drill motor in setting up the trailer? Did Gill make modifications to the set up inside the trailer? Gill might have done something in setting up the trailer that brought some electrical wire other than the cord in contact with the trailer body.

The majority seems to conclude that somehow unfounded speculation by experts can magically coalesce to constitute substantial evidence proving that a short in the cord was the cause of the accident. The testimony provided by experts, such as Clark's testimony that there was a 100% possibility of a short in the cord that he never examined, Peter Reynold's testimony that the cord was the weakest point in electrical equipment, and Lonnie Buie's testimony that the cord could undergo significant wear and tear simply supply possibilities, but do not constitute admissible evidence. The only credible evidence was that of Macmillan's testimony that in testing and examining the cord, he found no problems.

Surely justice ought not be meted out based on percentage chances, but that is precisely what was done in this case. Clark's testimony given the greatest leeway possible amounts to nothing more than Clark's subjective guess on what might have been the most likely cause, and that guess is directly contrary to the only credible evidence provide by Macmillan that there was no problem with the cord. Clark offered no credible evidence of the condition of the cord or evidence that the trailer body was charged by the cord. The Gills offered no evidence on how the trailer body became charged. The trial court erred first in admitting Clark's testimony over the objection that Clark could only speculate on the condition of the cord. The trial court then erred again in failing to grant a directed verdict. The evidence in this case simply does not support the jury's verdict. As this court stated in *First Elec. Coop.*:

> Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Glidwell, Adm'r. v. Arkhola Sand & Gravel Co.*, 212 Ark. 838, 208 S.W.2d 4 (1948). We stated in *Kapp v. Sullivan Chevrolet Co.*, 234 Ark. 395, 353 S.W.2d 5 (1962), that judgments based on speculation and conjecture will not be allowed to stand.

First Elec. Coop., 277 Ark. at 428-29. Conjecture and speculation is precisely what underlies the verdict in this case.

To state that Clark's qualifications to testify on the issue of the cord and redundant grounding systems were dubious is an

understatement. In *Farm Bureau Mutual Insurance. Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), this court stated:

> In *Daubert*, 509 U.S. 579, the petitioners urged the Court to dispose of the test established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which provided that "expert opinion based on a scientific technique is inadmissible unless the technique is 'generally accepted' as reliable in the relevant scientific community." 509 U.S. at 584. They contended that the *Frye* test had been superseded by the adoption of the Federal Rules of Evidence. The Court agreed and established the following inquiry to be conducted by the trial court:
>
>> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.
>
> *Id.* at 592-93 (footnotes omitted).

Farm Bureau, 341 Ark. at 115-16. The trial court did not apply the above requirements in the present case. Rather, the trial court concluded simply that Clark was current in his field. It is unclear what Clark's field was. Clark was some sort of electrical person within the structure of Alcoa, but what that translates to in the outside world was never made clear. It is likely Clark was qualified to testify as an expert in some limited regard, perhaps with regard to electrical practices at Alcoa in the 1960's, but he should not have been allowed free license to speculate as he was in this case.

The majority notes that Clark expressed opinions on conductivity and grounding. Clark characterized the issues in this case as "elementary." He also stated, "It's such a simple matter." Yet his opinions were not based in fact. The injury done to the credibility of the trial by the introduction of Clark's speculation and assumptions based upon assumptions so outweighs any slight value of his testimony on conductivity and grounding as to make

his presence prejudicial to the trial. That metal and human beings conduct electricity is such common knowledge that it is difficult to see how expert testimony is required on the subject. Injury by electrical shock has been a subject in the decisions of this court for many, many years. *See Presley v. Actus Coal Co.*, 172 Ark. 498, 289 S.W. 474 (1927). As a matter of common experience and knowledge the average person knows that what is in a light socket can kill. Grounding is also hardly a novel concept. The question is whether the untrained layman would be qualified to intelligently determine the issue. *Maxwell v. State,* 279 Ark. 423, 652 S.W.2d 31 (1983).

Had Clark been qualified to testify about the standard of care in use and maintenance of the type of trailer at issue, or had he been able to offer testimony about the standard of care in the industry regarding use of redundant grounding in trailers of this sort, he might have been helpful. He offered only his subjective opinions about what would be safe, not what the standard was.

An expert is presented to a jury as someone the jury can trust and rely on, someone who has more knowledge than the jury does. However, as this court has stated, where an expert is allowed to draw an inference the jury should make, or in this case to provide speculation in lieu of evidence, the jury is presented information "gift-wrapped with the fabric of expert scientific opinion." *Maxwell, supra.* That is what was done in this case. The jury was not presented with evidence that Gill suffered the electrical shock because of a defect in the cord, but rather was presented with unfounded speculation by an expert that cast no light on how the trailer body came to be charged with electricity. That the jury relied upon Clark and returned a verdict against Coca-Cola is hardly surprising.

Clark's opinions on secondary grounding systems are no more credible than his testimony on the cord. Clark has not been employed in a field remotely involving electricity in over thirty years. Even when he was employed, his position was not one that required he be a licensed electrician. In negligence, an expert is expected to provide the jury with information on the standard of care in the industry. *See Nationsbank v. Murray Guard*, 343 Ark.

437, 36 S.W.3d 291 (2001). In the context of this case, Clark would be expected to inform the jury of what other in the industry do with respect to redundant grounding. No such evidence was supplied. The question was whether Coca-Cola was behaving as a reasonably careful person would do under the circumstances. *Ethyl Corp. v. Johnson*, 345 Ark. 476, 49 S.W.3d 644 (2001). The jury was not provided with evidence on this issue. Instead, the jury was told:

> Q. Jimmy do you have an opinion with reference to the safety of Coca-Cola in not putting this ground on this trailer?
>
> A. Do I have an opinion about the safety of it?
>
> Q. Yes, sir.
>
> A. Well, it should have been there. I mean, the ground should have been there. The ground rod and the wire from the rod over to the — to the — whatever — what do you call that what we've been talking about? Well, from this vehicle here because it had wheels on it through a wire hooked to the frame and to the ground rod, it should have been there. It was designed for it. I understand at one time they used that and they just quit using it.

Whether the trailer ever had a redundant ground was a matter of contention in the case, and as with much of his testimony, Clark conveniently concluded without any basis in fact that there had been such a system on the trailer in this case. The above testimony is not expert testimony. It provides the jury with nothing regarding standard of care in the industry. Had Clark testified that the industry does or does not use a redundant grounding system as a standard, his opinion might have been helpful. Rather, his opinion is merely a personal opinion by Clark that it would have been safer with a redundant grounding system. If Clark concluded one redundant system made it safer, presumably he would have opined that a second redundant grounding system would make it even safer and guard against someone pulling up or running over the first redundant system. Ten redundant grounding systems would obviously increase safety even more, but the question is whether Coca-Cola was negligent and Clark's opinions on redundant grounding do not cast any light on negligence.

The trial court erred in allowing Clark to testify over objection about issues of which he knew nothing.

Waymatic Crossclaim

I also must respectfully disagree with the majority's holding that a pleading is exempted from use in impeachment where the action was nonsuited. The majority cites *Belz-Burrows, L.P. v. Cameron Construction. Co.,* 78 Ark. App. 84, 78 S.W.3d 126 (2002), as a case it looks to in determining that allegations in pleadings that were nonsuited may not be used for impeachment. I must note that the court of appeals stated:

> However, there is a significant difference between the admissibility of a withdrawn pleading and the admissibility of the fact that a nonsuit was taken. The admissibility of a withdrawn pleading rests on the fact that it is considered an admission and is inconsistent with the present position of the party who filed it. When a party states a fact in a pleading, he is averring that it is true; therefore, if at trial he takes a position contrary to the one taken in the pleading, a clear inconsistency is revealed. The same reasoning does not necessarily apply to the taking of a nonsuit. Unlike a pleading, a nonsuit is not defined by its content; it does not necessarily express a statement or assert a position. A pleader who takes a nonsuit does not necessarily admit that his suit has no basis; rather, a nonsuit is often taken for other reasons, such as settlement or trial strategy.

Belz-Burrows, 78 Ark. App. at 91-92. What was at issue in *Belz-Burrows* was whether the fact that there had been a nonsuit could be used to infer the claim was dropped because there was no merit to the claim. Admission of a pleading was not at issue. It is by a pleading that the party is impeached. The court of appeals decision provides simply that the fact a nonsuit has been taken does not necessarily imply anything about a position taken as opposed to a pleading which is an averment of the truth of what was asserted. A nonsuit may be taken for a number of reasons that have nothing to do with the validity of the claim. Therefore, the court of appeals distinguished a nonsuit from a pleading, which is correct.

In *Dodson v. Allstate Insurance. Co.,* 345 Ark. 430, 47 S.W.3d 866 (2001), this court discussed an attempt by Dodson to admit a filed and dismissed pleading of a party opponent. In *Dodson,* the court held that the pleading was admissible at trial as impeachment evidence to show that contrary to Allstate's position at trial, Allstate had earlier asserted that Dodson had been involved in wrongdoing. Similarly in the present case, Coca-Cola wishes to use a pleading that was effectually withdrawn by a nonsuit to show that a party is now taking a different position than earlier, and that the pleading is admissible impeachment evidence under Ark. R. Evid. 613 (2002).

Belz-Burrows is not on point. The majority asserts that no authority is cited by Coca-Cola in support of its assertion it should be able to use nonsuited allegations for impeachment. The majority states it is aware of no supporting authority. The majority need look no further than *Dodson,* which stands for the proposition that withdrawn pleadings are admissible for purposes of impeachment. Coca-Cola simply attempts to impeach the Gills with a pleading as allowed under *Dodson.* There is no difference between a withdrawn pleading and a nonsuited pleading. Both include allegations that are admissible. The majority argues that allowing admission of withdrawn pleadings against settling parties may discourage settlement. Allowing a nonsuiting party to exempt its pleadings from use in trial encourages less than candid behavior. It is one thing to allow alternative pleading where a plaintiff may be unsure of just how the injury was inflicted, but it is quite another to encourage a litigant to knowingly file contradictory pleadings as a matter of strategy. It is where a plaintiff is unsure that alternative pleading is proper. *See e.g., George v. Jefferson Hosp. Ass'n.*, 337 Ark. 206, 987 S.W.2d 710 (1999).

I would reverse and remand.

CORBIN and THORNTON, JJ., join this dissent.

Rudolph ZANGERL, III *v.* STATE of Arkansas

CR 02-1296 100 S.W.3d 695

Supreme Court of Arkansas
Opinion delivered March 13, 2003

[redacted]

Alvin Schay, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Rudolph Zangerl, III, appeals his judgment of conviction for third-offense DWI and asserts a violation of his right to a speedy trial. We agree that his speedy-trial rights were violated, and we reverse his judgment of conviction and dismiss the case.

On August 25, 1999, Zangerl was arrested for driving while intoxicated in the city of Humphrey. He was issued a ticket by the arresting police officer and advised of his court-appearance date of September 14, 1999, in Humphrey city court for taking a plea. That plea date was subsequently continued in order to give Zangerl an opportunity to consult with an attorney. On November 9, 1999, Zangerl entered a plea of not guilty in city court, and his trial was set for December 14, 1999. On December 14, 1999, the case was transferred to the Arkansas County Circuit Court on the belief that this was Zangerl's fourth DWI offense and, as such, a felony.

On January 18, 2000, an information was filed in circuit court charging Zangerl with fourth-offense DWI. Zangerl's pretrial hearing was set for June 12, 2000, and his jury trial was set for July 6, 2000. On June 9, 2000, Zangerl moved for a continuance of his pretrial hearing, because his counsel was in the process of preparing pretrial motions. On June 13, 2000, the circuit court reset his pretrial hearing for June 26, 2000. On June 21, 2000, Zangerl filed two pretrial motions. The first motion was to exclude his prior DWI convictions based upon a violation of the *ex post facto* clause, while the second motion was to exclude the prior convictions due to the statute of limitations.

On June 26, 2000, the court held Zangerl's pretrial hearing. At the hearing, defense counsel informed the court that Zangerl's pretrial motions "[were] of a variety that can be dealt with by the Court, based on the motions and perhaps, briefs[,]" but that Zangerl "would not need an evidentiary hearing on those." The court then "ma[d]e the briefs due" on July 11, 2000, and reset the trial for August 10, 2000. The jury trial did not take place on

July 6, 2000, and no explanation for this is contained in the record.

On August 16, 2000, which was six days after the scheduled trial date, the court reset the trial date for October 12, 2000, and stated the reason as "docket congestion, older case tried[.]" On October 19, 2000, which was seven days after the scheduled trial date, the court reset the case for January 4, 2001, and stated the reason as "Defendant's request, waiting on a brief from Mr. Molock[.]" On January 11, 2001, which was seven days after the scheduled trial date, the court again reset the trial for February 13, 2001, at the State's request. On January 23, 2001, the circuit court entered its order denying Zangerl's two motions to exclude prior DWI convictions. On January 30, 2001, Zangerl waived his right to a jury trial. On March 1, 2001, the court reset the case for a nonjury trial to be held on April 16, 2001.

On April 9, 2001, Zangerl filed his motion to dismiss based on an alleged violation of his right to a speedy trial. In his brief-in-support of the motion, Zangerl conceded that 181 days should be charged to him in the speedy-trial calculations. On April 16, 2001, the motion was heard before Zangerl's bench trial. At the hearing, Zangerl argued that his right to a speedy trial had been violated in that he was tried on the 566th day following his arrest on August 25, 1999. He then conceded that the following time periods should be charged to him: September 16, 1999, to November 9, 1999, for continuances at his request; June 21, 2000, to July 26, 2000, for the time in which his motion to exclude prior convictions was filed and heard; July 6, 2000, to August 8, 2000, for a continuance at his request; and February 13, 2001, to April 16, 2001, for his request to have a non-jury trial rather than a jury trial. The total days conceded by Zangerl was 164.

The State responded that even using the arrest date of August 25, 1999, as a starting point, the State was still within its time because only 275 days were attributable to either the circuit court's or State's requests or actions. Zangerl then made four arguments in reply: (1) that in response to the State's statement that the October 12, 2000 trial resetting was at the defendant's request due to his inability to get to Arkansas County because he

was in school in Jonesboro, there had been no time in which he was unable to attend because of school; (2) his request to change a pretrial-hearing date did not affect the trial date; (3) a continuance for docket congestion requires exceptional circumstances to be set out in the docket sheet or by court order under the criminal rules; and (4) his motions to exclude prior convictions of June 21, 2000, did not contain requests for a continuance; thus, the continuance on October 19, 2000, stating "Defendant's request, waiting on a brief from Mr. Molock" was in error. Zangerl claimed that the State was still 46 days over the 365-day limit. The State countered that even assuming this, the delay had been only 336 days. The court denied Zangerl's motion and, after the ensuing trial, found him guilty of DWI.

On May 29, 2001, the court held a sentencing hearing. At the sentencing hearing, the State conceded that this was Zangerl's third DWI offense, not his fourth. Thus, the crime was a misdemeanor, not a felony. The court then sentenced Zangerl to sixty days in jail and ninety days of community service, and ordered him to pay a fine of $3,500 plus $300 in costs. The court further ordered that his driver's license be revoked. On June 8, 2001, the court entered an order memorializing the judgment of conviction and sentence.

Zangerl appealed his conviction and sentence to the court of appeals, and the court of appeals reversed the conviction in an unpublished opinion and dismissed. *See Zangerl v. State*, No. CACR01-1437 (Nov. 13, 2002). This court subsequently granted the State's petition for review. When we hear an appeal pursuant to a grant of a petition for review, we review the matter as if it were originally filed in this court. *See Ilo v. State*, 350 Ark. 138, 85 S.W.3d 542 (2002); *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 370 (2002).

Zangerl's sole point on appeal is that the circuit judge erred in denying his motion to dismiss on speedy-trial grounds. The apposite law governing speedy trials has been often stated by this court. Arkansas Rule of Criminal Procedure 28 governs speedy-trial determinations. It requires the State to try a defendant within twelve months, excluding any periods of delay

authorized by Ark. R. Crim. P. 28.3. *See* Ark. R. Crim. P. 28.1 (2002); *Miles v. State*, 348 Ark. 544, 75 S.W.2d 677 (2002). The time for trial begins to run from the date the charge is filed; however, if prior to that time, the defendant has been continuously held in custody, on bail, or lawfully at liberty, the time shall begin to run from the date of arrest. *See* Ark. R. Crim. P. 28.2(a); *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000). Once a defendant demonstrates a *prima facie* case of a speedy-trial violation, the burden is on the State to show that the delay was the result of the defendant's conduct or was otherwise justified. *See Turner v. State*, 349 Ark. 715, 80 S.W.3d 382 (2002); *Burmingham v. State*, 346 Ark. 78, 57 S.W.3d 118 (2001). If a defendant is not brought to trial within the requisite time, Ark. R. Crim. P. 30.1 provides the defendant will be discharged, and such discharge is an absolute bar to prosecution of the same offense and any other offense required to be joined with that discharged offense. *See Moody v. Arkansas County Circuit Court*, 350 Ark. 176, 85 S.W.3d 534 (2002).

Zangerl was arrested on August 25, 1999 for driving while intoxicated. His trial commenced on April 16, 2001, which was the 600th day following his arrest.[1] Because Zangerl has made a *prima facie* showing of a speedy-trial violation, the State must show that 235 days of delay were caused by the defendant or otherwise legally justified. *See Ibsen v. Plegge*, 341 Ark. 225, 15 S.W.3d 686 (2000).

Zangerl initially conceded before the circuit court that 181 days were excludable due to his delay. On appeal, however, he concedes 188 days are attributable to him. However, as the State points out, the correct dates and calculation of days of the times conceded by Zangerl are as follows:

---

[1] Both the appellant and the State contend that 599 days elapsed between Zangerl's arrest and his bench trial. However, our calculations reveal that April 16, 2001, the date of Zangerl's bench trial, was the 600th day counting from the day after his arrest on August 25, 1999. *See* Ark. R. Crim. P. 1.4. The discrepancy may be due to the fact that 2000 was a leap year.

(1) September 14, 1999 to November 9, 1999, due to Zangerl's request for a continuance to consult an attorney, for a total of 56 days;

(2) June 21, 2000 to July 26, 2000, for the period in which appellant's pretrial motion was under advisement;

(3) July 6, 2000 to August 10, 2000, due to Zangerl's request for a continuance, for a total of 50 days (due to overlap of prior period); and

(4) February 13, 2001 to April 16, 2001, due to Zangerl's request for a non-jury trial, for a total of 62 days.

Using these corrected dates and calculations, it appears Zangerl concedes that a total of 168 days are chargeable to him rather than 164, 181, or 188 days. The State, however, argues that 70 more days should be charged to Zangerl. It contends that the entire period from August 10, 2000, until at least October 19, 2000, on which the docket sheet reflects the case was reset while "waiting on brief [from] Mr. Molock[,]" should be excluded. We disagree.

On June 21, 2000, Zangerl did indeed file his motions to exclude his prior convictions. The court addressed the status of the motions in its pretrial hearing held on June 26, 2000. At that time, the following colloquy took place between counsel and the court:

DEFENSE COUNSEL: . . . And I think [the motions] are of a variety that can be dealt with by the Court, based on the motions and perhaps briefs, but that we would not need an evidentiary hearing on those. . . .

. . . .

THE COURT: Well, let's see, it will obviously be — we are not going to be ready for trial on the sixth?

DEFENSE COUNSEL: I doubt it, as far as getting the motions resolved by that time.

THE COURT: Why don't we make the briefs due, like, the eleventh, and re-set the trial —

CASE COORDINATOR: August 10.

It appears clear to this court that the court requested briefs to be filed by July 11, 2000.

Arkansas Rule of Criminal Procedure 28.3(a) provides in pertinent part that "[n]o pretrial motion shall be held under advisement for more than thirty (30) days, and the period of time in excess of thirty (30) days during which any such motion is held under advisement shall not be considered an excluded period." Ark. R. Crim. P. 28.3(a) (2002). The State contends, however, that under the facts of this case, the motions filed by Zangerl were not "under advisement" until the briefs were filed, which, as of October 19, 2000, they had not been. Again, we disagree. In *Ferguson v. State, supra*, this court addressed a similar scenario and held as follows:

> For example, on July 15, 1996, Appellant filed a motion to suppress the custodial statements made by Appellant to his fellow inmates. On August 5, 1996, a continuance was granted upon agreement of the parties to obtain additional information from the lead police investigator that was pertinent to his pretrial motions. The suppression hearing was held on November 4, 1996. At the conclusion of the hearing, the trial court took the motion under advisement and requested briefs from both sides. No ruling was made within thirty days after the hearing. The thirtieth day from the date of hearing was December 3, 1996. Thus, under our holding in *Gwin*, the period of time from July 15 to December 3, 141 days, should be excluded from the calculation of speedy trial as a period of delay attributable to hearings on a pretrial motion.

Ferguson, 343 Ark. at 171, 33 S.W.3d at 123. *See also Gwin v. State*, 340 Ark. 302, 306, 9 S.W.3d 501, 504 (2000) (" . . . the excluded period contemplated by the rule begins at the time the pretrial motion is made and includes those periods of delay attributable to the defendant until the motion is heard by the court and not more than thirty days thereafter."). Although the State claims that in the instant case, appellant's motions were not "heard" at the June 26, 2000 hearing, the prosecutor was in fact present and represented as stated on the cover page of the hearing's transcript. The prosecutor failed to object to Zangerl's counsel's statement

that the motions could be decided on the motions or briefs. Moreover, the record fails to reflect that any briefs were filed by either party.

The State submits as persuasive authority the United States Supreme Court decision of *Henderson v. United States,* 476 U.S. 321 (1986), and argues that it stands for the proposition that a motion is not "under advisement" until all the papers it reasonably expects to aid it in ruling on the motion are received. The State's citation is unpersuasive. The Court said in *Henderson* that it was "consistent with [the] exclusion [permitted by another statute] to exclude time when the court awaits the briefs and materials needed to resolve a motion on which a hearing has been held[.] . . . We therefore hold that subsection (F) excludes time after a hearing has been held where a district court awaits additional filings from the parties that are needed for proper disposition of the motion." 476 U.S. at 331. The facts in *Henderson* are not the facts in the instant case, as we have no evidence before us that briefs were ever filed in this case. Ultimately, the circuit court apparently decided the motions without briefs. Why there was such a delay in deciding the motions is unclear. What we do know is that the circuit court asked that briefs be submitted on July 11, 2000, and that the circuit court noted it was "waiting" on defense counsel's brief on October 19, 2000. Zangerl denies that he requested a continuance based on briefing.

■ ■ We conclude that Rule 28.3(a) is clear in its terms and provides that no pretrial motion shall be held under advisement for more than thirty days, and our case law confirms this. The question then becomes when was the case taken under advisement. We answer the question by looking to the date that the judge asked for briefs, July 11, 2000. Hence, thirty days from that date would be August 10, 2000. However, this time period was within the time already conceded by Zangerl as chargeable to him. Accordingly, the State still fails to meet its burden of showing that the delay in trying Zangerl was the result of his conduct or otherwise legally justified. In sum, we conclude the following time is chargeable to the State:

August 25, 1999 — September 14, 1999	20 days
November 9, 1999 — June 21, 2000	225 days
August 10, 2000 — February 13, 2001	187 days
Total	432 days

There is one further point. As stated previously, Zangerl filed his motion to dismiss on April 9, 2001. The date the speedy-trial motion is filed by a defendant tolls the running of the time for speedy trial under our rules. *See Doby v. Jefferson County Circuit Court*, 350 Ark. 505, 88 S.W.3d 824 (2002); *Moody v. Arkansas County Circuit Court, supra*; *Ibsen v. Plegge, supra*. This time between August 25, 1999, and April 9, 2001, is 593 days. Thus, the State had the burden of showing that at least 228 days were properly excluded in order for Zangerl to have been timely brought to trial. Here, Zangerl only conceded 168 days were chargeable to him. Thus, the State was left with the burden of showing that at least 60 additional days could be properly excluded. This the State failed to do.

Again, we are mindful of the fact that on October 19, 2000, there was a letter from the court resetting the case which referred to "Defendant's request, waiting on a brief from Mr. Molock[.]" Defense counsel disputes the fact that he requested a continuance for briefing purposes. We admit to some ambivalence on the point in light of this docket entry. Nevertheless, the question is whose obligation is it to bring a defendant to trial in 365 days. Our Criminal Rule 28 places that burden squarely on the shoulders of the State. In this case, approximately four months passed from the date pretrial motions were filed to October 19, 2000, and seven months passed between the time the motions were filed and their denial. The circuit court ordered briefs due by July 11, 2000, and they apparently were never filed. Saddling the defendant with a four-month or seven-month delay because pretrial motions were not decided runs counter to the express policy behind Rule 28 and specifically Rule 28.3(a), which expressly limits excludable time for pretrial motions. A defendant is not required to bring himself to trial or "bang on the courthouse door" to preserve his right to a speedy trial; the burden is on the courts and the prosecutors to see that trials are held in a timely

fashion. *Nelson v. State*, 350 Ark. 311, 86 S.W.3d 909 (2002) (quoting *Burmingham v. State, supra*). *See also Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002).

Under the dissent's analysis, there was no obligation on the part of the State or the court to move this case along even though Rule 28.3(b) specifies a 30-day time limit for an exclusion after pretrial motions are taken under advisement. We believe the date the briefs were due must be the operative date. Otherwise, a circuit court could set a date for briefs and then the State and the court could wash their hands of any responsibility to comply with the speedy-trial rule until the briefs were filed. That could take seven months, which is exactly what occurred in the case before us. And we still do not know whether a brief was actually filed or whether only cases were sent to the court because no evidence of this is in the record. Such a loophole undermines completely the obligation of the State and the court to bring a person to trial within twelve months of the date of arrest. Again, our Rule 28.3(b) is clear — only thirty days from when the motion was taken under advisement is excludable. The rule makes no reference to when the matter was "heard."

We conclude that the State failed to meet its burden of showing that the seventy days between August 10, 2000, and October 19, 2000, are chargeable to Zangerl. This is especially true in light of the policy expressed in Rule 28.3(a) relating to excludable time for pretrial motions. Because we decide the issue on this basis, we need not address Zangerl's second point that a mere reference to "docket congestion, older case tried" does not comply with Rule 28.3(b).

Reversed and dismissed.

GLAZE, CORBIN, and HANNAH, JJ., dissent.

JIM HANNAH, Justice, dissenting. I must respectfully dissent. I disagree with the majority's finding that Zangerl's case was taken under advisement on July 11, 2000, the date the briefs were to be submitted to the trial court. I agree with the

State's contention that the entire period from August 10, 2000, until at least October 19, 2000, should be excluded.[1]

Rule 28.3(a) of the Arkansas Rules of Criminal Procedure provides, in part, that "[n]o pretrial motion shall be held under advisement for more than thirty (30) days, and the period of time in excess of thirty (30) days during which any such motion is held under advisement shall not be considered an excluded period." At the pretrial conference on June 26, 2000, the following colloquy took place between defense counsel and the trial court:

> DEFENSE COUNSEL: . . . And I think [the motions] are of a variety that can be dealt with by the Court, based on the motions and perhaps briefs, but that we would not need an evidentiary hearing on those . . . .
>
> * * *
>
> THE COURT: Why don't we make briefs due, like, the eleventh. . . .

Clearly, the June 26 pretrial conference was not a hearing on the motions, and the motions were not submitted to the court for decision on that date, nor were the motions taken under advisement on that date. For whatever reason, Zangerl failed to file a brief on July 11.

The majority states that the issue is "when was the case taken under advisement." The answer, according to the majority, is "the date that the judge asked for briefs, July 11, 2000." By stating that the first day the motion was held under advisement is the date that the brief was *due*, the majority, in effect, condones Zangerl's refusal to comply with the court's order to submit his brief on July 11, 2000.

In *Gwin v. State*, 340 Ark. 302, 306, 9 S.W.3d 501 (2000), we held that the excluded period contemplated by Rule 28.3(a) "begins at the time the pretrial motion is made and includes those

[1] As the majority points out, Zangerl conceded the period from June 21, 2000, to August 10, 2000. The only time period at issue is the period between August 10, 2000, and October 19, 2000.

periods of delay attributable to the defendant until the motion is *heard by the court and not more than thirty days thereafter.*" (Emphasis added.) Zangerl made his pretrial motions on June 21, 2000. The motion was not heard by the court on July 11; rather, the briefs were *due* on July 11. It is obvious from the docket sheet that Zangerl's brief had still not been received on October 19, 2000.

The majority states that we addressed a similar scenario in *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000), where we stated:

> For example, on July 15, 1996, Appellant filed a motion to suppress the custodial statements made by Appellant to his fellow inmates. On August 5, 1996, a continuance was granted upon agreement of the parties to obtain additional information from the lead police investigator that was pertinent to his pretrial motions. *The suppression hearing was held on November 4, 1996.* At the conclusion of the hearing, the trial court took the motion under advisement and requested briefs from both sides. No ruling was made within thirty days after the [suppression] hearing. The thirtieth day from the date of [the suppression] hearing was on December 3, 1996. Thus, under our holding in *Gwin*, the period of time from July 15 to December 3, 141 days, should be excluded from the calculation of speedy trial as a period of delay attributable to hearings on a pretrial motion.

Ferguson, 343 Ark. at 171 (emphasis added).

Ferguson, supra, is distinguishable from the present case. In the present case, there was no hearing on the merits of Zangerl's pretrial motions prior to the trial court's request on June 26 that briefs be submitted on July 11. The facts indicate that in *Ferguson, supra*, the trial court conducted a suppression hearing, where it addressed the merits of the motion, prior to the request for briefs. The majority indicates that the court addressed the "status" of the motions in the pretrial hearing held on June 26; however, the "status" hearing did not include a hearing on the merits of Zangerl's motions.

The majority states that "we have no evidence before us that briefs were ever filed in this case." Although the actual briefs are not included in the record, we do have evidence before us that briefs were filed. On April 6, 2001, prior to Zangerl's trial on

the merits, defense counsel acknowledged that he had filed a brief, stating:

> DEFENSE COUNSEL: . . . [B]riefs or authorities were directed to be supplied and in all being perfectly candid with the Court, I do not know what date I supplied those - my authorities to the Court. Unfortunately, my transmittal letter to the Court which was prepared by myself and not by my secretary who does much better work, did not have a date.

Later, defense counsel argued that the continuance noted on the docket sheet on October 19, which stated that the case was reset at the defendant's request, could not be charged against Zangerl because there was no record of a request by the defense. Defense counsel stated:

> DEFENSE COUNSEL: There is no Motion, there is no letter that was charged to the defense I guess administratively by the Court because it's apparently attributable to the fact that Your Honor did not have my brief.

It is clear from the record that Zangerl did submit a brief. It is equally clear from the record that Zangerl's attorney knew that he had been directed by the trial judge to submit a brief and that the trial judge was waiting on the brief before he decided the motion.

The majority is correct in stating that the issue is "when was the case taken under advisement." The thirty-day rule in Rule 28.3 is not triggered until the motion is *heard* by the trial court and is submitted to the trial court for decision. In this case, there was neither a hearing on the merits of Zangerl's motion nor was the case submitted to the trial court for decision prior to October 19, 2000. At the June 26, 2000, pretrial conference, the trial court requested briefs. It is clear that Zangerl's motions were not submitted to the trial court for decision until the briefs were filed. A trial court cannot take a motion under advisement until the motion has been submitted for decision to the trial court. The

docket entry on October 19, 2000, which stated that Zangerl's brief had not been received, leaves no doubt that the trial court did not consider Zangerl's motions submitted for decision as of that date. The trial could not proceed until Zangerl's motions were decided.

The period from August 10, 2000, to October 19, 2000, a total of 70 days, should be excluded. When the period of 70 days is subtracted from the majority's total of 432 days, the number of days which can be excluded is 362 days, an amount which is within the speedy-trial period.

The trial court's denial of Zangerl's motion to dismiss should be affirmed.

GLAZE and CORBIN, JJ., join this dissent.

FIRST NATIONAL BANK of DeWitt *v.*
William Claude "Bill" CRUTHIS, Jr. and Terry Cruthis,
d/b/a Cruthis Brothers

02-610 100 S.W.3d 703

Supreme Court of Arkansas
Opinion delivered March 13, 2003

Russell D. Berry and *Bradley A. Chambless*, for appellant.

T. David Carruth, for appellee.

RAY THORNTON, Justice. Appellant, First National Bank of DeWitt ("Bank"), appeals the trial court decision in favor of appellees, William Cruthis and Terry Cruthis, d/

b/a Cruthis Brothers, refusing to grant its motion to dismiss based on Rules 12 and 13 of the Arkansas Rules of Civil Procedure. We hold that the action was a compulsory counterclaim and must have been brought as such. Accordingly, we reverse and dismiss.

The Bank financed the Cruthises' farming operations by making loans for the production of crops. The loans were secured by the Cruthises' farm equipment and crops. In October and November of 1995, the Bank made a wheat-production loan to the Cruthises to finance that year's wheat and oat crops. The loan was also secured by the crops.

In March of 1996, the Cruthises discontinued their farming operation and informed the Bank that they had no funds to continue production of the wheat and oat crop that was growing. The Cruthises surrendered the crop to the Bank to complete the harvest. After evaluating the benefits of completing the crop, the Bank decided to complete production.

As the crop approached maturity, the market price of wheat and oats increased and the Cruthises asked the Bank to enter a booking contract in order to secure the higher price. The Bank entered the booking contract with Bunge Corporation ("Bunge") for the sale of 11,000 bushels of wheat. However, on May 21, 1996, the Cruthises told the Bank that the crop should be delivered to Stratton Seed Company ("Stratton") on booking contracts that the Cruthises had entered prior to relinquishing possession, and the Cruthises threatened action for conversion if the crop was delivered to Bunge.

The Bank hired Mike Walton to harvest the wheat. Mr. Walton cut and delivered one trailer load of wheat to Stratton, as requested by the Cruthises and over the Bank's objections. Mr. Walton abandoned his job, and the Cruthises rented machinery to complete production, delivering all the remaining crops to Stratton. The Cruthises disavowed any contract with Bunge, and the Bank terminated the contracts with Bunge. Bunge then paid $5,920.00 to the Bank, pursuant to their contract, to compensate for the drop in the price of wheat.

After the harvest was completed in August of 1996, the Cruthises delivered settlement checks from Stratton payable to the Cruthises, the Bank, and Stratton. In the settlement checks, Stratton allocated rental shares and set prices over the Bank's objection. The Bank did not negotiate these checks. The Bank then filed suit in Arkansas County Chancery Court in May, 1997, against Stratton, the Cruthises, and the Cruthises' parents on the basis of equitable theories for the recovery of property lost in the liquidation of the Cruthises' equipment and crops. In April 1998, the Cruthises and their parents brought this action based on conversion, fraud, tortious interference with a contract, breach of fiduciary duty, slander of title and defamation against the Bank in Monroe County Circuit Court. The Bank responded with a motion to dismiss due to the pendency of the action in the Arkansas County Chancery Court pursuant to Rules 12 and 13 of the Arkansas Rules of Civil Procedure, as well as a general denial asserting its security interest and its rights as a secured party. The trial court denied the motion to dismiss.

The Cruthises' causes of action for conversion, interference with a contractual relationship, and breach of fiduciary duty proceeded to trial. The trial court also ruled as a matter of law that a fiduciary relationship to the Cruthises was imposed upon the Bank. The jury was instructed upon the theories of conversion, tortious interference with a contract, and over the Bank's objection, on breach of fiduciary duty.

The jury returned a verdict of $172,850.00, and the judge entered the judgment on November 13, 2001. This appeal arises from the trial court's denial of appellant's motion to dismiss on the basis of Rules 12 and 13, the trial court's denial of appellant's motion on the sufficiency of the evidence, and the trial court's alleged error in instructing the jury on breach of fiduciary duty.

We first address the questions of whether the claims filed in Arkansas County and Monroe County arise out of the same transaction or occurrences and whether the claims are compulsory counterclaims that should have been brought in Arkansas County in response to the Bank's complaint.

Rule 12(b) of the Arkansas Rules of Civil Procedure states in pertinent part:

> Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts upon which relief can be granted, (7) failure to join a party under Rule 19, (8) *pendency of another action between the same parties arising out the same transaction or occurrence.* A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

Id. (emphasis added). We have held that we had no choice but to dismiss the complaint where another case is pending in a different court. *Patterson v. Isom*, 338 Ark. 234, 992 S.W.2d 792 (1999). Where concurrent jurisdictions are vested in different tribunals, the first exercising jurisdiction rightfully acquires control to the exclusion of, and without the interference of, the other. *Id.*, (citing *Tortorich v. Tortorich*, 324 Ark. 128, 919 S.W.2d 213 (1996)). When a case is brought in a court of competent jurisdiction, that court's authority and control over the case continues until the matter is disposed of in the appellate court. *Id.* This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results. *Id.* (citing *Moore v. Price*, 189 Ark. 117, 70 S.W.2d 563 (1934)).

Rule 13(a) of the Arkansas Rules of Civil Procedure states in pertinent part:

> A pleading *shall* state as a counterclaim any claim which, at the time of filing the pleading, the pleader has against any opposing party, *if it arises out of the transaction or occurrence that is the subject*

> *matter of the opposing party's claim* and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Id. (emphasis added).

Linn v. Nationsbank, 341 Ark. 57, 14 S.W.3d 500 (2001), supports our conclusion that the claims at issue arise from the same set of circumstances, and therefore were compulsory counterclaims to the Bank's complaint filed in Arkansas County. In *Linn*, appellants had obtained a construction loan from the bank to build a bed-and-breakfast. Construction was completed, and soon after, a dispute arose. As a result, the Linns discontinued payment on the loan and the bank responded by filing a foreclosure action in the chancery court. Two months later, the Linns filed a counterclaim, requesting that it be severed and transferred to a circuit court for jury trial. Meanwhile, the Linns filed bankruptcy in the federal district court. After that, the Linns filed a motion requesting that the court dismiss their counterclaim without prejudice. A year later, the Linns filed a complaint against the bank in the circuit court that stated that it was founded on the same action nonsuited in the chancery court. It was the same claim plus new claims for breach of good faith and breach of fiduciary duty. The bank filed an answer that asserted the claims were compulsory counterclaims and were barred by *res judicata* or collateral estoppel. The trial court agreed and granted the summary judgment. *Id.*

In *Linn*, we held that there was "no question that the claims at issue here arose from the same set of circumstances—financing arrangements for a bed-and-breakfast facility." *Id.* We further held that there was a "logical relationship . . . between the foreclosure, the counterclaim, and the subsequent complaint." We held that the claims were compulsory counterclaims, and stated: "The purpose for this rule is to require parties to present all existing claims

simultaneously to the court or be forever barred, thus preventing a multiplicity of suits arising from one set of circumstances." *Id.*

In the instant case, the same "logical relationship" exists between the Bank's financing of the farming operations, secured by the growing oat and wheat crops and the subsequent complaint by the Bank and by the Cruthises. It was the booking contracts concerning those very crops that became the subject of the dual contracts for sale of bushels of wheat and oats to both Stratton and Bunge. The purpose of booking the crops was to offset the cost of repaying the Bank's financing of the farming operation that the Cruthises abandoned. The Bank filed suit, alleging its claim for recovery of lost property when the Cruthises liquidated their farming equipment and crops — the very crops that were the security for the financing. The Cruthises' complaint, alleging basically the same factual circumstances as set out in the Bank's complaint, included claims of conversion of the wheat and oat crop that was the security for the financing. The complaint alleged interference with a contractual relationship, based upon the Bank's contract to sell to Bunge the wheat that the Cruthises argued had been sold to Stratton. Finally, the Cruthises' complaint alleged breach of fiduciary duty, which stemmed from the Bank's relationship with the Cruthises concerning the financing. All of these claims are inextricably tied to the same transaction. There is a "logical relationship" between the claims and the financing and liquidation of the farming operation.

In light of *Linn*, *supra*, it is clear that pursuant to Rule 12(b)(8) and Rule 13(a) the claim in Monroe County arose out of the same set of circumstances as the Bank's complaint in Arkansas County, and therefore should have been dismissed because it should have been filed as a compulsory counterclaim to the Bank's complaint in Arkansas County. Because we hold that the claims should have been dismissed by the trial court, we decline to reach the issues that arose during the trial in Monroe County, such as the trial court's denial of appellant's motion on the sufficiency of the evidence and the trial court's alleged error in instructing the jury on breach of fiduciary duty.

We reverse and dismiss.

CITY OF DOVER *v.* CITY OF RUSSELLVILLE

02-308 100 S.W.3d 689

Supreme Court of Arkansas
Opinion delivered March 13, 2003

McCormick Law Firm, P.A. by: *David H. McCormick*, for appellant.

Dunham & Faught, P.A, by: *James Dunham*; *William F. Smith, III*; and *Alex G. Street*, for appellee.

JIM HANNAH, Justice. The City of Dover ("Dover") appeals a judgment granting a dismissal with prejudice where the trial court found that Dover lacked standing to contest an annexation election. Dover alleges that the trial court erred in finding that it has no rights entitling it to sue. Dover asserts that it is the property owner of land annexed in the election, and therefore it may contest the election. We hold that judicial review of elections in municipal annexation as set out in Ark. Code Ann. § 14-40-304 (Repl. 1998) provides for legal action contesting compliance with the statutory requirements in annexation elections, and that Dover may contest the election. The trial court is reversed.

Facts

This case continues a longstanding dispute between Dover and the City of Russellville ("Russellville") over land and sewage treatment. In May of 1997, Dover contracted to purchase fifteen acres of unincorporated land on which to construct a sewage-treatment facility. Construction on the facility commenced in 1997. However, Dover was sued in 1997 by Russellville, among others. *City of Dover v. Barton*, 337 Ark. 186, 987 S.W.2d 705 (1999) (*Dover I*). Russellville alleged in *Dover I* that Dover failed to comply with Act 1336 of 1996 which required a feasibility

study showing that the proposed sewage-treatment plant could not be constructed within the existing city limits. This court reversed the trial court in *Dover I,* holding that the language in Act 1336 was not effective at the time construction began. Then, in *City of Dover v. A.G. Barton*, 342 Ark. 521, 29 S.W.3d 698 (2000) (*Dover II*), this court considered the appeal from the trial court's decision after remand in *Dover I.* In *Dover II,* this court reversed summary judgment entered by the trial court, finding that Dover was required to comply with Russellville's Land Subdivision and Development Code because the proposed sewage-treatment plant was to be built on property within one mile of Russellville city limits, or on land contiguous to property within one mile of Russellville city limits. The trial court was again reversed in *Dover II.*

The present case arises from an October 19, 2000, Russellville ordinance calling for an annexation election to annex the fifteen acres on which Dover had commenced construction of a sewage-treatment facility, as well as other land, into the city of Russellville. The election was held December 19, 2000, and the voters approved annexation. On December 29, 2000, Dover filed the present action under Ark. Code Ann. § 14-40-304, alleging Russellville failed to comply with the requirements in Ark. Code Ann. §§ 14-40-301—14-40-304 (Repl. 1998 and Supp. 2001). The present case was submitted to this court previously and was remanded for failure to comply with Ark. Sup. Ct. R. 4-2. *City of Dover v. City of Russellville*, 351 Ark. 557, 95 S.W.3d 808 (2003).

Standard of Review

Dover appeals the dismissal of its action under Ark. R. Civ. P. 12(b)(6) (2002). When reviewing a dismissal under Rule 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Id.* Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.*; Ark. R. Civ. P. 8(a) (2002). We look to the underlying

facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Id.; Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*, 332 Ark. 645, 966 S.W.2d 894 (1998).

Standing

The trial court found that Dover was not an elector who could challenge the annexation, and also that Dover lacked any due process or other constitutional rights related to the annexation and therefore lacked standing. The trial court also noted an unidentified "related proceeding" where Dover argued Russellville lacked standing to challenge annexation and where the trial court agreed Russellville lacked standing. The trial court then stated that to be consistent, it would also find a lack of standing in the present case.

Russellville acknowledges that Dover owns land affected by the annexation, but argues that Dover is neither a person nor a resident who has standing, and further that Dover, as a municipal corporation with powers limited to those provided by statute, may not challenge the annexation because no statute allows it to do so. We disagree.

Russellville seeks a holding which states that, although Dover owns land included in the annexation, and on that basis would be an interested person entitled to contest the annexation, Dover may not contest the annexation because, as a municipal corporation it is not a natural person and is without power to contest the annexation. Whether a municipal corporation may contest an annexation by an election under Ark. Code Ann. § 14-40-301 is an issue of first impression. Annexation of a portion of another city or incorporated town is expressly forbidden by Ark. Code Ann. § 14-40-301. However, the statutory scheme for municipal annexation of contiguous land under Ark. Code Ann. §§ 14-40-301—14-40-304 does not include any discussion of annexation of land owned by another city. Dover stands in the same position as any other landowner whose land is annexed and who wishes to contest the election that resulted in annexation.

[redacted] Election contests are creatures of statute and have no basis in the common law. *Adams v. Dixie Sch. Dist. No. 7*, 264 Ark. 178, 570 S.W.2d 603 (1978). The right to contest an annexation undertaken by election is set out in Ark. Code Ann. § 14-40-304. *See also Duennenberg v. City of Barling*, 309 Ark. 541, 832 S.W.2d 237 (1992). Section 14-40-304 provides that "if it is alleged that the area proposed to be annexed does not conform to the requirements and standards prescribed in § 14-40-302, a legal action may be filed in the circuit court. . . ." Ark. Code Ann. § 14-40-304.

[redacted] Although it is not explicitly stated in Ark. Code Ann. § 14-40-304, to have standing a party must have an interest at issue in the annexation. In *Reynolds v. Guardianship of Sears*, 327 Ark. 770, 940 S.W.2d 483 (1997), we cited David Newbern, *Arkansas Civil Practice and Procedure* § 5-15, at 61-62 (2d ed. 1993):

> To be a proper plaintiff in an action, one must have an interest which has been adversely affected or rights which have been invaded. Courts will not allow suit by one who is a "stranger to the record" or for the purpose of vindicating an abstract principle of justice.

Reynolds, 327 Ark. at 775. The land upon which Dover was building a sewage-treatment facility was annexed by Russellville. Certainly Dover's interest in the land was affected by the annexation. Dover has an interest in land that was affected by the annexation because its fifteen acres were taken by Russellville. *See, e.g., Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 44 S.W.3d 140 (2001). Therefore, Dover has standing as a landowner affected by the annexation.

Russellville, however, argues that Dover, as a municipal corporation, is not empowered to contest the election because no statute specifically provides that municipal corporations are included as those who may bring a legal action under Ark. Code Ann. § 14-40-304. Section 14-40-304 does not specifically mention a municipal corporation. However, a municipal corporation is empowered to sue or be sued. Ark. Code Ann. § 14-54-101 (Repl. 1998). We note that although standing was not discussed in the case, *City of Springdale v. Town of Bethel Heights*, 311 Ark.

497, 845 S.W.2d 1 (1993), involved municipal corporations contesting the validity of annexation under Ark. Code Ann. § 14-40-301—14-40-304.

Municipal corporations are creatures of the legislature and only possess those powers bestowed by statute or by the Arkansas Constitution. *Stilley v. Henson*, 342 Ark. 346, 28 S.W.3d 274 (2000). Municipal corporations have no inherent power and can exercise only those powers expressly given by the Legislature or the Arkansas Constitution. However, municipal corporations do have powers necessarily implied by the express powers granted, as well as those powers indispensable to the objects and purposes of the powers granted in the statutes and Arkansas Constitution. *Id.*

As already noted, a municipal corporation has the power to sue and be sued. A municipal corporation also has the power to acquire, hold, and possess real property. Ark. Code Ann. § 14-54-101(3) (Repl. 1998). *See also City of Harrison v. Boone County*, 238 Ark. 113, 378 S.W.2d 665 (1964). Further, a municipal corporation may sell property even though sale is not expressly provided for in Ark. Code Ann. § 14-54-101. *See Broach v. City of Hampton*, 283 Ark. 496, 677 S.W.2d 851 (1984). This is an example of a power necessarily implied from the power to hold and possess property. Likewise, a power necessarily implied from the power to hold and possess property is the power to sue and protect property interests, even though the right to sue to protect property is not expressly stated in Ark. Code Ann. § 14-54-101. *See e.g. City of Springdale, supra.* Thus, Dover may sue to protect its property rights.

However, Russellville argues that even if Dover has standing, it may not sue under Ark. Code Ann. § 14-40-304 because the language of Ark. Code Ann. § 14-40-304 will not permit suit by a municipal corporation, but rather is limited to suits by natural persons. Russellville asserts that Ark. Code Ann. § 14-40-301—14-40-304 permits participation in the suit by only the annexing municipality, the persons who reside in the annexed area, and the electors. Therefore, Russellville argues Dover may not contest the election. Russellville cites *City of Cave Springs v.*

City of Rogers, 343 Ark. 652, 37 S.W.3d 607 (2001), in arguing Dover is not a person, noting that under *Cave Springs*, a municipality was not a person for purposes of asserting deprivation of Fourteenth Amendment rights. However, the opinion in *Cave Springs* is not so narrow as Russellville argues. It is true that in *Cave Springs* we held that Cave Springs was not a person for purposes of asserting Fourteenth Amendment rights, but we also stated that the City of Cave Springs was a person for purposes of declaratory relief actions under Ark. Code Ann. § 16-111-101 (1987). Thus, *Cave Springs* does not stand for the proposition that a municipal corporation may never be considered a person.

In any event, contrary to Russellville's argument, the language of Ark. Code Ann. § 14-40-304 does not limit an election contest to one brought by a person. The statute provides that a legal action may be filed in the circuit court. Aside from the requirement of standing already discussed, there are no additional requirements restricting suit under Ark. Code Ann. § 14-40-304 to one brought by a natural person.

There are no prior cases interpreting who may sue under Ark. Code Ann. § 14-30-304. Thus, we must turn to statutory interpretation. 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. *Bond v. Lavaca Sch. Dist.*, 347 Ark. 300, 64 S.W.3d 249 (2001). The language in Ark. Code Ann. § 14-40-304 is clear; "a legal action may be filed in circuit court." Applying the plain meaning rule it is apparent that any property owner affected by the annexation may sue. Dover is such a property owner; therefore, Dover may sue. The trial court erred in granting the motion to dismiss.

Issues Raised by Russellville

Russellville argues that it presented the trial court with multiple independent bases for dismissal, and that even if the court finds error in the trial court on the issue of standing, this court should affirm the trial court because the right result was reached even if the trial court erred in its reasoning. Russellville asserts there are at least eight other reasons Dover failed to state a cause of

action. A review of the order of dismissal fails to reveal that the trial court addressed any of the issues. Because we decide the case on standing we need not address the remaining issues.

Reversed and remanded.

John E. SEARCY, III *v.* Emmett DAVENPORT, Neill Reed, Stephanie E. Whitwell, and Hurley Whitwell Realty Co., Inc.

02-729 100 S.W.3d 711

Supreme Court of Arkansas
Opinion delivered March 13, 2003

[Petition for rehearing denied April 10, 2003.]

Appellant, pro se.

Stephen E. Whitwell, for appellees.

JIM HANNAH, Justice. Appellant John E. Searcy, III, appeals the dismissal of his Amended Complaint for Fraud Upon

the Court and denial of his motion to recuse. We hold that this case is barred by *res judicata* because the fraud alleged by Searcy is a repeated allegation that he was unlawfully deprived of his property, all aspects of which were or could have been litigated in the prior action to quiet title. *Searcy v. Davenport*, slip op. at 1 (Ark. App. March 14, 2002). We also hold that the trial judge did not abuse his discretion in denying Searcy's motion to recuse.

Facts

Searcy acquired forty acres in Van Buren County in 1986. Searcy then became involved in a dispute with the Internal Revenue Service over back taxes, and the forty acres were seized and sold. A deed in the record indicates that on September 18, 1995, the forty acres were deeded to the United States of America, and this same deed indicates that on June 21, 1996, the forty acres were deeded to appellees Neill Reed and Emmett Davenport by the United States in a quitclaim deed.

On June 27, 1997, appellees filed an action on the quitclaim deed to quiet title in the forty acres. On November 12, 1999, the Van Buren County Chancery Court entered a decree quieting title in appellees, specifically finding that Searcy held no interest in the forty acres. On March 14, 2001, the decision of the chancery court was affirmed. *Searcy, supra.*

On June 8, 2000, Searcy filed the present action for fraud on the court against Neill Reed, Emmett Davenport, Stephen E. Whitwell and Hurley Whitwell Realty Co., Inc., alleging the decree in *Searcy* had been procured by fraud and requested that the 1999 decree be set aside. Searcy filed an amended complaint making the same allegations, but changed the relief requested and asked for damages against appellees. However, at the hearing on the motion to dismiss in the present case, Searcy stated that he was alleging that the attempt to transfer title to appellees by the United States was fraudulent, and that he had attempted to prove this fraud in *Searcy,* but was prevented from doing so by the chancery court.

Searcy also moved the trial court to recuse in the present case. The motion to recuse alleges that Judge Charles E. Clawson,

Jr. was biased. Searcy argued as support for the accusation of bias that Judge Clawson presided in *Searcy* and ruled against him on evidence and the ultimate issue of title to the forty acres. We note that Searcy also filed a complaint with the Judicial Discipline and Disability Commission following the decision on the action to quiet title.

Res Judicata

Searcy presents the same arguments in the present action as he asserted in the earlier case in *Searcy*. He again asserts in the present case, as he did in *Searcy*, that the United States Government failed to follow lawful procedure in acquiring title, that the United States never acquired title, and that appellees therefore could not acquire title from the United States. Searcy also argues as he did in *Searcy*, that appellees committed a fraud upon the court by presenting the trial court with documents and making arguments to quiet title when the appellees knew that they could not acquire title because the United States had no title to pass to them.

In his answer to the petition to quiet title in *Searcy, supra,* Searcy asserted that the appellees had acquired no interest in the forty acres through the United States because the United States seized the forty acres from him fraudulently and without due process. He further alleged in the action to quiet title that appellees knowingly provided title documents to the trial court which the appellees knew to be fraudulent. Thus, the issue of whether appellees committed fraud in asserting a right to clear title in the forty acres was raised in *Searcy, supra,* and it is now being raised again in the present case.

The concept of *res judicata* has two facets, one being issue preclusion and the other claim preclusion. *Huffman v. Alderson*, 335 Ark. 411, 983 S.W.2d 899 (1998); *John Cheeseman Trucking, Inc. v. Pinson*, 313 Ark. 632, 855 S.W.2d 941 (1993). Under claim-preclusion, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim. *Huffman, supra. Res judicata* bars not only the relitiga-

tion of claims which were actually litigated in the first suit, but also those which could have been litigated. *Id.* Further, 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. *Id.*

Issue preclusion, or collateral estoppel, bars relitigation of issues. *Crockett & Brown v. Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993). In *State v. Thompson*, 343 Ark. 135, 34 S.W.3d 33 (2000), we stated of collateral estoppel:

> When an issue of ultimate fact has once been determined by a valid and final judgment, collateral estoppel precludes relitigation of that issue between the same parties in any future proceeding. *E.g.*, *Edwards v. State*, 328 Ark. 394, 943 S.W.2d 600, *cert. denied,* 522 U.S. 950 (1997) (*quoting Schiro v. Farley*, 510 U.S. 222, 232 (1994)). In order to establish collateral estoppel, proof of the following is required: 1) the issue sought to be precluded must be the same as that involved in the prior litigation; 2) the issue must have been actually litigated; 3) the issue must have been determined by a final and valid judgment; and 4) the determination must have been essential to the judgment. *Edwards*, 328 Ark. at 401-02, 943 S.W.2d at 603.

Thompson, 343 Ark. at 139-40.

At the hearing on appellee's motion to dismiss in the present case, Searcy responded to the assertion that he was attempting to relitigate the issue of fraud by stating that he believed the issue of fraud was a new issue. He stated:

> In fact, the Chancery Court, when I attempted — when I attempted to prove the fraud in Chancery Court, I was prevented from — from proceeding down that road. It was considered a — separate issue, which I — I disagreed with. I think it — I think it had — it was an issue that was very — very germane to the — to the decision of that — of that Court. And I don't believe that those issues were ever considered by the Chancery Court — or this issue — the — the issues I'm bringing forward in this case.

It is abundantly clear that Searcy sincerely believes that he has been defrauded of his interest in the forty acres. However, it is also abundantly clear that Searcy previously made these same assertions that appellees were acting fraudulently in the action to quiet title.

He now makes the assertions again. The doctrine of *res judicata* precludes relitigation of claims already litigated. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). *Res judicata* also bars relitigation of claims that could have been litigated. *Linder, supra.* Thus, we hold Searcy's attempt to relitigate the issue of fraud in the present action is barred by *res judicata.*

However, Searcy alleges that he may raise the claim now because the trial court in the action to quiet title refused to hear the claim. Searcy does not argue that the trial court in *Searcy, supra* refused to rule, but rather that the trial court refused to allow him to admit evidence on the claim of fraud by appellees. Searcy thus alleges the trial court erred in admission of evidence in *Searcy, supra.* All issues of trial error should have been raised in the appeal from the action to quiet title. The case was affirmed on appeal, and the doctrine of *res judicata* precludes Searcy's attempt to again raise the claim of fraud in the present case.

Motion to Recuse

Searcy moved for recusal, alleging that Judge Clawson had presided in *Searcy, supra*, and that throughout that litigation Judge Clawson had refused to consider his claims of fraud, refused to consider the issue of whether the federal government had lawfully seized his property, and stopped him from putting on evidence of fraud. Searcy further alleged that Judge Clawson was biased in favor of appellees, and that he acted summarily and refused to provide conclusions of fact and law underlying his decision quieting title in the forty acres. The trial court denied the motion to recuse.

The rule is long established that there is a presumption of impartiality on the part of judges. *City of Dover v. City of Russellville*, 346 Ark. 279, 57 S.W.3d 171 (2001). A judge's decision to recuse is within the trial court's discretion and will not be reversed absent abuse. *Id*; *Trimble v. State*, 336 Ark. 437, 986 S.W.2d 392 (1992). The party seeking recusal must demonstrate bias. *Bradford v. State*, 328 Ark. 701, 947 S.W.2d 1 (1997). Fur-

ther, unless there is an objective showing of bias, there must be a communication of bias in order to require recusal for implied bias. *City of Dover, supra.*

Searcy offers no facts to show bias. The mere fact that Judge Clawson ruled against Searcy in the prior case is not sufficient to demonstrate bias. *Irvin v. State*, 345 Ark. 541, 49 S.W.3d 635 (2001). In addition, the mere fact that Searcy filed a petition with the Judicial Discipline and Disability Commission against Judge Clawson is not sufficient to demonstrate bias. Bias must be demonstrated. *Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999). Whether a judge has become biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge. *Irvin, supra.* We find no abuse of discretion in denial of the motion to recuse.

Affirmed.

Carl JOHNSON *v.* STATE of Arkansas

CR 03-170 100 S.W.3d 739

Supreme Court of Arkansas
Opinion delivered March 13, 2003

John Joplin, for appellant.

No response.

PER CURIAM. John Joplin, a full-time, state-salaried public defender in Sebastian County, was appointed by the trial court to represent appellant, Carl Johnson, an indigent defendant, on the charge of murder in the first degree. Following a trial held on November 15, 2002, appellant was found guilty and sentenced to serve forty years in the Arkansas Department of Correction and to pay a fine of $15,000. A timely notice of appeal was filed with the circuit clerk, pursuant to Ark. R. App. P.—Crim. 10, and the record was timely lodged in this court.

Mr. Joplin now asks to be relieved as counsel for appellant in this criminal appeal, based upon the cases of *Rushing v. State*, 340 Ark. 84, 8 S.W.484 (2000) (holding that full-time, state-salaried public defenders were ineligible for compensation for their work on appeal) and *Tester v. State*, 341 Ark. 281, 16 S.W.3d 227 (2000) (*per curiam*) (relieving appellant's court-appointed public defender and appointing new counsel on appeal).

Since the time of those decisions, the law was changed by the General Assembly. Act 1370 of 2001 provides in part: "[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." That provision is now codified as Ark. Code Ann. § 19-4-1604(b)(2)(B) (Supp. 2001).

Mr. Joplin's motion states that he is provided with a full-time, state-funded secretary. Accordingly, we grant his motion to withdraw as attorney. Mr. Tim Cullen will be substituted as attorney for appellant in this matter. The Clerk will establish a new briefing schedule.

Ruby MURPHY, Juanita Sandusky, Meramec Specialty Company *v.* CITY OF WEST MEMPHIS, The American Fireworks Company, Inc.

02-990 100 S.W.3d 221

Supreme Court of Arkansas
Opinion delivered March 20, 2003

Clint Saxton; *Bill Bristow*; and *Chris A. Averitt*, for appellants.

Thomas N. Kieklak, for appellee City of West Memphis.

Jeffrey L. Singleton, for appellee American Fireworks.

W. H. "DUB" ARNOLD, Chief Justice. This is an appeal involving the enactment of zoning ordinances. Appellants challenge four West Memphis city ordinances passed by the West Memphis City Council that allow certain businesses to purchase licenses to engage in the sale of fireworks in West Memphis, Arkansas. The trial court found that the agreement between American Fireworks and the City of West Memphis did not bind the West Memphis City Council to rezone. The trial court also found that the City of West Memphis had gone through a bona fide procedure in passing the subject ordinances. We affirm.

Facts

Appellants, Ruby Murphy and Juanita Sandusky, filed a lawsuit against appellee, City of West Memphis (hereinafter "City of West Memphis"), as interested property owners. Appellant Meramec Specialty Company (hereinafter "Meramec"), filed as an entity with a leasehold interest in property located in West Memphis, Arkansas. Meramec sells fireworks from leased property. Meramec has been operating a firework stand at its present location since 1975, located

first in the county limits, and later in the West Memphis city limits. Meramec's traditional sales location was originally located outside the city limits of West Memphis. However, the area was eventually annexed into the city limits in 1992.

Initially, the applicable city fire code prohibited the sale of fireworks. At the time its location was annexed into the city limits of West Memphis, Meramec was "grandfathered in" and allowed to continue its sale of fireworks. Subsequently, the fire code was amended and the altered version contained no prohibition of the sale of fireworks.

Through the years, appellee American Fireworks Company (hereinafter "American Fireworks"), a competitor of Meramec has unsuccessfully attempted to obtain the right to sell fireworks in West Memphis. On July 21, 1999, the City of West Memphis passed an ordinance which made the sale of fireworks illegal within the city limits. This prohibition did not apply to Meramec. In an attempt to obtain the right to sell fireworks in West Memphis, American Fireworks sought redress through various governing authorities controlling land use within the city to obtain the appropriate rezoning to allow for it to operate in the area of Mound City Road in West Memphis; however, each attempt was denied.

On October 12, 1999, American Fireworks sued the City of West Memphis, and other individuals in the United States District Court for the Eastern District of Arkansas. In that lawsuit, the City of West Memphis argued that it did not want any company to be allowed to sell fireworks in West Memphis and only allowed Meramec to sell fireworks due to its grandfathered status. The City of West Memphis defended the lawsuit on the basis that the requested zoning was not proper for health and safety concerns. Also within that lawsuit, American Fireworks alleged various violations to its rights guaranteed by the Constitution of the United States, as well as violations of the Sherman Anti-trust Act. In this lawsuit, the City of West Memphis consistently argued that it was against the law to sell fireworks in the City of West Memphis; that the outlawing of fireworks was a valid use of the city's police power; and, that the location American Fireworks desired was not properly zoned for the sale of fireworks.

On February 16, 2000, American Fireworks' attorney wrote the City of West Memphis's attorney and offered to settle the fed-

eral litigation by promising to dismiss the lawsuit on behalf of American Fireworks in exchange for the approval to sell fireworks at American Fireworks' location on Mound City Road on or before April 1, 2000, with the demand that American Fireworks be regulated in the same manner as any other firework vendor in West Memphis.

After American Fireworks and the City of West Memphis reached the tentative settlement agreement, a secondary issue arose as to whether appellant Meramec would be limited to its one location. In a May 12, 2000, letter, American Fireworks' attorney informed United States District Judge Bill Wilson that the settlement between American Fireworks and the City of West Memphis had "fallen through." Subsequently, American Fireworks' attorney wrote letters to the City's attorney on May 11, 2000, and May 26, 2000, and advanced his understanding of the settlement agreement which he believed had fallen through.

On June 15, 2000, the West Memphis City Council passed a series of ordinances which permitted the sale of fireworks within a certain area of the city of West Memphis. Specifically, the West Memphis City Council passed ordinance number 1942 which created a zoning classification allowing for firework sales within an area zoned under that classification. It also passed ordinance number 1943, which rezoned the land lying in the area of Mound City Road in West Memphis to the zoning classification allowing for the sale of fireworks within that area. In addition, the City Council also passed ordinance number 1944, which elevated the building/tent permit fee for businesses engaged in the sale of fireworks to $2,500.00 per location.

At the City Council meeting on June 15, 2000, when the rezoning ordinances were passed, representatives of interested parties were in attendance. At that time, while arguments were being held in the course of the "precouncil" meeting, American Fireworks agreed to dismiss its federal lawsuit, if the West Memphis City Council voted in favor of the ordinances rezoning the Mound City Road area to allow for the sale of fireworks. An attorney was also present on behalf of Meramec, and he did not object to the passage of the ordinances to rezone, namely ordinances 1942 and 1943; however, Meramec's attorney did voice an objection to ordinance number 1944, which increased the building/tent permit fee.

At the meeting, the Mayor of West Memphis specifically indicated that he wanted the record to reflect that the passage of these ordinances would finalize the settlement of the pending litigation. The emergency clauses for each of the ordinances specifically reflect that the ordinances were passed to settle the pending litigation in federal court. On July 11, 2000, a joint motion to dismiss was filed in the federal court case; and, on July 13, 2000, an order was entered dismissing the action with prejudice.

Appellants initiated this action against the City of West Memphis in Crittenden County Circuit Court challenging the validity of ordinances numbers 1933, 1942, 1943 and 1944 (hereinafter referred to collectively as "challenged ordinances"), which appellants argue were the result of illegal contract zoning. Subsequently, American Fireworks was allowed to intervene in the action.

On March 20, 2001, appellants filed a motion for summary judgment. In their motion for summary judgment, appellants argued that this case involves the following undisputed facts: (1) West Memphis had a long standing policy against the sale of fireworks within the city limits; (2) Up through 1999, American Fireworks made efforts to sell fireworks with the West Memphis city limits without success; (3) West Memphis rejected American Fireworks' attempts to sell fireworks because the request did not comply with the zoning ordinance and because the sale of fireworks in West Memphis was prohibited due to concerns for public health, safety and welfare; and (4) The passage of the four challenged ordinances was the direct result of an agreement reached between West Memphis and American Fireworks. This motion was supported by several exhibits any of which were ultimately introduced at the bench trial.

In considering appellants' motion, the trial court determined that the only reason the city relented to American Fireworks' demands was to settle the federal lawsuit. However, the trial court also ruled that such a settlement can be upheld as long as the city went through a bona fide procedure in the rezoning process. Following this ruling the trial court conducted a bench trial on the merits.

Following a trial on the merits, the parties submitted extensive posttrial briefs. After reviewing all the evidence, the trial court found that the City of West Memphis had gone through a bona fide procedure in the rezoning process and that, although the

evidence demonstrated a predetermined decision to rezone, the mayor and the city council members were not shown to have specifically been bound by the settlement agreement and the attorney for the City of West Memphis was not shown to have had the authority to commit the city to such action in entering into the settlement agreement. In other words, the trial court found that there was no showing that the agreement with American Fireworks bound the City Council members or the Planning Commission or that the rezoning process had been a sham. The trial court also found that, while initially the settlement agreement was rough and informal, the agreement was finalized at the precouncil meeting. The trial court also found that the precouncil meeting was open to the public and that the council was theoretically open to objections.

It is from that ruling that appellants bring this appeal arguing two points on appeal: (1) whether the trial court erred in ruling that the subject zoning ordinances, which were the result of a contract to rezone, could be upheld under any circumstances; and, (2) whether the trial court erred in ruling that the subject zoning ordinances, which were the result of a contract to rezone, should be upheld under the present circumstances. We affirm and hold that the trial court was not clearly erroneous in ruling that the city council followed a bona fide procedure in enacting the challenged ordinances. Therefore, we do not reach the argument of the legality of contract zoning.

Standard of Review

In bench trials, the standard of review on appeal is whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Foundation Telecommunications, Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000); *Neal v. Hollingsworth*, 338 Ark. 251, 992 S.W.2d 771 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, when considering all of the evidence, is left with a definite and firm conviction that a mistake has been committed. *Neal, supra.* This court views the evidence in a light most favorable to the appellee, resolving all inferences in favor of the appellee. *Arkansas Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000). However, a trial court's conclusion on a question of law is given no

deference on appeal. *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *City of Lowell v. M & N Mobile Home Park, Inc.*, 323 Ark. 332, 916 S.W.2d 95 (1996).

Additionally, in reviewing cases involving legislative enactments such as zoning ordinances, there is a strong presumption that the legislative branch acted in a reasonable manner, and the burden is on the moving party to prove that the enactment was arbitrary or unreasonable. *City of Little Rock v. Breeding*, 273 Ark. 437, 619 S.W.2d 664 (1981). In cases challenging the validity of an ordinance, the plaintiff's burden of proof is elevated, and there must be clear and satisfactory proof that the ordinance is unreasonable and arbitrary. *Wright v. City of Monticello*, 345 Ark. 420, 47 S.W.3d 851 (2001). Every reasonable presumption is to be afforded to the municipal authority in support of the legality of the ordinance. *City of Little Rock v. T.H. Linn*, 245 Ark. 260, 432 S.W.2d 455 (1968). Because of this presumption, one who challenges the validity of an ordinance, alleging it to be arbitrary, discriminatory, or unreasonable, should make it so appear by clear and satisfactory evidence. *Wright, supra*; *City of Fort Smith v. Van Zandt*, 197 Ark. 91, 122 S.W.2d 187 (1938).

Bona Fide Procedure

Although alleged to be the result of contract zoning, the trial court did not err in finding that the actions of the West Memphis city government in enacting the challenged ordinances followed a bona fide procedure. In its letter opinion, the trial court held:

> Here, the Court has to conclude that there is no showing that the planning commission meeting of May 31, 2000, or the city council and pre-council meeting of June 15, 2000, can be said to be a sham, or pre-textual. There is no showing that the council had closed its mind to other voices. A city has the right to settle a lawsuit, and that is all that transpired here, The complaint will be dismissed.

Appellants argue that the sole basis for the enactment of the subject ordinances was the supposed contract entered into between the City of West Memphis and American Fireworks. Appellants contend that the reason for the enactment of the ordinances was to settle the federal litigation, which would make it contract zoning.

The legality of contract zoning is an issue of first impression in the State of Arkansas. However, other jurisdictions have examined contract zoning and found that contracts rezone are not prohibited; but, other jurisdictions have held in the exercise of its governmental function, a city cannot legislate by contract. The term "contract zoning" refers to an agreement between a property owner and a local government where the owner agrees to certain conditions in return for the government's rezoning or enforceable promise to rezone. *Chung v. Sarasota County*, 686 So.2d 1358 (Fla. 2d Dist. Ct. App. 1996). Here, the trial court was correct in finding that American Fireworks and the City of West Memphis had not entered into any type of binding agreement to settle the federal litigation until the city council meeting. The agreement was only finalized after the city council passed the challenged ordinances, not before.

However, at no point in the trial court's ruling does it hold that contract zoning occurred in this case. Rather, the trial court engages in a brief analysis of the principles of contract-zoning law as described in cases from other jurisdictions, concluding that none of the circumstances which traditionally give rise to a finding of contract zoning was present in the instant case. Therefore, the question of the legality of contract zoning in the State of Arkansas is not an issue that need be addressed by this court in the instant appeal.

Here, the trial court correctly ruled that the challenged ordinances could be upheld under the facts of the instant case. There is a strong presumption of the validity of ordinances enacted in this state. Because of this presumption, one who challenges the validity of an ordinance, alleging it to be arbitrary, discriminatory, or unreasonable, should make it so appear by clear and satisfactory evidence. *City of Forth Smith v. Can Zandt*, 197 Ark. 91, 122 S.W.2d 187 (1938; See also, *Wright v. City of Monticello*, 345 Ark. 420, 47 S.W.3d 851 (2000). Appellants argue that the trial court erred in finding that the City of West Memphis followed a bona fide rezoning procedure in enacting the subject ordinances. Appellants contend that one of the reasons contract zoning is generally rejected is because the legislative power to enact and amend zoning regulations requires due process, notice, and hearings. Appellants assert that City Council made its decision to rezone

prior to the City Council's public hearing. Thus, any process following the agreement to rezone was merely a sham.

However, appellants have failed to make any showing that the legislative process was replaced by a contract to rezone. The trial court specifically found that the pre-council and city council meeting on June 15, 2000, were not pretextual. Rather, the public hearing provided a bona fide due process protection with respect to the enactment of the instant ordinances.

Sara Voye, who was called to testify by appellants, testified that the notice of the Planning Commission meeting on May 31, 2000, was published in the newspaper, and that the meeting was open to the public. She also testified that the precouncil meeting conducted on June 15, 2000, was open to the public. In fact, Voye confirmed that it is during the precouncil meetings that the city council normally entertains argument. She also stated that the pre-council meeting is considered part of the council meeting.

In addition, the "Agreed Stipulations" executed by the attorneys for the City of West Memphis state, "All proper notice and public hearing and reading requirements were met concerning each of the ordinances which are the subject of this litigation." Also, appellants had counsel in attendance at the June 15, 2000, city council meeting. Despite this presence, there was no objection to the ordinances dealing with rezoning, by appellants' counsel, or anyone else. Considering this proof, appellants' contention that the meeting was *pro forma* or a sham is at odds with the greater weight of the evidence.

Therefore, appellants have not overcome the strong presumption of legality or proven that enactment of the challenged ordinances was arbitrary or unreasonable. The city council meeting was open to the public and proper notice of such was given. The trial court found that the City of West Memphis followed the proper procedure in enacting the challenged ordinances. This court has not been left with a definite and firm conviction that a mistake his been committed by the trial court. Because the City of West Memphis followed a bona fide procedure, this court need not address the legality of contract zoning at this time.

Affirmed.

CORBIN AND IMBER, JJ., not participating.

Ronald A. WEATHERFORD *v.* STATE of Arkansas

CA CR 02-415 101 S.W.3d 227

Supreme Court of Arkansas
Opinion delivered March 20, 2003

[redacted]

Hampton & Larkowski, by: *Mark F. Hampton*, and *J. Thomas Sullivan*, of counsel, for appellant.

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

DONALD L. CORBIN, Justice. Appellant Ronald A. Weatherford was convicted in the Pulaski County Circuit Court of manufacture of methamphetamine, possession of drug paraphernalia with intent to manufacture, and possession of drug paraphernalia. On the first count, he was sentenced to a term of ten years' imprisonment in the Arkansas Department of Correction. He received a fine in connection with the remaining two counts. Subsequently, Appellant lodged an appeal with the Arkansas Court of Appeals challenging his conviction. At the time that he lodged his appeal, Appellant also filed a motion seeking to waive the prohibition of citation to unpublished court of appeals' opinions as set forth in Ark. Sup. Ct. R. 5-2(d). The court of appeals certified that motion to this court on August 27, 2002, on the basis that the motion dealt with the constitutionality of a rule of this court; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(6). We deny Appellant's motion.

Following the certification of Appellant's motion, this court entered an order staying the briefing schedule of Appellant's direct appeal, pending a decision by this court on his motion. We also ordered that the motion was to be submitted as a case and ordered briefing on the matter on September 12, 2002. Appellant avers that Rule 5-2(d)'s prohibition should be waived, because he needs to rely on certain unpublished opinions as persuasive authority in establishing his argument that there was not sufficient evidence

supporting his conviction. He argues that the rule's prohibition implicates constitutional concerns. In this regard, he raises four separate arguments. First, Appellant argues that application of Rule 5-2(d) violates his right to due process under the Fourteenth Amendment to the United States Constitution. Second, he argues that application of the rule violates his right to due process under Article 2, §§ 8 and 21, of the Arkansas Constitution. Next, Appellant avers that the rule violates his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. Finally, Appellant claims that prohibiting him from relying on unpublished opinions violates his right to be heard through counsel under Article 2, § 10, of the Arkansas Constitution.

Before addressing Appellant's arguments, it is helpful to consider the current context surrounding the issue of prohibiting reliance on unpublished opinions. The role of unpublished cases took on recent importance following a decision by the Eighth Circuit Court of Appeals in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000). That case involved an appellant claiming that she was entitled to a refund from the Internal Revenue Service, resulting from an overpayment of her federal income taxes. The appellant waited three years to seek the refund and, in fact, mailed her claim immediately prior to the expiration of time in which she could seek the refund. The IRS did not receive her claim until one day after the expiration period. The appellant filed suit claiming that a liberal interpretation of the "mailbox rule" should be applied in her case, thus, meaning that she timely filed her claim, because she mailed it prior to the deadline.

At the time that the case reached the Eighth Circuit, there were no published opinions directly on point, but the court had addressed this precise situation in an unpublished opinion in *Christie v. United States*, No. 91-2375MN (8th Cir. March 20, 1992) (*per curiam*). There, the court rejected the parties' argument that the "mailbox rule" provided that their claims had been filed timely because they had been mailed prior to the expiration of the three years. Because *Christie* was not published, however, it was not binding precedent on the court of appeals. Recognizing this problem, the court determined that its Rule 28A(i), governing unpublished opinions, was unconstitutional under Article III of the United States Constitution, because it attempted to confer on

the federal courts a power in excess of the "judicial" power. In reaching this conclusion, the court stated:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78, 2 L.Ed. 60 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991); *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L.Ed. 257 (1821). These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution. Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional. That rule does not, therefore, free us from our duty to follow this Court's decision in *Christie*.

Anastasoff, 223 F.3d at 899-900 (footnote omitted). The court stated that it did not mean to imply that the Framers anticipated publication of all opinions; rather, the Framers did not intend limited reporting to be an impediment to the precedential nature of judicial opinions. Thus, according to the court's reasoning in *Anastasoff*, all decisions of the court of appeals should be regarded as binding precedent. The court then rejected the appellant's claim, finding that it was bound by the panel's decision in *Christie*. In concluding its opinion, the court noted that this case was not about a requirement that all cases be published; rather, the question resolved was the precedential effect of opinions, published or not.

The decision in *Anastasoff* was later vacated as moot, after the government notified the court that it intended to pay Anastasoff's claim in full. *See Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000). Thus, as the court pointed out, "[t]he constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit." *Id.* at 1056. This remains the case today.

The debate surrounding "no citation" rules deepened following the Ninth Circuit's opinion in *Hart v. Massanari*, 266 F.3d 1155

(9th Cir. 2001). Therein, an attorney violated the court's no-citation rule by relying on an unpublished opinion, but argued that the rule was unconstitutional in light of the Eighth Circuit's opinion in *Anastasoff*. The court ordered that the attorney show cause as to why he should not be sanctioned for violating the no-citation rule. According to the opinion in *Hart*, the court in *Anastasoff* erred in determining that rules, such as the one prohibiting citation to unpublished opinions, violated the court's judicial power conferred under Article III. According to the court in *Hart*, the "judicial power" clause had never before been thought to encompass a constitutional limitation on the manner in which courts conduct their business. *Id.* The court stated in relevant part:

> [W]e question whether the "judicial Power" clause contains any limitation at all, separate from the specific limitations of Article III and other parts of the Constitution. The more plausible view is that when the federal courts rule on cases or controversies assigned to them by Congress, comply with due process, accord trial by jury where commanded by the Seventh Amendment and generally comply with the specific constitutional commands applicable to judicial proceedings, they have ipso facto exercised the judicial power of the United States. In other words, the term "judicial Power" in Article III is more likely descriptive than prescriptive.

Id. at 1161 (footnote omitted).

The court in *Hart* also disagreed with the contention in *Anastasoff* that there existed a historically-based constitutional requirement of binding precedent. According to the court in *Hart*, the notion of binding precedent developed gradually over the nineteenth and twentieth centuries. Thus, the *Hart* court rejected the Eighth Circuit court's opinion in *Anastasoff* that a court may not decide which of its opinions will be deemed binding on itself.

This court has also recently been faced with a constitutional challenge to its rule prohibiting citation to unpublished opinions in *Williams v. State*, 351 Ark. 215, 91 S.W.3d 54 (2002). In that case, the appellant contended that Rule 5-2(d) was unconstitutional because it allowed the court to ignore its own precedent, thus exceeding its judicial authority. The appellant relied on the *Anastasoff* decision, but to no avail. Agreeing with the State, this court determined that a person must have suffered an injury or

belong to a class that is prejudiced in order to have standing to challenge the validity of a rule. *Id.* (citing *Ross v. State*, 347 Ark. 334, 64 S.W.3d 272 (2002)). The court then concluded that the appellant lacked such standing, as he was not seeking to rely on unpublished opinions of this court, but rather sought to rely on unpublished opinions of the court of appeals. *Id.* This court reasoned that because court of appeals' decisions have no binding effect on this court, the appellant lacked standing to challenge the rule. There is no such lack of standing in the present appeal, however, as Appellant's direct appeal is pending before the court of appeals. With this background history in mind, we now turn to Appellant's arguments on appeal.

I. Violation of Federal Due Process

Appellant first argues that the application of Rule 5-2(d) preventing him from relying on unpublished opinions violates his right to due process of law by depriving him of access to available law to support his arguments on appeal. According to Appellant, the need to rely on unpublished opinions is particularly significant in a case such as his, because he is attempting to rely on these opinions to support his argument that there was insufficient evidence submitted at trial to support the charges against him. According to Appellant, challenges to the sufficiency of the evidence are clearly fact intensive because the law governing substantial evidence is understood best when applied to the facts in an individual case. Appellant claims that in his case there is no binding precedent that he can rely on in support of his argument; thus, he must couch his sufficiency argument in terms of differentiating his case from prior cases where the evidence was held sufficient. According to Appellant, this line of argument is necessary in order to avoid summary dismissal on the basis that his arguments are not supported by authority. Appellant then asserts that his right to be free from a conviction not supported by sufficient evidence compels the conclusion that he be allowed to rely on unpublished opinions to establish why there was insufficient evidence in his case. We disagree.

The history of Rule 5-2 demonstrates that the proscription against relying on unpublished opinions first appeared in 1974. Originally codified as Ark. Sup. Ct. R. 21, the rule applied only to opinions of this court, as there was no intermediate appellate

court in existence at that time. In a *per curiam* opinion addressing the issue, this court stated that Rule 21 was being amended to eliminate the publication of opinions that had no precedential value. This court then set forth the standards for publication, stating:

> An opinion of this court shall not be designated for publication unless:
>
> (a) The opinion establishes a new rule of law or alters, modifies, or clarifies an existing rule; or
>
> (b) The opinion involves a legal or factual issue of continuing public interest; or
>
> (c) The opinion criticizes existing law; or
>
> (d) The opinion resolves a real or apparent conflict of authority; or
>
> (e) The opinion will serve as a useful reference, such as one reviewing case law or legislative history.

In Re: Opinions, Standards For Publication—Copies Available, 257 Ark. 1065 (1974) (*per curiam)*. This court went on to state that those opinions not designated for publication could not be "cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court[.]" *Id.* at 1066.

Following the creation of the court of appeals, Rule 21 was again amended in 1979. In another *per curiam* opinion, this court stated that all of its signed opinions would be designated for publication, but then set forth criteria allowing only certain opinions of the court of appeals that "resolve novel or unusual questions" to be published. *In Re: Changes in Supreme Court Rules*, 265 Ark. 972, 973 (1979) (*per curiam*). The proscription against citing to unpublished opinions remained the same.

The rationale underlying the prohibition against citing to unpublished opinions was discussed by the court of appeals in *Aaron v. Everett*, 6 Ark. App. 424, 644 S.W.2d 301 (1982). There, the court stated:

> An opinion which qualifies as one not designated for publication is written primarily for the parties and their attorneys. These interested parties already are knowledgeable of the facts of their case. For that reason, such nonpublished opinions often do not contain a litany or rehash of those matters which underly the legal issue(s) decided by this Court. Once again, we state that

> nonpublished opinions will not be considered as authority and should not be cited to this court.

Id. at 426, 644 S.W.2d at 302. *See also Yockey v. Yockey*, 24 Ark. App. 169, 750 S.W.2d 420 (1988).

The Court of Appeal of Louisiana similarly discussed the reasons behind no-citation rules, stating:

> The reason for such rules is that citation or reliance on unpublished opinions by counsel or by courts defeats the entire purpose for which unpublished opinions are allowed—to ease the burden on judges by allowing them to decide cases involving well settled principles of law without having to spend the extensive time and effort that is required in deciding cases involving unsettled principles of law and writing full-fledged, . . . opinions.

L.M. v. J.P.M., 714 So.2d 809, 811 (La. Ct. App. 1998) (citing George Rose Smith, *The Selective Publication of Opinions: One Court's Experience*, 32 ARK. L. REV. 26 (1978)).

Here, Appellant states that there are five decisions that he relies on in his brief in support of his arguments challenging the sufficiency of the evidence. Those decisions include: *Bolton v. State*, 2001 WL 577062 (Ark.App.); *Dodson v. State*, 2001 WL 615330 (Ark.App.); *Porter v. State*, 2001 WL 56444 (Ark.App.); *Strom v. State*, 2001 WL 167822 (Ark.App.); and *Zajac v. State*, 1999 WL 436283 (Ark.App.). According to Appellant, these cases are either the only known decisions demonstrating the argument that he is raising, or are the most appropriate opinions available to support the proposition advanced.

[redacted] Appellant, however, fails to cite to any cases that stand for the proposition that due process requires that Appellant be able to cite to unpublished opinions. Instead, he relies on the United States Supreme Court's decisions in *Fiore v. White*, 531 U.S. 225 (2001), and *Fiore v. White*, 528 U.S. 23 (1999). Appellant opines that the litigation in *Fiore* demonstrates that federal due process guarantees require a minimum level of procedural fairness in the operation of state appellate review systems. *Fiore* involved a petitioner seeking federal habeas relief on the ground that his conviction under Pennsylvania law was based on an inconsistent application of state law. The petitioner's argument was based on the fact that while one appellate panel rejected his argument challenging the sufficiency of the evidence, another appellate panel

agreed with his co-defendant that his conviction was not supported by substantial evidence. The Supreme Court agreed with the petitioner, holding that his conviction violated due process. *Fiore*, however, is inapposite to the present case. While we agree that an appellant is entitled to fundamental fairness in appellate proceedings, we do not agree with Appellant's unsupported assertion that due process requires that he be entitled to rely on unpublished opinions.

We believe it is important to note that while Appellant challenges the constitutionality of Rule 5-2(d), he does not argue that the rule should be abolished. Likewise, he does not argue that there are cases representing binding precedent that he should be allowed to rely on; rather, he simply wants to rely on certain opinions as persuasive authority. Specifically, he wants to rely on the factual circumstances of those opinions to demonstrate how the evidence was insufficient in his case. While Appellant may prefer those cases that are not published, there is nothing to indicate that Appellant is impaired in seeking appellate relief by not being able to rely on those cases. There are ample published opinions setting forth the test for sufficiency of the evidence, as well as its application.

In reviewing a sufficiency issue, the reviewing court is charged with viewing the evidence in the particular case on appeal. *See, e.g., Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002); *Williams v. State*, 346 Ark. 304, 57 S.W.3d 706 (2001); *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998). This issue was discussed by Justice George Rose Smith, who stated:

> The court, in adopting its selective-publication rule, sought to achieve two goals—a reduction in the volume of published opinions and a reduction in the amount of time devoted to opinion writing. The justification for the first goal lies simply in the undeniable truth that many appellate court opinions are of no precedential value. Of course, like snowflakes, no two cases are exactly alike. But, for the purpose of selective publication, the question is whether the factual differences between one case and another are of precedential value. For instance, it is a familiar rule that out-of-court declarations of an alleged agent are not admissible to prove the agency. *Here it is the rule of law, not the differences in the fact situation, that is important.*

32 ARK. L. REV. 26, 28 (emphasis added). Likewise, the evidence used to support a conviction in one manufacture case is of no

moment in this case; thus, even if Appellant were allowed to cite to unpublished opinions, there is no requirement that this court agree with Appellant's assessment that a particular case constitutes persuasive authority. *See Webb v. State*, 318 Ark. 581, 886 S.W.2d 624 (1994). *See also Heathscott v. Raff*, 334 Ark. 249, 973 S.W.2d 799 (1988). Accordingly, Appellant's argument on this point fails.

II. Violation of this State's Law of the Land

For his second point on appeal, Appellant argues that the prohibition of Rule 5-2 violates his right of due process under Article 2, §§ 8 and 21, of the Arkansas Constitution. While this argument mirrors Appellant's previous one, he further avers that under section 21, the due-process right is predicated on the "law of the land." According to Appellant, this is a reference to the law applicable at the time of the section's adoption. Arguing for an expanded interpretation of "law of the land," Appellant avers that the phrase must refer to the entire body of law known to govern individual rights at the time of adoption of the state constitution; thus, judges are not authorized to act beyond the powers accorded by the Judicial Article. Appellant states that the Judicial Article does not allow this court to abrogate the common law, which he argues, is precisely what this court has done in the application of Rule 5-2(d). Appellant concludes his argument on this point by stating that his right to rely on the entire body of available Arkansas law in advancing his sufficiency argument is protected by section 21's reference to "law of the land."

Appellant's argument on this point mirrors the discussion set forth in *Anastasoff*, 223 F.3d 898. Thus, for Appellant to prevail on this theory, this court must agree that the judicial power does not encompass the ability of this court to set forth a rule regarding the reliance on unpublished opinions. At the time of this rule's enactment, this court's judicial power was derived from Article 7, § 4, of the Arkansas Constitution. That section was repealed by Amendment 80, but this amendment still grants this court the power to set forth rules governing all courts. Moreover, it is well settled that this court possesses the inherent authority to make procedural rules. *State v. Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990); *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986). *See also Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991). As previously stated, this court's rule prohib-

iting citation to unpublished opinions does not impede Appellant's ability to pursue an appeal of his conviction. The Ninth Circuit stated in *Hart*, 266 F.3d 1155, that the federal judicial power clause has never before been construed to limit courts in the manner in which they conduct their business. The same may be said for our state's judicial article. Accordingly, there is no due-process violation under this state's constitution.

III. Denial of Effective Assistance of Counsel

Next, Appellant argues that the proscription of Rule 5-2(d) violates his right to effective assistance of counsel under the Sixth Amendment. According to Appellant, the determination of appellate strategy falls under the notion of effective assistance of counsel, and when counsel is restricted from relying on unpublished opinions to demonstrate what facts have previously been considered significant, counsel's ability to represent his client is compromised. Appellant cites to no legal authority in support of this novel proposition, however. We have frequently stated that we will not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Hollis v. State*, 346 Ark. 175, 55 S.W.3d 756 (2001).

Appellant does attempt to analogize this case to the situation in *Brooks v. Tennessee*, 406 U.S. 605 (1972), where the United States Supreme Court struck down a Tennessee court rule that required a defendant wishing to testify in his own behalf to be the first witness called by defense counsel. In that case, the Court's primary reason for striking down the rule was that it infringed on a defendant's right to choose whether or not to testify at trial. As a secondary concern, the Court noted that the rule also implicated a defendant's right to due process because it restricted the defendant's counsel's planning of the case. No such restriction can be demonstrated in this case, however. The fact that Appellant's counsel may be restricted in arguing the facts of certain cases in no way restricts counsel from setting forth the facts of his own case and demonstrating how they do not rise to the level of sufficient evidence. Accordingly, Appellant's argument on this point fails.

IV. Denial of Counsel's Right to be Heard

Finally, Appellant argues that application of Rule 5-2(d) violates his right to be heard through his counsel under Article 2, § 10, of the Arkansas Constitution. Appellant states that section 10's provision that counsel shall be heard means, in the context of an appeal, that counsel be allowed to argue prior decisions available to the public through online research sites. Appellant avers that this court's due-process doctrine regarding effective representation must be based on an expanded protection under section 10, rather than the protections provided under the Sixth and Fourteenth Amendments. Again, however, Appellant fails to cite to any authority or convincing argument in support of this point. We therefore decline to address the merits of this point. *See Hollis*, 346 Ark. 175, 55 S.W.3d 756.

For the foregoing reasons, Appellant's motion is denied.

Kenneth HARNESS *v.* STATE of Arkansas

CR 02-452 101 S.W.3d 235

Supreme Court of Arkansas
Opinion delivered March 20, 2003

James W. Robb, for appellant.

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant Kenneth Roy Harness pleaded guilty to one count of manufacturing methamphetamine and to two counts of possession of drug paraphernalia. In an amended judgment and commitment order filed on March 30, 2001, the circuit court sentenced him to a term of twenty years' imprisonment and suspended the imposition of sentence as to an additional term of twenty years. Based on a violation prior to his incarceration, the trial court revoked the suspended portion of Mr. Harness's sentence and sentenced him to a term of thirty years' imprisonment. His only point on appeal is that the trial court did not have the power to revoke the suspended portion of his sentence prior to the commencement of the period of suspension. We agree and reinstate the original sentence as modified.

The facts are not in dispute. Upon sentencing, Mr. Harness was not instructed to report immediately to the Arkansas Department of Correction. Instead, he was placed under a $20,000 ADC bond and instructed to call the ADC each morning at 6:00 a.m. and surrender to the ADC when informed that it had room for him. Mr. Harness called in each morning from February 23, 2001, through March 6, 2001, except on February 28. On March 6, 2001, the ADC advised the Crawford County jail administrator that Mr. Harness should surrender at 5:00 a.m. the next morning, March 7, 2001. Mr. Harness did not surrender, and a warrant was issued for his arrest on March 14, 2001. On September 11, 2001, Mr. Harness was arrested in Utah, where he was working under an assumed name, and then returned to Arkansas.

After a hearing, the circuit court revoked Mr. Harness's suspended sentence and resentenced him to a term of thirty years' imprisonment in an amended judgment and commitment order filed on January 16, 2002. Mr. Harness filed a motion for reconsideration alleging that the original sentence was illegal because it was longer than the statutory maximum, that the circuit court was without the power to revoke the suspended portion of his sentence prior to the commencement of the period of suspension, and that the revocation violated his due-process rights. The circuit court denied his motion for reconsideration. The Arkansas Court of Appeals certified Mr. Harness's appeal to this court because it presents an issue of first impression involving statutory construction. Thus, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1), (2), (5) (2002).

Mr. Harness does not challenge his conviction or the lawfulness of his apprehension. His only challenge is to the propriety of the circuit court's revocation of the suspended portion of his sentence. First, he contends that a circuit court does not have the power to revoke a suspended sentence prior to the commencement of the period of suspension. In the alternative, he presents a procedural due-process argument contending that he did not receive fair warning or other notice that the violation of a condition of suspension prior to the commencement of his suspended sentence could lead to its revocation.

I. The March 30, 2001 Amended Judgment and Commitment Order

As an initial matter, the sentence imposed in the March 30, 2001 amended judgment and commitment order is illegal in two respects. First, the original judgment reflects a sentence of forty years' imprisonment, as well as a twenty-year suspended imposition of sentence, for a total of sixty years — a sentence not authorized for a class Y felony. Second, because the suspended portion of the sentence requires Mr. Harness to report to a supervising officer, the sentence is in reality imprisonment followed by probation — a sentence specifically prohibited by statute. Even though neither Mr. Harness nor the State challenges the legality of the sentence on appeal, we treat problems of void or illegal sentences similar to problems of subject-matter jurisdiction and review them even if not raised on appeal and not objected to in the trial court. *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992); *Lambert v. State*, 286 Ark. 408, 692 S.W.2d 238 (1985).

Sentencing is entirely a matter of statute in Arkansas. *Bunch v. State*, 344 Ark. 730, 738, 43 S.W.3d 132, 137 (2001). "No defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter." Ark. Code Ann. § 5-4-104(a) (Supp. 2001). A circuit court has jurisdiction to correct an illegal sentence even if it has been placed into execution. *Meadows v. State*, 324 Ark. 505, 922 S.W.2d 341 (1996); *Bangs v. State, supra*; *Nelson v. State*, 284 Ark. 156, 680 S.W.2d 91 (1984); *Massey v. State*, 278 Ark. 625, 648 S.W.2d 52 (1983). If we hold that a trial court's sentence was illegal and that the error had nothing to do with guilt, but only with the illegal sentence, we can correct the sentence in lieu of remanding. *Banks v. State, supra.*

In *Lewis v. State*, this court set out the parameters for interpreting a trial court's judgment. 336 Ark. 469, 986 S.W.2d 95 (1999). "[J]udgments are generally construed like other instruments and the determinative factor is the intention of the court, gathered from the judgment itself and the record, including the pleadings and the evidence. . . . [I]t is to be presumed that a defendant has been accorded a fair trial, and that the judgment of conviction is valid." *Id.* at 475, 986 S.W.2d at 98. The March 30, 2001 amended judgment and commitment order imposed a sentence of 480 months' imprisonment and a suspended sentence of 240 months, for a total of 720 months (or sixty years). The sentence for a Class Y felony is ten to forty years, or life. Ark. Code Ann. § 5-4-401(a)(1) (Repl. 1997). Mr. Harness's attorney pointed out the illegal length of the sentence to the trial court. After a brief discussion among the judge, the prosecutor, and Mr. Harness's attorney in which all agreed on the intended sentence, the judge ruled as follows: "[a]ll right, then it will be amended to reflect 20 year sentence with 20 suspended." Based upon the record in this case, the clear intent of the circuit court and the understanding of both the State and the defendant was that Mr. Harness be sentenced to twenty years' imprisonment, followed by a twenty-year suspended imposition of sentence.

One of the conditions imposed by the circuit court in connection with the twenty-year suspended sentence was as follows: "You must report as directed to a supervising officer and permit him or her to visit you in your residence, place of employment, or other property." This reporting requirement makes the actual sentence imposed by the circuit court one of probation rather than suspension.

Section 5-4-104 of the Arkansas Criminal Code provides in relevant part as follows: "The court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment, but the court shall not sentence a defendant to imprisonment and place him on probation, except as authorized by § 5-4-304." Ark. Code Ann. § 5-4-104(c)(3) (Supp. 2001). Section 5-4-304 permits confinement as a condition of suspension; however, the period of confinement cannot exceed 120 days in the case of a felony or thirty days in the case of a misdemeanor. Ark. Code Ann. § 5-4-304(d)(1) (Supp. 2001). The original commentary explains that this section recognized the practice of Arkansas judges to use the shock of a short

period of incarceration to enhance the effectiveness of a subsequent period of suspension or probation by giving the offender a "taste" of imprisonment. Original Commentary to Ark. Code Ann. § 5-4-304 (Repl. 1995).

As noted earlier, the judge, the prosecutor, and the defense attorney all agreed that the circuit court intended to sentence Mr. Harness to twenty years' imprisonment followed by a twenty-year suspended imposition of sentence. The issue before us is whether the condition that Mr. Harness report to a supervising officer transformed the suspension into probation. We addressed this same issue in *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294.

> The distinction between probation and suspension is one of supervision. Ark. Code Ann. § 5-4-101 (1987) defines both probation and suspension as release without pronouncement of sentence. However, probation is defined as "release without pronouncement of sentence but *subject to the supervision* of a probation officer" and suspension is defined as "release without pronouncement of sentence and *without supervision*."

Id. at 239-40, 835 S.W.2d at 296 (emphasis added).[1] The *Bangs* court explained that when the current criminal code was written, imprisonment followed by suspension was authorized because it was a widespread practice by the Arkansas trial bench. *Id.* However, "probation was prohibited from following imprisonment because supervision by both the court and the Board of Pardons and Paroles is a needless duplication of effort conducive to jurisdictional disputes." *Id.* at 240, 835 S.W.2d at 296. The *Bangs* court held as follows: "we affirm the trial court's revocation based on the escape and modify the conditions so that appellant is no longer required to report to a probation officer." *Id.* at 242, 835 S.W.2d at 297 (Mr. Bangs had fled during the period of suspension). Accordingly, the conditions imposed by the circuit court in this case are hereby modified so that Mr. Harness is no longer required to report to a supervising officer.

As modified herein to reflect a sentence of twenty years' imprisonment, followed by a twenty-year suspended imposition of sentence, and with the above-mentioned modification to the conditions of suspension, the March 30, 2001 amended judgment and commit-

[1] The current Criminal Code retains the supervision distinction between probation and suspension. Ark. Code Ann. § 5-4-101 (Supp. 2001).

ment order imposes a legal sentence. This then leads us to a consideration of Mr. Harness's point on appeal — whether the circuit court had jurisdiction to issue its amended judgment and commitment order on January 16, 2002, revoking Mr. Harness's suspended sentence and imposing a term of thirty years' imprisonment.

II. The January 16, 2002 Amended Judgment and Commitment Order

The first point on appeal challenges the jurisdiction of the circuit court to revoke Mr. Harness's suspended sentence for an action occurring prior to the commencement of the suspension period. This court has stated that "without another statutory provision conferring jurisdiction, 'the jurisdictional statements contained in §§ 41-1208 and 41-1209 [now §§ 5-4-309 and 5-4-310] control [revocation of probation].'" *Carter v. State*, 350 Ark. 229, 233, 85 S.W.3d 914, 916-17 (2002) (quoting *Gill v. State*, 290 Ark. 1, 3, 716 S.W.2d 746, 747 (1986)). Therefore, resolution of Mr. Harness's point on appeal involves an issue of statutory interpretation. We construe criminal statutes strictly, resolving any doubts in favor of the defendant. *Short v. State*, 349 Ark. 492, 79 S.W.3d 313 (2002). We construe a statute just as it reads, giving the words their ordinary and usually accepted meaning in common language, and 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. *Id.* In construing any statute, we place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect derived from the whole. *Id.* However, we will not interpret a statute, even a criminal one, so as to reach an absurd conclusion that is contrary to legislative intent. *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999).

Mr. Harness argues that a plain reading of the statutes limits a circuit court's power to revoke to the time during the period of suspension or probation and that to interpret the statutes to allow revocation prior to the commencement of the suspension period leads to absurd results. He acknowledges an opinion to the contrary by the Arkansas Court of Appeals, and asks this court to overrule *Venable v. State*, 27 Ark. App. 289, 770 S.W.2d 170 (1989). On the other hand, the State contends that the statutes permit a circuit court to revoke a suspended sentence at any time prior to the expiration of the period of suspension, not just during

the period of suspension. When asked to specify the reason for revoking Mr. Harness's suspended sentence, the circuit court replied that rather than surrendering to the ADC as ordered by the court, Mr. Harness fled to Utah under an alias "specifically for the purpose of avoiding the penalty here in Arkansas and the sentence here in Arkansas . . . ."

Our analysis begins with one of the statutory provisions that confers jurisdiction on the circuit court to revoke a suspended sentence. Section 5-4-309 provides in pertinent part:

> If the court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspension or probation, it may revoke the suspension or probation *at any time prior to the expiration of the period of suspension or probation.*

Ark. Code Ann. § 5-4-309(d) (Supp. 2001) (emphasis added). While this section clearly refers to the end of the period in which a circuit court can revoke a defendant's suspension, it does not specify when the period of suspension begins. In order to make that determination, we must read section 5-4-309 in harmony with other sections dealing with the same subject matter. *Short v. State, supra.*

When a circuit court considers whether to order a suspended sentence, it must *first* decide whether "[t]here is undue risk that *during the period* of suspension . . . the defendant will commit another offense . . . ." Ark. Code Ann. § 5-4-301(b)(1) (Supp. 2001) (emphasis added). A circuit court's power to impose terms and conditions of suspension is established in Ark. Code Ann. § 5-4-303 (Supp. 2001). Although the court is directed to "attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life," Ark. Code Ann. § 5-4-303(a), it is required to provide as an express condition of every suspension "that the defendant not commit an offense punishable by imprisonment *during the period of suspension* . . . ." Ark. Code Ann. § 5-4-303(b) (emphasis added). Thus, both the purpose and the mandatory conditions of suspension contemplate that the conditions are imposed during the period of suspension. The permissive conditions also contemplate that the conditions be imposed during the period of suspension. For example, a circuit court may require, as a condition of suspension, that the defendant support dependents, work faithfully, participate in community-based rehabilitation programs, refrain from consorting with designated persons, make restitution,

post bond, or the court may require other conditions "not unduly restrictive of [the defendant's] liberty[.]" Ark. Code Ann. § 5-4-303(c). The alternatives available to the court after revocation of suspension also assume that the revocation takes place during the period of suspension. The circuit court may continue the period of suspension, impose a period of confinement, direct the defendant to report to the court, require the defendant to remain within the jurisdiction of the court, and notify the court of any change of address or employment. Ark. Code Ann. § 5-4-303(d).

Section 5-4-306 requires that the suspension "shall be for a definite period of time . . . ." Ark. Code Ann. § 5-4-306(a) (Supp. 2001). Section 5-4-307 explains that the period of suspension "commences to run on the day it is imposed," except where the suspension follows a term of imprisonment and then "the period of suspension commences to run on the day the defendant is lawfully set at liberty from the imprisonment." Ark. Code Ann. § 5-4-307 (Repl. 1997). Our review of section 5-4-309 along with the other sections that are relevant to the subject matter of suspended sentences leads us to conclude that a circuit court is statutorily authorized to revoke a period of suspension for a violation of the terms or conditions of suspension that occurs "during the period" of suspension.

In any event, the interpretation suggested by the State would lead to absurd results because certain terms and conditions of suspension only make sense if imposed during the period of suspension. For example, as a condition of suspension, Mr. Harness was ordered not to associate with persons who have been convicted of felonies. He was required to be gainfully employed or a student, to pay household expenses, and to support his dependents. He was also ordered to remain within the state. If a defendant can violate the conditions of suspension before the commencement of the suspension period, then imprisonment itself would result in a violation. Upon imprisonment, the defendant necessarily associates with persons who have been convicted of felonies — a suspension violation. Moreover, incarceration prohibits the defendant from being gainfully employed to support his or her family and dependents, and it makes remaining within the state a meaningless condition. Thus, terms and conditions of suspension in this case only make sense if imposed during the period of suspension. Any other interpretation leads to an absurd result.

Nonetheless, the State relies on *Venable v. State, supra*, in which an equally divided court of appeals panel affirmed a trial court's revocation of a suspended sentence based on circumstances similar to those in this case. In revoking Mr. Harness's suspended sentence, the circuit court relied on an unpublished decision of the court of appeals, that in turn relied on *Venable v. State, supra.* The *Venable* plurality based its reasoning primarily on policy considerations drawn from the decisions of federal courts and the courts of some, but not all, of our sister states. However, those decisions provide little guidance in the resolution of the issue before us because sentencing in Arkansas is strictly a matter of Arkansas statutes, and a trial court may only impose a sentence authorized by statute. Ark. Code Ann. § 5-4-104(a); *Bunch v. State, supra.* Because none of the cases from other state and federal jurisdictions are based on statutes containing the same language as the Arkansas statutes, we must rely on our own criminal code and case law.

Construing the statutes authorizing a suspended sentence as a whole and resolving all doubts in favor of the accused, as we must do, we hold that the statutes did not empower the circuit court to revoke Mr. Harness's suspended sentence prior to the commencement of the period of suspension. Because a sentence is void when the trial court lacks the authority to impose it, we reverse the January 16, 2002 amended judgment and commitment order. We reinstate the March 30, 2001 amended judgment and commitment order as modified herein.

Having concluded that the circuit court does not have the power to revoke a suspended sentence prior to the commencement of the suspension period, we overrule *Venable v. State*, 27 Ark. App. 289, 770 S.W.2d 170 (1989), and all other court of appeals decisions in conflict with this holding. Because we reverse based on Mr. Harness's first point on appeal, we need not address his due-process argument.

The January 16, 2002 amended judgment and commitment order is reversed, and the March 30, 2001 amended judgment and commitment order is reinstated as modified.

Affirmed as modified.

CORBIN, J., not participating.

Donald Gene HUDSON *v.* Christina KYLE

02-275 101 S.W.3d 202

Supreme Court of Arkansas
Opinion delivered March 20, 2003

Charles L. Carpenter, Jr., for appellant.

One brief only.

ANNABELLE CLINTON IMBER, Justice. The issue on appeal is whether a trial court had authority to terminate the parental rights of appellant, Donald Gene Hudson. Testimony showed that Mr. Hudson became involved with appellee, Christina Kyle (then Christina Harvey), when he was thirty-seven and she was seventeen. During their approximately four-year relationship, Ms. Kyle's daughter, K.H., was born. Although DNA

tests proved Mr. Hudson was not K.H.'s biological father, a birth certificate was issued listing him as her father. Mr. Hudson and Ms. Kyle were married in December 1996, when K.H. was fourteen months old. Mr. Hudson never made any attempt to adopt K.H.

Ms. Kyle testified that Mr. Hudson was violent toward her during their relationship both before and after K.H.'s birth, and that violence eventually resulted in a conviction for domestic battery for an incident in which Mr. Hudson beat Ms. Kyle, causing a concussion that kept her off work for weeks. In March 1997, Ms. Kyle filed for divorce, stating there were no children born of the marriage. Nonetheless, in the November 25, 1997 divorce decree issued by the Saline County Chancery Court, Mr. Hudson was adjudicated the legal father of K.H. and was granted reasonable visitation rights. Ms. Kyle never contested or appealed that decree.

In July 1998, Mr. Hudson and Ms. Kyle met at the Benton Police Station so that Mr. Hudson could visit with K.H. During that visit, an incident occurred that led to an allegation of child abuse against Mr. Hudson. An investigator with the Arkansas State Police Family Protection Division made a finding that there was credible evidence of abuse, and the Arkansas Department of Human Services placed Mr. Hudson's name on the Arkansas Child Maltreatment Central Registry. Mr. Hudson appealed DHS's determination and, following a hearing by an administrative law judge, his name was removed from the Registry.

On March 30, 2001, Ms. Kyle filed a motion in the Saline County Chancery Court, asking that the court rescind the divorce decree's finding that Mr. Hudson was K.H.'s legal father, and further asking that all visitation between Mr. Hudson and K.H. be terminated. Mr. Hudson's answer asserted that his status as K.H.'s father was settled in the November 1997 divorce decree, and that he had a right to reasonable visitation with his daughter.

On October 25, 2001, a hearing on Ms. Kyle's motion was held. Pursuant to Act 1736 of 2001, codified at Ark. Code Ann. § 9-10-115 (Repl. 2002), Ms. Kyle asked the court to set aside the finding that Mr. Hudson was K.H.'s legal father, asserting that Ms. Kyle was under duress at the time she signed the decree. Through a child psychotherapist who had counseled K.H. for several years, Ms. Kyle presented evidence that K.H. had been sexually abused by Mr. Hudson. The psychotherapist, Ms. Denise Maples, testi-

fied that K.H. had consistently stated that Mr. Hudson had sexually abused her, and that K.H. had expressed fear of Mr. Hudson on many occasions.

In a letter-order filed on October 29, 2001, the trial court found that Act 1736 of 2001 did not apply and refused to set aside the divorce decree.[1] However, the trial court went on to say that he found Ms. Maples's testimony compelling, and that the allegation of sexual abuse of K.H. by Mr. Hudson had been "established by clear and convincing evidence." The trial court then found that it was in the best interests of K.H. to terminate Mr. Hudson's parental rights. In a written order entered on November 5, 2001, the court terminated Mr. Hudson's parental rights and ordered that the divorce decree's previous orders with regard to Mr. Hudson's child support obligation be withdrawn, stating that he owed no further duty of child support to K.H.

Mr. Hudson asserts four points of error on appeal: (1) the trial court erred in terminating his parental rights because it lacked jurisdiction to do so in an action between private parties; (2) the trial court erred by failing to credit the DHS decision that there was no credible evidence to support a finding of sexual abuse; (3) the trial court erred in finding there was clear and convincing evidence to terminate parental rights; and (4) the trial court erred in failing to grant a new trial. Because we agree that the trial court had no jurisdiction to terminate Mr. Hudson's parental rights, we reverse and remand for a new trial on Ms. Kyle's motion to terminate visitation.

---

[1] The dissent incorrectly states that the trial court "set aside provisions of that divorce decree relating to paternity rights and responsibilities." In fact, the trial court declined to set aside the divorce decree that adjudicated Mr. Hudson to be K.H.'s father. The trial court's order states in pertinent part as follows:

> 1. The Decree of Divorce entered on November 25, 1997 shall not be set aside. Act 1736 of 2001 does not apply to this case.
>
> 2. The Plaintiff established by clear and convincing evidence that it is in the best interests of the minor child . . . , for the parental rights of Defendant to be terminated. The Defendant's parental rights to said child are hereby terminated.
>
> 3. The previous Court's orders with regard to Defendant's obligation to pay child support to Plaintiff are hereby withdrawn, and Defendant owes no further duty of support as to [K.H.].

Thus, the paternity statutes cited by the dissent are inapposite.

In its order, the trial court cited no statutory basis upon which to predicate its jurisdiction to enter an order terminating Mr. Hudson's parental rights. Given the situation in which the trial court terminated Mr. Hudson's parental rights, we conclude that no statutory authority conferred jurisdiction upon the trial court to terminate parental rights.[2]

Two Arkansas statutes confer jurisdiction upon a circuit court[3] to terminate parental rights. The first is Arkansas Code Annotated § 9-27-341 of the juvenile code, which states in pertinent part:

> (a)(1)(A) This section shall be a remedy available only to the Department of Human Services or a court-appointed attorney ad litem.
>
> (B) It shall not be available for private litigants or other agencies.
>
> (2) It shall be used only in such cases when the department is attempting to clear a juvenile for permanent placement.

Ark. Code Ann. § 9-27-341 (Repl. 2002). Neither DHS nor an attorney ad litem petitioned the court for termination of Mr. Hudson's parental rights, and DHS was not trying to permanently place K.H.; therefore, § 9-27-341 did not apply.

The second statute that gives a circuit court jurisdiction to terminate parental rights is found at Ark. Code Ann. § 9-9-220, which states in pertinent part:

> (a) With the exception of a duty to pay child support, the rights of a parent with reference to a child, including parental right to control the child or to withhold consent to an adoption, may be relinquished and the relationship of parent and child terminated *in or prior to an adoption proceeding* as provided in this sec-

---

[2] None of the paternity statutes cited by the dissent authorize a trial court to terminate parental rights.

[3] Between the time this case was originally filed with the Saline County Chancery Court in March 2001, and the date of the hearing in October 2001, Amendment 80 to the Arkansas Constitution became effective, designating all courts as "circuit courts." Pursuant to Amendment 80, we no longer have separate "chancery courts" and "circuit courts." The courts have now been merged and carry the designation of "circuit courts." Thus, when Amendment 80 took effect on July 1, 2001, the statutory jurisdiction that allowed chancery courts to terminate parental rights conferred that same jurisdiction upon circuit courts.

tion. The duty of a parent to pay child support shall continue until an interlocutory decree of adoption is entered.

* * * *

(c) In addition to any other proceeding provided by law, the relationship of parent and child may be terminated by a court order issued *under this subchapter* on any ground provided by other law for termination of the relationship, or on the following grounds:

(1) Abandonment;

(A) A child support order shall provide notice to the non-custodial parent that failure to pay child support or to visit the child for at least one (1) year shall provide the custodial parent with the right to initiate proceedings to terminate the parental rights of the non-custodial parent.

(B) If the notification clause required by subdivision (c)(1)(A) is not in the child support order, the custodial parent, prior to termination of parental rights, shall notify the non-custodial parent that he or she intends to petition the court to terminate parental rights.

(C)(1) The non-custodial parent shall have three (3) months from the filing of the petition to pay a substantial amount of past due payments owed and to establish a relationship with his or her child or children.

(2) Once the requirements under subdivision (c)(1)(C)(1) are met, the custodial parent shall not be permitted to proceed with the adoption nor the termination of parental rights of the non-custodial parent.

(3) The court may terminate parental rights of the non-custodial parent upon a showing that:

(i) Child support payments have not been made for one (1) year or the non-custodial parent has not visited the child in the preceding year and the non-custodial parent has not fulfilled the requirements of subdivision (c)(1)(C)(1); *and*

(ii) It would be in the best interest of the child to terminate the parental relationship.[4]

---

[4] Contrary to the dissent's limited citation of subsection (c)(1)(C), a court may terminate parental rights under (3)(ii) only in conjunction with (3)(i). Subpart (3)(i) does not apply because the record shows that Mr. Hudson paid his child support payments and attempted to visit K.H.

(2) Neglect or abuse . . .

(3) That in the case of a parent not having custody of a child, his consent is being unreasonably withheld contrary to the best interest of the child.

* * * *

(e) A petition for termination of the relationships of parent and child *made in connection with an adoption proceeding* may be made by:

(1) Either parent if termination of the relationship is sought with respect to the other parent;

(2) The petitioner for adoption, the guardian of the person, the legal custodian of the child, or the individual standing in parental relationship to the child or the attorney ad litem for the child;

(3) An agency; or

(4) Any other person having a legitimate interest in the matter.

Ark. Code Ann. § 9-9-220 (Repl. 2002) (emphasis added). Section 9-9-220 is part of the Arkansas Uniform Adoption Code, and sets out several grounds for termination of parental rights, but only in connection with an adoption proceeding. Subsection (a) deals with termination of parental rights in an adoption proceeding by voluntary relinquishment of those rights by the parent. Subsection (c) outlines some of the grounds for involuntary termination of parental rights, but because of the language "under this subchapter," it is apparent that this termination is, once again, only appropriate when an adoption is contemplated. This is clarified by subsection (e), which gives private litigants and others the right to petition the court for termination of parental rights, but limits this right to petitions "made in connection with an adoption proceeding."

In the instant case, the record shows that Ms. Kyle had at some point requested Mr. Hudson's consent to allow her current husband to adopt K.H., but Mr. Hudson refused to give that consent. The record also shows that Mr. Hudson has paid child support for K.H. and has on several occasions given Ms. Kyle financial assistance over and above the child-support amount. At the time the motion at issue here was filed, there was no adoption

proceeding in the works. Moreover, Ms. Kyle's motion for cessation of visitation does not reflect that an adoption proceeding is her reason for the motion. For these reasons, the circuit court did not have jurisdiction to terminate Mr. Hudson's parental rights under § 9-9-220.

In addition to these two sections of the Arkansas Code, Mr. Hudson cites one other section, Ark. Code Ann. § 16-13-304, as possibly giving the circuit court jurisdiction to terminate parental rights, but notes that the subsection giving that jurisdiction also required the appointment of a guardian ad litem prior to the termination, as follows:

> (d)(1) Chancery courts shall have the power to terminate parental rights in matters properly before the chancery court, except when the parties to the chancery court action are also parties to a juvenile division of chancery court action; then the juvenile division of chancery court shall have exclusive jurisdiction over termination of parental rights.
>
> (2) In all proceedings involving the termination of parental rights before the chancery court, the court shall appoint a guardian ad litem to represent the best interest of the juvenile and to advocate for the juvenile's articulated wishes.

Ark. Code Ann. § 16-13-304(d) (Repl. 1999).

While this section of the Code was still in effect on March 30, 2001, when Ms. Kyle filed her motion to cease Mr. Hudson's visitation, the Arkansas General Assembly, on March 28, 2001, passed Act 1153 of 2001 to repeal § 16-13-304(d). This repeal was effective in August 2001. The original motion to cease visitation made no mention of terminating Mr. Hudson's parental rights, and § 16-13-304(d) had already been repealed when the matter came up for the first time during the October 2001 hearing on the motion. Thus, this subsection could not have conferred jurisdiction for termination of Mr. Hudson's parental rights.

Because no statutory authority conferred jurisdiction on the court to terminate Mr. Hudson's parental rights,[5] this case is

[5] Likewise, Ark. Code Ann. § 9-13-101 (Repl. 2002) is inapposite and did not confer jurisdiction on the trial court to terminate Mr. Hudson's parental rights. That statute deals with child custody and visitation issues and does not address the termination of parental rights. In order to prevent confusion, we hereby overrule the decision of the

reversed and remanded for a new trial on the motion to terminate visitation.

Reversed and remanded for new trial.

ARNOLD, C.J., and THORNTON, J., dissent.

RAY THORNTON, Justice, dissenting. The majority opinion holds that a circuit court established by Amendment 80 to our constitution does not have jurisdiction to terminate the parental rights of Mr. Hudson, who is not the biological or adoptive father of the child, K.H. Mr. Hudson's only relationship to K.H.[1] is based on the fact that for a short time, more than a year after the child was born, Mr. Hudson was married to the child's mother, and that the decree of divorce referred to him as the child's father.[2]

The trial court heard evidence that the brief marriage of Mr. Hudson to Ms. Kyle was violent, with physical attacks by Mr. Hudson sending his wife to the hospital for an extended period of time before she filed for divorce. Further, the trial court found that Mr. Hudson's relationship with the child was abusive. The trial court quoted with approval evidence that K.H. had been sexually abused by Mr. Hudson and found that the best interest of the child required termination of Mr. Hudson's parental rights.

Exercising its jurisdiction over the divorce decree handed down in 1997, the trial court set aside provisions of that divorce decree relating to paternity rights and responsibilities. Specifically, the trial court ordered that provisions of the divorce decree imposing upon Mr. Hudson an obligation to pay child support be set aside, and ruled that Mr. Hudson owes no further duty of support to K.H. This exercise of jurisdiction to modify the 1997 divorce decree is not challenged.[3]

Arkansas Court of Appeals in *Office of Child Support v. Lawrence,* 57 Ark. App. 300, 944 S.W.2d 566 (1997), to the extent that it holds otherwise.

[1] A DNA test of K.H. and Mr. Hudson excluded Mr. Hudson as K.H.'s parent. The test was performed before the marriage.

[2] There is no showing that the trial court granting the divorce was cognizant of the results of the DNA test.

[3] The majority asserts that the trial court did not exercise its jurisdiction to modify the 1977 divorce decree, and claims that the dissent is in error in stating that the trial court "set aside" provisions of that divorce decree.

The trial court order reads in pertinent part as follows:

Mr. Hudson now appeals the order of the trial court in a one-brief appeal. We need not speculate as to why the prevailing parties did not brief the issue on appeal, but it seems that a good brief might have helped avoid today's untenable holding by the majority, from which I most respectfully dissent.

Mr. Hudson's first point on appeal is that the trial court lacked jurisdiction to terminate his parental rights, and the majority writes, "[W]e agree that the trial court had no jurisdiction to terminate Mr. Hudson's parental rights . . . [.]" Further, we are told by the majority that, notwithstanding the fact that a circuit court has all jurisdiction formerly invested by the constitution and laws of Arkansas in circuit, chancery, probate, and juvenile courts, as well as part of the constitutional jurisdiction formerly assigned to county courts over juvenile and illegitimacy proceedings, that this circuit court does not have jurisdiction to terminate parental rights of a noncustodial, non-biological, and nonadoptive father in the best interest of the child.

The majority also proceeds *sua sponte* to reach out and overrule a decision of our court of appeals' holding in *Office of Child Support Enforcement v. Lawrence*, 57 Ark. App. 300, 944 S.W.2d 566 (1997), which provides:

> [T]he authority to terminate parental rights is specifically granted to the juvenile and probate courts. *See* Ark. Code Ann. §§ 9-9-220, 9-27-341 (1987). However, in the context of a divorce, where child custody is at issue, the chancellor is vested with broad discretion to make decisions that are in the best interests of the minor child. *See* Ark. Code Ann. § 9-13-101 (1987).

Lawrence, supra.

This eminently correct statement of law by the court of appeals falls victim to the confusion attending this one-brief appeal. Presumably the majority's opinion will also require rever-

---

3. The previous Court's orders with regard to Defendant's obligation to pay child support to Plaintiff are hereby withdrawn, and Defendant owes no further duty of support as to [K.H.].

The majority contends that the trial court's modification of the earlier divorce decree by ordering that appellant's obligations to pay child support "are hereby withdrawn" is different from setting aside such obligations.

The fine distinction between withdrawing an order and setting it aside eludes me. Both require the exercise of jurisdiction over the previous divorce decree.

sal of our decision in *Patterson v. Isom*, 338 Ark. 234, 992 S.W.2d 792 (1999), where Patterson, the father, filed a petition for change in custody, and in response, Judkins, the mother, filed a petition for paternity testing to determine that Patterson was not the biological father of the child. We held: "The chancery court had exclusive jurisdiction under § 9-10-101(a)(2) to determine the issue of paternity." *Id.* We reversed the decision to the contrary by the juvenile court. *Id.* Regardless of the disposition of that case, it is beyond question that the circuit court does indeed have jurisdiction to determine the matter.

The majority may also be required to overturn our decision in *Parker v. Sebourn*, 351 Ark. 453, 95 S.W.3d 762 (2003), handed down less than a month ago where we held that a chancery court had subject-matter jurisdiction to terminate parental rights of a biological mother to her own child. *Id.*

The crux of the argument in *Parker, supra*, was whether jurisdiction was in the chancery court or in the juvenile court. It was not disputed that subject-matter jurisdiction was in one or the other of those two courts. *Id.*[4] It is clear that the jurisdiction of both these courts, as well as that of the probate court and the circuit courts, are now conferred by Amendment 80 upon the circuit court in the case under advisement.

We only need look to our constitution to become informed about jurisdiction. Section 6(a) of Amendment 80 confers upon circuit courts "jurisdiction of all justiciable matters not otherwise assigned pursuant to the constitution." Amendment 80, section 6(a). Section 19(B) of Amendment 80 confers "to circuit courts jurisdiction over all matters previously cognizable by circuit, chancery, probate, and juvenile courts" and other related provisions.

I am bewildered by the majority's holding that issues of paternity and the termination of parental rights are not justiciable matters assigned to the circuit court by the constitution. If this constitutional grant of jurisdiction requires statutory language to become effective, plenty can be found, and perhaps would have been cited if we had the other side of the issue briefed in the matter before us.

---

[4] The statutory basis upon which *Parker, supra* was decided has been replaced by Ark. Code Ann. § 16-13-304(b) (Supp. 2001), which is set out below.

For example, Ark. Code Ann. § 16-13-304 confirms jurisdiction in chancery (now circuit) courts and provides in pertinent part:

> (a) Chancery court shall have original jurisdiction in all matters in equity as fully as that exercised by the circuit courts of this state in counties where no separate chancery courts have been established prior to April 27, 1903.
>
> (b) Notwithstanding the provisions of the Arkansas Juvenile Code of 1989, § 9-27-301 *et seq.*, or any other enactment which might be interpreted otherwise, the chancery court or any division of *chancery court shall have jurisdiction for all cases and matters relating to paternity.*

Id. (emphasis added). This statute resonates with Amendment 80's grant of jurisdiction for the trial court to hear paternity cases.[5]

Turning to other statutory resonance with the constitutional grant of jurisdiction, it is notable that Arkansas Code Annotated § 9-9-220(c) (Repl. 2002), relating to adoption, provides in pertinent part:

> (c) In addition to any other proceeding provided by law, the relationship of parent and child may be terminated by a court order issued under this subchapter on any ground *provided by other law* for termination of the relationship, *or on the following grounds*:
>
> * * *
>
> (3) The court may terminate parental rights of the non-custodial parent upon a showing that:
>
> (ii) It would be in the best interest of the child to terminate the parental relationship.

Id. (emphasis added).

It should be noted that this grant of jurisdiction does not depend upon the pendency of an adoption proceeding. Arkansas Code Annotated § 9-9-220(a) states in pertinent part that "parental right[s] to control the child or to withhold consent to an adoption may be relinquished and the relationship of parent and child terminated *in or prior to an adoption proceeding* as provided in

[5] On March 28, 2001, a later section of this statute expressing limitations upon the exercise of authority to terminate parental rights, as set out in subparagraph (d), was repealed. The repealing statute did not address the grant of jurisdiction to decide issues relating to paternity as set out in Ark. Code Ann. § 16-13-304(b).

this section." *Id.* (emphasis added). The plain language of the statute provides jurisdiction for termination of parental rights *before* an adoption proceeding commences.

Not only does the circuit court have authority to determine parental rights under Ark. Code Ann. § 16-13-304(b) and under Ark. Code Ann. § 9-9-220(c), the circuit court has jurisdiction to terminate parental rights as provided by Ark. Code Ann. § 9-10-115(d). We held in *Littles v. Flemings*, 333 Ark. 476, 970 S.W.2d 259 (1998):

> By its terms, § 9-10-115(d) (Supp. 1995) directs the chancellor, upon scientific proof that the "adjudicated or presumed father" is not the "biological father," to do the following two things: (1) set aside a previous finding of paternity, *and* (2) "relieve the adjudicated or presumed father of any future obligation of support or any back child support as authorized under § 9-14-234 as of the date of entry of the order of modification." Thus, an "adjudicated father" who proves that he is not the "biological father" may receive two forms of relief. *He is entitled to have the paternity judgment set aside and* to be relieved of future child-support obligations.

Littles, supra (emphasis supplied).

As previously stated, it is not clear whether the results of DNA testing establishing that Mr. Hudson is not the biological parent of K.H. have ever been considered by the court. It remains unclear from the record in this one-brief case what principles of law or statutory authority the trial court relied upon. But while the abstract and brief before us do not disclose the basis upon which the trial court proceeded, no adequate showing was made that the trial court lacked jurisdiction to make a decision.

In the matter before us, the trial court was reviewing a divorce decree, as it had jurisdiction to do, and it set aside the provisions of the divorce decree relating to child support. It noted the existence of Ark. Code Ann. § 9-10-115(d)(1) that provides in pertinent part that

> a person may challenge a paternity establishment pursuant to a voluntary acknowledgment of paternity or an order based on an acknowledgment of paternity only upon an allegation of fraud, duress, or material mistake of fact.

Id.

Notwithstanding whether the trial court based its order setting aside provisions of the divorce decree upon Ark. Code Ann. § 9-10-115(d)(1), the trial court determined that there was no proof of duress. However, that finding did not deprive the trial court of jurisdiction. Indeed the trial court exercised its jurisdiction in setting aside portions of the divorce decree. The trial court was also appraised that an effort to adopt K.H. had been frustrated by Mr. Hudson's refusal to consent, and the trial court clearly had jurisdiction to inquire further into the showing of the DNA evidence. For the purpose of determining jurisdiction, it does not matter whether the trial court correctly or incorrectly interpreted the statutes, or correctly weighed the evidence. It is clear to me that the trial court had jurisdiction of the subject matter of paternity rights.

Mr. Hudson does not make an argument that the trial court lacked jurisdiction because there was no grant of jurisdiction by our constitution. He cites no authority for such a proposition, and presents no persuasive argument. Neither does Mr. Hudson address the issue whether the circuit court has jurisdiction formerly accorded to juvenile and probate courts. His contention is predicated upon the incorrect assumption that the only possible source of jurisdiction was that granted to DHS under the provisions of Ark. Code Ann. § 9-27-341, which does not confer jurisdiction to terminate parental rights upon private litigants. However, no one contends that the trial court relied upon that statute for jurisdiction or that the trial court acted under that statute.

Mr. Hudson did not address the question whether the trial court had jurisdiction pursuant to other laws. In a departure from precedent, the majority proceeds to review issues and statutes not raised by appellant below or in his brief in order to reverse the trial court. I cannot agree with this procedure or with the result.

I respectfully dissent. I am authorized to state that Chief Justice ARNOLD joins in this dissent.

Alvin Bernal JACKSON, a/k/a Rahman X *v.*
STATE of Arkansas

CR 02-104 105 S.W.3d 352

Supreme Court of Arkansas
Opinion delivered March 20, 2003

[Substituted opinion upon denial of rehearing
delivered April 24, 2003]

Jeff Rosenzweig, for appellant.

Mark Pryor, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

RAY THORNTON, Justice. Alvin Bernal Jackson, a/k/a Rahman X, was convicted of capital murder in Pulaski County Circuit Court and was sentenced to life imprisonment

without parole. We affirmed Mr. Jackson's sentence in *Jackson v. State*, 306 Ark. 70, 811 S.W.2d 299 (1991). While serving the above sentence, Mr. Jackson was charged with capital murder in the death of Scott Grimes, a correctional officer at the Maximum Security Unit in Jefferson County. Mr. Jackson was tried in Jefferson County Circuit Court and found guilty. During the sentencing phase of the trial, the trial court found an error on the verdict form used by the jury to determine the presence and weight of aggravating and mitigating circumstances. The jury had incorrectly marked Verdict Form 2 D to indicate that "no evidence of mitigating circumstances was presented by either party during any portion of the trial." Form 2 D further provided as follows: "(Check only if no evidence was presented. If evidence was presented but the jury agreed that it was not mitigating, check section C.)" The trial judge brought the problem to the jury's attention and directed them to return to the jury room to correct the form. Mr. Jackson's counsel did not object to the judge's action in returning the forms to the jury for correction, nor was there an objection to the judge's specific instruction that Form 2 D could not be checked because it was clear that some evidence of mitigating circumstances had been presented for consideration by the jury. After their return to the jury room, only a few minutes passed before the jury returned to open court with completed forms. The jury had deleted the check mark previously affixed to Form 2 D that had stated that no evidence of any mitigating circumstances had been presented but rather checked Form 2 C, as follows:

> (X)THERE WAS EVIDENCE OF THE FOLLOWING CIRCUMSTANCES, BUT THE JURY WAS UNANIMOUSLY AGREED THAT THEY WERE NOT MITIGATING CIRCUMSTANCES:
>
> > ( ) THE CAPITAL MURDER WAS COMMITTED WHILE ALVIN JACKSON WAS UNDER EXTREME MENTAL OR EMOTIONAL DISTURBANCE.
> >
> > ( ) THE CAPITAL MURDER WAS COMMITTED WHILE THE CAPACITY OF ALVIN JACKSON TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS IMPAIRED AS A RESULT OF MENTAL DISEASE,

( ) ALVIN JACKSON HAD A HISTORY OF MENTAL RETARDATION.

The trial court noted that while the first paragraph of Form 2 C was checked, no check marks were made to any of the three listed mitigators set forth following the first paragraph of Form 2 C. The trial court further noted that Form 3, the weighing of aggravating circumstances and mitigating circumstances, required by Ark. Code Ann. § 5-4-603 (Repl. 1997), had been unanimously signed by the jury. Counsel for defendant did not object to the form or substance of Forms 1, 2, or 3, nor to the conclusion that the jury unanimously sentenced the defendant to death. We affirmed. *Jackson v. State*, 330 Ark. 126, 954 S.W.2d 894 (1997)(*"Jackson I"*). The trial court's effort to correct Form 2 on mitigating circumstances was before this court for review in the appeal on the merits. *Jackson I, supra.* We also conducted an Ark. Sup. Ct. R. 4-3(h) review in *Jackson I.* In the event that the judge's effort to correct deficiencies in filling out Form 2 constituted an error that rose to the level where our review was required notwithstanding the lack of a contemporaneous objection, in accordance with *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), we considered that issue in our review on the merits.

Mr. Jackson then pursued a Rule 37 appeal in his death-penalty case. After relieving the attorney originally appointed to Mr. Jackson because of her possible witness status, attorney Jeff Rosenzweig was appointed and given ninety days from the entry of the order, pursuant to Arkansas Rule of Criminal Procedure 37.5(e). The State argued that the petition was untimely filed, and the lower court agreed and dismissed the case. The order was entered on November 19, 1998. The issue of whether the petition was timely filed was appealed, and we reversed and remanded the matter back to the trial court. *Jackson v. State*, 343 Ark. 613, 37 S.W.3d 595 (2001), (*"Jackson II"*). Upon remand, the trial court denied Mr. Jackson a hearing and entered an order finding that Jackson was conclusively not entitled to relief on any point. The trial court entered the order on October 9, 2001, and from that order comes this appeal. We hold that the trial court properly denied Mr. Jackson's petition for Rule 37 relief, and we affirm.

This court does not reverse a circuit court's decision to deny post conviction relief unless that decision was clearly erroneous or clearly against the preponderance of the evidence. *Noel*

v. State, 342 Ark. 35, 26 S.W.3d 123 (2000). In reviewing a petition for postconviction relief under Rule 37, we do not reexamine issues raised and resolved in the direct appeal. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). A Rule 37 proceeding is directed toward determining whether counsel was so deficient in performance of his duties that the defendant was denied his right to the effective legal representation guaranteed by the Sixth Amendment. *Id.* In an appeal from a trial court's denial of a Rule 37 petition, the question presented to us is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). We have often applied the standard set forth in *Strickland*, *supra*, to determine ineffective assistance of counsel:

> [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 the wide range of reasonable professional assistance. Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. The petitioner must show there is a reasonable probability that, but for counsel's errors, the fact finder 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.

Cothren v. State, 344 Ark. 697, 42 S.W3d 543 (2001). The language, "the outcome of the trial," refers not only to the finding of guilt or innocence, but to possible prejudice in the sentencing. *Lasiter v. State*, 290 Ark. 96, 717 S.W.2d 198 (1986). In making a determination of ineffective assistance of counsel, the totality of the evidence must be considered. *Id.* Furthermore, trial strategy is not a basis for postconviction relief. *Wooten v. State*, 352 Ark. 241, 91 S.W.3d 63 (2002).

Mr. Jackson states his first point on appeal as "whether the circuit court originally erred in an improper incursion into the jury's

role in a misguided attempt to cure obvious penalty phase error." The jury was required to fill out three different forms relating to sentencing. Form 1 related to the jury's findings concerning the possible aggravating circumstances. The jury found that both aggravating circumstances presented to them by the State existed. Form 2 contained four parts: A, B, C, and D. The instructions directed that if they found that specific mitigating circumstances existed at the time of the murder, they should make marks in the available spaces on Form 2 A. The jury checked none of the spaces. Form 2 B instructed that if one or more members of the jury believed that some of the mitigating circumstances existed but the jury was not unanimous, they should check the available spaces. The jury checked none of the spaces. Form 2 C provided spaces for the jury to mark if they found that there was mitigating evidence presented, but that they unanimously agreed that they were not mitigating circumstances, then underneath that statement, the possible mitigating circumstances were written out with spaces next to them for the jury to make marks indicating those circumstances were presented. Originally, Form 2 C was not marked by the jury. Instead, the jury had marked Form 2 D, which stated that no mitigating circumstances were presented by either party during any portion of the trial. Furthermore, Form 2 D reminded jurors that if mitigating evidence was presented though it was not mitigating, they were to required to check Form 2 C.

When the jury first returned the verdict forms, the circuit court judge ascertained that they had incorrectly filled out the sentencing portion of the forms, checking Form 2 D. Rather than allow the jury to create an error as a matter of law, he instructed them to return to the jury room and correct their mistake. The following colloquy occurred:

THE COURT: Ms. Rideau, has the jury arrived at a recommended sentence?

FOREPERSON RIDEAU: Yes, sir.

THE COURT: Would you pass it up to the bailiff, please. (Form handed to the Court.) Ms. Rideau, on the — on Form 2, you have checked paragraph (d) and signed this. I was, perhaps, unclear in my instructions to you. Paragraph (d) says that no evidence of mitigating circumstances was presented by either party during any portion of

> the trial. That was included in the form. It was to be checked only if no evidence. Certainly, some evidence was presented. And it goes to say, if evidence was presented but the jury agreed that it was not mitigating, check section (c). I'm going to ask you if you will, please, for y'all to retire to the jury room and complete Form 2 in accordance with the instructions contained on that if you would, please. I'm going to send you back with all of the forms you just returned. And if you would, please make that correction. I'll just tell you as a matter of law Form 2, section (d) should not be checked because there was, in fact, evidence submitted as to mitigating circumstances.
>
> Would the jury retire then to the jury room for the correction of Form 2, please.

The court then reviewed the forms and the following colloquy occurred:

> THE COURT: Form 2 is executed paragraph (c). There was evidence of the following circumstances but the jury unanimously agreed that they were not mitigating circumstances. There are none checked. But there is a signature line on the fourth page by you Ms. Rideau. Is that the unanimous finding of the jury?
>
> FOREPERSON RIDEAU: Yes, sir.

We agree with the concurring opinion's view that any confusion concerning Form 2 C does not show that the jury failed to properly consider mitigating circumstances in accordance with our statutory requirements. Trial counsel declined to poll the jury when asked by the court, stating, "Not with the signatures, your honor." We cannot conclude that this action by counsel constituted an ineffective performance of counsel under the *Strickland* test.

In *Jones v. State*, 329 Ark. 62, 947S.W.339 (1997), on direct appeal, we faced a similar issue and held that though the jury filled out the verdict form incorrectly, there was no error when the jury found that the aggravating circumstances outweighed the mitigating circumstances in accordance with Ark. Code Ann. § 5-4-603 (Repl. 1997). In *Jones*, we held that any inconsistencies by the

jury in completing the form pertaining to mitigating factors constituted harmless error. *Id.* We distinguished *Jones, supra,* from *Camargo v. State,* 327 Ark. 631, 940 S.W.2d 464 (1997), where we reversed a sentence of death and remanded for resentencing based on the jury's failure to return a unanimous written finding that the aggravating circumstances warranted a sentence of death. *Id.* In *Camargo,* the jury did not comply with the requirements of Ark. Code Ann. § 5-4-603, whereas in *Jones, supra,* and the instant case, the statutory requirements were satisfied.

Mr. Jackson claims that the trial court improperly directed the jury to find that there were no mitigating circumstances and that they had no choice but to give a sentence of death. We disagree. Any completion of Form 2 following the trial court's action in returning the forms for further consideration does not reflect a failure by the jury to properly consider mitigating circumstances. We note that Form 3 setting out the statutory requirements for weighing aggravating circumstances and mitigating circumstances was correctly filled out by the jury. The statute, codified at Arkansas Code Annotated § 5-4-603, requires that

> (a) The jury shall impose a sentence of death if it unanimously returns written findings that:
>
> (1) Aggravating circumstances exist beyond a reasonable doubt; and
>
> (2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and
>
> (3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.
>
> (b) The jury shall impose a sentence of life imprisonment without parole if it finds that:
>
> (1) Aggravating circumstances do not exist beyond a reasonable doubt; or
>
> (2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or
>
> (3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.
>
> (c) If the jury does not make all findings required by subsection (a) of this section, the court shall impose a sentence of life imprisonment without parole.

Id. The statute requires that the jury vote unanimously and perform a weighing test of the mitigating factors against the aggravating factors before it can impose the death penalty.

Here, the trial court did not direct the jury to impose the death penalty. Instead, the court properly instructed the jury to go back into the jury room and correct an error made in completing the form.

Mr. Jackson presents a secondary issue within his first point on appeal as whether the court erred in denying relief and in denying Jackson a hearing on the point. We do not reach this issue because we find no error in the court's action to require the jury to correct an erroneous finding in Form 2 D. Because there was no error, the issue of whether the court properly denied a hearing on the matter is moot.

Mr. Jackson presents as his second point on appeal as whether his trial counsel were ineffective by their failure to present an adequate penalty-phase defense, and whether the trial court erred in denying a hearing in its application of the law. We find no error and affirm.

Mr. Jackson acknowledges that his counsel did attempt a penalty-phase defense. Mr. Jackson, an inmate at the Department of Correction serving a life sentence for capital murder, made a "shank" and escaped from his cell. A lifelong friend of his, Kia Duncan, testified that Mr. Jackson told her that he had not intended to kill the officer, but the inmate the officer was escorting. Mr. Jackson told her that "he had kind of worked his cell door loose to get to the inmate . . . [Mr. Jackson] said the inmate had done something to one of his Muslim friends, and that the Muslim friend asked him to take care of the situation for him[.]" Mr. Jackson admitted to Ms. Duncan that he had premeditated his actions. Phone records confirmed that Ms. Duncan and Mr. Jackson had talked on the day that she testified they had.

Tony Tableriou, a former employee at the Department of Corrections, testified that on the day of the crime, he saw Mr. Jackson "sliding through the door of his cell." Mr. Tableriou yelled to the victim, and saw Sergeant Grimes and the inmate Mr. Jackson was allegedly intending to kill standing by a staircase. Mr. Tableriou witnessed Sergeant Grimes physically restrain Mr. Jackson and saw something in Mr. Jackson's hand. Mr. Tableriou tried to get the shank out of Mr. Jackson's hand, and they all fell to the ground. When Mr. Jackson had been restrained, Mr. Tableriou saw that Sergeant Grimes was kneeling on the ground with two tears near his

armpit, then he fell down and died. Mr. Tableriou's testimony was corroborated by another officer, Gary Hill.

During the penalty phase, trial counsel called Mr. Jackson's twin brother, Calvin Jackson, in mitigation. Calvin promised that if the jury gave his brother a life sentence, he and his mother would continue to visit appellant. Calvin recounted his twin brother's troubled youth and that when his brother had been on medication, his behavioral problems seemed to subside. Calvin testified that his brother had an uncontrollable temper, and that the medication had seemed to help him control it, suggesting that there was a possible mental condition to blame for Mr. Jackson's behavior. In contrast, Calvin offered testimony that though they had grown up in the same house, under the same conditions, that he had very little trouble in his life and that he had a successful career in restaurant management.

Trial counsel's decisions as to which witnesses should be called during the penalty phase is a matter of trial strategy and we have held that matters of trial strategy are not grounds for a showing of ineffective assistance of counsel. *Coulter v. State*, 343 Ark. 22, 31 S.W.2d 826 (2000). Even though another attorney may have chosen a different course, trial strategy, even if it proves unsuccessful, is a matter of professional judgment. *Camargo*, *supra*. Furthermore, in light of the totality of evidence presented, counsel's performance during the penalty phase was not deficient, and Mr. Jackson's contention that trial counsel should have used the same strategy in his second murder trial as that used in his first murder trial fails. Mr. Jackson, already serving a life sentence for the first murder, planned and committed another murder. The jury was made aware that this was Mr. Jackson's second murder charge and to contend that the strategy during the penalty phase should be the same for two substantially different murders must fail. Accordingly, on this point, we affirm the denial of Rule 37 relief.

Mr. Jackson's third point on appeal is whether trial counsel was ineffective in failing to seek further examination to determine if Mr. Jackson had a mental illness, and whether the denial of relief was based on a faulty understanding of the law. We find no error and affirm.

Mr. Jackson makes only conclusory statements concerning whether further examination might have led to the determination that an organic cause of a mental illness was present. Mr. Jackson explains that if CT, PET or MRI tests had been performed, the tests might have resulted in some showing of an organic cause of some mental illness. Conclusory statements cannot be the basis of postconviction relief. *Sanford v. State*, 342 Ark. 22, 25 S.W. 3d 414 (2000). We will not grant postconviction relief for ineffective assistance of counsel where the petitioner fails to show what the omitted testimony or other evidence was and how it would have changed the outcome. *Camargo, supra.* In the absence of any showing of what the evidence concerning the results of medical testing might have proven, we affirm.

Mr. Jackson's fourth point on appeal is whether trial counsel was ineffective in not objecting to a misstatement of the law by the prosecuting attorney, and whether the trial court's analysis of the law concerning mitigating circumstances was incorrect as a matter of law. We find no error in either the prosecutor's statement of the law or the trial court's interpretation of the law, and therefore, we affirm on this point.

The alleged misstatement of the law by the prosecutor was made during the closing arguments of the penalty phase of the trial. Mr. Jackson asserts that the following statement caused the jury to reject the evidence of mitigating circumstances:

> [H]e's talking about this case and he's talking about the murder of Scott Grimes, was able to appreciate the criminality of his conduct and conform his conduct to the requirements of the law at the time of the alleged crime. That's the psychological examiner's opinion. That mitigating circumstances wouldn't apply.

Mr. Jackson is incorrect. The prosecutor did not misstate the law, and therefore, it was not error for Mr. Jackson's attorney to fail to object.

Failure to make a meritless objection is not an instance of ineffective assistance of counsel. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 348 (2001). The prosecutor stated the elements of Ark. Code Ann. 5-4-605(3), which states the elements necessary for finding mitigating circumstances due to mental impairment: (1) the ability to appreciate the wrongfulness of the conduct, or (2) the ability to conform conduct to the require-

ments of the law at the time of the commitment of the crime. *Id.* The prosecutor then reminded the jury of the psychological examiner's expert opinion of Mr. Jackson's ability to appreciate the criminality of his conduct and to conform his conduct to the law. The prosecutor then explained that because Mr. Jackson was able to do both of these things the mitigating circumstances presented by the defense would not apply. The State was permissibly responding to Mr. Jackson's claim of the presence of mitigating circumstances by impairment due to mental disease or defect. Thus, the trial court's assessment that the State did not misstate the law concerning Ark. Code Ann. § 5-4-605(3) was proper. We find no error and affirm.

Mr. Jackson's fifth point on appeal is whether trial counsel were ineffective in failing to appropriately argue objections to victim-impact evidence. We decline to reach this issue on the grounds that it was not preserved for appeal. We previously held that this claim was procedurally barred because Mr. Jackson did not obtain a ruling from the trial court concerning the constitutionality of victim-impact evidence. *Jackson I, supra.* Furthermore, had the issue been preserved, Mr. Jackson's argument is without merit. We have rejected claims of error because of a failure to object to victim-impact evidence several times. *See, Kemp v. State,* 324 Ark. 178, 919 S.W.2d 943 *cert.* denied, 519 U.S. 892 (1996); *Nooner v. State,* 322 Ark. 87, 907 S.W.2d 677 (1995), *cert.* denied 517 U.S. 1143 (1996). The United States Supreme Court has also held that victim-impact evidence is permissible. *See Payne v. Tennessee,* 501 U.S. 808, (1991).

Because we have determined that the trial court order denying Rule 37 relief was not clearly erroneous or clearly against the preponderance of the evidence, we affirm.

IMBER, J., concurs.

ANNABELLE CLINTON IMBER, Justice, concurring. I concur in the judgment that this case should be affirmed, but I write to clarify an issue with regard to the sentencing forms filled out by the jury. The majority seems to say that Form 2 C was filled out incorrectly by the jury that sentenced Mr. Jackson to death, and cites to *Jones v. State,* 329 Ark. 62, 947 S.W.2d 339 (1997), for the proposition that the only sentencing form needed to justify a death sentence is Form 3, which sets out the statutory

requirements of Ark. Code Ann. § 5-4-603 (Repl. 1997). I must respectfully disagree with the majority on two points.

First, this court did find in *Jones, supra*, that the jury correctly completed Form 3, and we held that this satisfied the statutory requirement that the jury must find aggravating circumstances outweigh mitigating circumstances in order to return a sentence of death. However, that holding hinged on the fact that the jury *considered* mitigation in its decision, as evidenced by the jury's completion of Form 2, albeit incorrectly. This point was crucial to our decision in *Jones*, because to decide that Form 3 alone is enough to justify a death sentence would be to render Form 2 superfluous. The three forms must be read together — Form 1, which considers aggravators, Form 2, which considers mitigators, and Form 3, which balances the aggravators against the mitigators. Only because the *Jones* jury had considered mitigation on its Form 2, was the correctly completed Form 3 enough to satisfy the statutory requirements. Form 3, alone, would not have been enough to meet the requirements.

Second, I must disagree with the majority's implication that Form 2 was incorrectly filled out by the *Jackson* jury. The jury originally checked Section D of Form 2, which stated that no evidence of mitigation was presented by either party during the trial. Because evidence of mitigation had been presented, the trial court realized the mistake and correctly instructed the jury to return to the jury room and correct the form. Form 2 directed the jury to leave Section D blank if there was any evidence of mitigation; and, if the evidence of mitigation was not enough to constitute mitigating circumstances, Section C was to be checked. The jury did exactly as instructed by Form 2 and checked the box at the top of Form 2 Section C, that read as follows:

> C. ( ) There was evidence of the following circumstances, but the jury unanimously agreed that they were not mitigating circumstances

This section was then followed by a list of three possible mitigating circumstances. No instruction on the form stated that it was necessary to check off the individual mitigators. Presumably, if evidence of only one or two had been found, those mitigators would have needed a check mark to distinguish them from the others. In the instant case, the jury only checked the space beside

the letter "C," and then signed the form. Form 2 as filled out by the *Jackson* jury can thus be read as a statement by the jury that, while evidence of all three of the listed mitigators was presented, none of them were considered by the jury to rise to the level of mitigating circumstances. I cannot say that Form 2 was completed incorrectly by the *Jackson* jury, when there was no instruction on the form that required the jury to check anything other than Section C, which they did.

Because I believe that the jury was required to complete all three forms, not merely Form 3, and because I believe the jury correctly completed Form 2 pursuant to the instructions by the judge and those on the form itself, I concur with the majority in affirming the trial court's order denying postconviction relief under Ark. R. Crim P. 37 (2003).

Roberto BENEVIDEZ *v.* STATE of Arkansas

CR 02-611 101 S.W.3d 242

Supreme Court of Arkansas
Opinion delivered March 20, 2003

William R. Simpson, Jr., Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

Mike Beebe, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Justice. A Pulaski County jury convicted Appellant Roberto Benavidez of the capital murder of Daniela Araujo-Hernandez and sentenced him to life imprisonment. His sole claim on appeal is that the trial court erred by denying his motion to suppress because the Georgia police officers who arrested him did so by making a "search warrantless" entry

into a third party's home without having a reasonable belief that the home was Benavidez's residence. We hold that the trial court's denial of Benavidez's motion to suppress was not clearly erroneous and, accordingly, we affirm. We have jurisdiction of this case pursuant to Ark. Sup. Ct. R. 1-2(a)(2) (2002).

Facts

On August 3, 2000, Benavidez filed a motion to suppress evidence, alleging that members of the Chamblee Police Department of Chamblee, Georgia, conducted a warrantless search of a residence where he had rented a room. Benavidez alleged that during a search of the room he occupied, certain items were discovered and seized by the police in violation of his Fourth and Fourteenth Amendment rights.

At the suppression hearing, the following testimony was adduced. Following the murder, Benavidez left Arkansas, and officers investigating the murder obtained information that Benavidez was staying in Georgia. On November 4, 1999, Ellis Westbrooks, a sergeant of the Chamblee Police Department, in Chamblee, Georgia, received a copy of a warrant authorizing Benavidez's arrest for capital murder from the Jacksonville Police Department in Jacksonville, Arkansas. The Jacksonville police informed Westbrooks that Benavidez was staying at 3554 Shallowford Road, Apartment E-11, in Chamblee. The Jacksonville police also informed Westbrooks that Benavidez was driving a 1989 blue, two-door Pontiac Grand Am with Arkansas plates. In addition, the Jacksonville police provided a picture of Benavidez to the Chamblee police and told the officers that Benavidez might be armed.

Lieutenant Peabody, an officer of the Chamblee Police Department, located Benavidez's car in the parking lot of the apartment complex located at 3554 Shallowford Road. Peabody called Westbrooks and told him that he had spotted the vehicle, and Peabody and Westbrooks, along with another Chamblee police officer, went to Apartment E-11, at the Shallowford Arms apartment complex and knocked on the door.

An Asian female answered the door, and the officers told the woman that they had a warrant to arrest Benavidez. She pointed to the bedroom. The officers went to the bedroom and found two men sleeping on the floor of an unfurnished room. The officers

turned on the light and woke up the two men in the room. Using the picture provided by the Jacksonville police, Westbrooks identified Benavidez as one of the persons in the room.

Benavidez was not wearing a shirt and, since it was cold outside, Westbrooks reached into an open closet to get a shirt for Benavidez. When Westbrooks reached for the shirt, he saw an identification card and pulled it out. Westbrooks looked at the identification card and gave it to Peabody. Westbrooks again reached for the shirt and when he grabbed it, he found a .380 caliber pistol. Benavidez was then placed under arrest.

Benavidez stated that at the time he was arrested, he had been living at the apartment for four days. He stated that he was staying at the apartment with the permission of the Asian woman who lived there. According to Benavidez, after he met someone "in the street" and asked where he could rent a place to live, he was told to go to the apartment where the Asian woman lived. Benavidez testified that he paid $125.00 to stay in the apartment, and that the only belongings he had in the apartment were some clothing, his identification card, and a .380 caliber pistol.

At the suppression hearing, Benavidez argued that he had standing to contest the "search." He also argued that the arrest warrant alone, without proper consent or exigent circumstances, was not enough to allow officers to enter the apartment. In addition, Benavidez argued that the officers did not have reasonable belief that their safety was at issue or that there was any need for a protective sweep.

At the conclusion of the hearing, the trial court made several findings. The trial court held that Benavidez did have standing to assert a Fourth Amendment violation. The trial court found that Westbrooks's discovery of the gun was inadvertent, that it met the requirements of a plain-view search, and that Westbrooks was in a place where he lawfully had a right to be. The trial court also found that the issue of whether the woman answering the door gave consent for the officers to enter was irrelevant because the officers had an arrest warrant. Benavidez's motion to suppress was denied.

Standard of Review

■ ■ When reviewing a motion to suppress, the court makes an independent determination based on the totality of the

circumstances and reviews the evidence in the light most favorable to the appellee. *Howell v. State*, 350 Ark. 552, 89 S.W.3d 343 (2002). We note that the arrest and seizure of evidence took place in Georgia. This court has previously held that Mississippi law applies to determine whether an arrest was valid in a situation where an Arkansas defendant was arrested in Mississippi. *See Criddle v. State*, 338 Ark. 744, 1 S.W.3d 436 (1999); *Jackson v. State*, 241 Ark. 850, 410 S.W.2d 766 (1967). In the present case, we must look to Georgia law, to the extent that it does not conflict with the United States Constitution, to determine the reasonableness of the officers' conduct in executing the arrest warrant and seizing the evidence.

In determining the lawfulness of law enforcement officers' conduct, Georgia follows the approach taken by the United States Supreme Court, stating that "the touchstone of the Fourth Amendment is reasonableness." *Padron v. State*, 562 S.E.2d 244, 247 (Ga. Ct. App. 2002) (citing *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

We give respectful consideration to the findings of the trial court, and we must defer to the superior position of the trial court to pass upon the credibility of witnesses. *Davis v. State*, 351 Ark. 406 (2003) (citing *State v. Osborn*, 263 Ark. 554 (1978)). We will reverse only if the trial court's ruling on a motion to suppress is clearly erroneous. *Howell, supra.*

Benavidez concedes that the Georgia police officers who arrested him had a valid arrest warrant; however, he argues that the trial court should have granted his motion to suppress evidence because the Georgia police officers did not have a valid search warrant. In *Steagald v. United States*, 451 U.S. 204 (1981), the United States Supreme Court held that, although an arrest warrant carries with it the authority to enter a suspect's residence to arrest him or her, it does not give the authority to enter the residence of a third party to search for the subject of the arrest warrant, absent consent or exigent circumstances.[1] However, in *Payton v. New York*, 445 U.S. 573, 603 (1980), the Court stated that

[1] We note that the facts in the present case are distinguishable from the facts in *Steagald v. United States*, 451 U.S. 204 (1981). In *Steagald*, the Court stated: "The issue

> for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

In the present case, there is no dispute that the arrest warrant for Benavidez was founded on probable cause. With the valid warrant, the Chamblee officers had the authority to enter the apartment where Benavidez was living if the officers had reason to believe that Benavidez lived in the apartment and that Benavidez was present in the apartment at the time the warrant was executed.

Clearly, the officers had reason to believe that Benavidez was present in the apartment at the time the warrant was executed. The Jacksonville police had informed Westbrooks that Benavidez was staying at 3554 Shallowford Road, Apartment E-11, in Chamblee, and Westbrooks had been told that Benavidez was driving a 1989 blue, two-door Pontiac Grand Am with Arkansas plates. While on patrol, Lieutenant Peabody located Benavidez's car in the parking lot of the apartments located at 3554 Shallowford Road and called Westbrooks and told him that he had spotted the vehicle.

Benavidez argues that

> the State may attempt to argue that the apartment was Appellant Benavidez's residence and, therefore, with a valid arrest warrant the police could enter his residence and arrest him. If the State makes such an argument, it must inevitably depend on facts discovered by the Georgia police while or after they arrested Appellant Benavidez. Such after-the-fact evidence will not support the State's argument. According to the *Payton* rule, the police must have a reasonable belief *before* they enter the defendant's residence that the residence is, in fact, the defendant's residence.

When asked what information he had pertaining to who was living at the apartment, Westbrooks stated: "We didn't have any information who was living at the apartment; that he may be there. If we found the car there, he probably would be staying there." At issue is whether the arrest for Benavidez provided the

---

here . . . is not whether the subject of an arrest warrant can object to the absence of a search warrant [for] . . . another person's home, but rather whether the residents of that home can complain of the search." 451 U.S. at 219.

police officers with legal authority to enter the apartment, thereby validating the seizure of evidence that was in plain view.

From the totality of the circumstances, it was reasonable for the Georgia police to believe prior to the execution of the arrest warrant that Benavidez was both living in Apartment E-11 and actually present inside the apartment. The Georgia police officers had received information from the Jacksonville police that Benavidez was driving a 1989 blue, two-door Pontiac Grand Am with Arkansas plates, and that if the car was at the apartment complex located at 3554 Shallowford Road, Chamblee, Georgia, then Benavidez probably would be staying in Apartment E-11. Subsequent to receiving this information, the Georgia police officers discovered the subject car parked at the subject apartment complex.

The trial court's denial of Benavidez's motion to suppress was not clearly erroneous. The officers reasonably believed that Benavidez was residing at the apartment and they reasonably believed that Benavidez was present at the apartment at the time they went to execute the warrant. The officers entered the bedroom where Benavidez was sleeping and positively identified him. Westbrooks reached into an open closet to get a shirt for Benavidez; there is no evidence that he was conducting a search when he reached into the closet. Westbrooks inadvertently discovered the gun and identification card, which were wrapped in the shirt. The gun and the identification card were in plain view. The seizure of the evidence in plain view was valid.

Rule 4-3(h) Review

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

Affirmed.

GLAZE, J., concurs.

CORBIN, J., not participating.

CARWELL ELEVATOR CO., Inc.,
and Poinsett Rice & Grain, Inc. *v.*
Timothy LEATHERS, Commissioner of Revenue;
and Arkansas Rice Research and Promotion Board

02-240 101 S.W.3d 211

Supreme Court of Arkansas
Opinion delivered March 20, 2003

[redacted]

Snellgrove, Langley, Lovett, & Culpepper, by: *Todd Williams*, for appellants.

Mark Pryor, Att'y Gen., by: *Arnold M. Jochums*, Ass't Att'y Gen.; and *Friday, Eldredge & Clark*, by: *William A. Waddell, Jr.*, for appellees.

JIM HANNAH, Justice. Carwell Elevator Co., Inc., and Poinsett Rice & Grain, Inc., appeal the decision of the Circuit Court of Pulaski County finding that Carwell and Poinsett may not recover assessments of the Arkansas Rice Research & Promotion Board ("Board") that they paid as first-time rice buyers because the assessments were voluntarily paid. Carwell and Poinsett also appeal the trial court's finding that Carwell and Poinsett's claims that the assessments were illegal are precluded by laches.

Carwell and Poinsett allege that the trial court erred in failing to find that an illegal-exaction lawsuit creates a class suit. Carwell and Poinsett also allege that the trial court erred in failing to find that they are entitled to a refund of the assessments paid.

Facts

Act 344 of 1995, codified at Ark. Code Ann. § 2-20-511 (Repl. 1996), authorized the Board to refer to the rice producers the question of whether the Board should levy an assessment of $1.35 per bushel to be paid by buyers of rice at the first point of sale. The producers approved the assessment, and beginning in August 1996, the assessment was collected. On August 14, 1996, Gulf Rice Arkansas, Inc. brought suit alleging that Act 344 constituted an unlawful delegation of taxing power under article 2, section 23, and an illegal exaction under article 16, section 13, of the Arkansas Constitution. The Gulf Rice suit was resolved at the trial level by summary judgment finding that Act 344 constituted an unlawful delegation of legislative authority. That summary judgment was appealed to this court and affirmed in *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 994 S.W.2d 481 (1999).

In *Gulf Rice*, this court affirmed the trial court's holding that Act 344 constituted an unconstitutional delegation of legislative authority. In addition, we noted that we did not address the issue of whether the assessment constituted an illegal exaction. In *Gulf Rice*, we stated, "Because we agree with the Chancellor that Act 344 is unconstitutional as an unlawful delegation of legislative power, it is unnecessary to examine whether the Act's assessment is also invalid as an illegal exaction" *Gulf Rice*, 338 Ark. at 434 n 1.

On February 15, 2000, Carwell and Poinsett filed an illegal-exaction suit in Pulaski County Circuit Court alleging that they are entitled to a refund of all assessments they paid after Gulf Rice filed its lawsuit in 1996. This case was tried before the circuit court on October 8, 2001.

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. *Shelter Mut. Ins. Co v. Kennedy*, 347 Ark. 184, 60 S.W.3d 458 (2001); *Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702 (1997).

Illegal Exaction

Carwell and Poinsett argue that the trial court erred in failing to find that an illegal-exaction lawsuit creates a constitutional class action entitling them to refunds of rice assessments they paid pursuant to the assessment levied under Act 344. Carwell and Poinsett rely upon the holding in *Gulf Rice, supra*, that Act 344 constituted an unlawful delegation of legislative authority. Carwell and Poinsett allege that they are members of the class of rice buyers in *Gulf Rice, supra*, and therefore there is already a finding that the assessment was illegal. On that basis Carwell and Poinsett allege they are entitled to a refund of the assessments they paid.

However, the trial court found that as a matter of fact and law, *Gulf Rice* was not a class action on behalf of all rice buyers subject to the assessment, and that the case only adjudicated the rights of Gulf Rice. Therefore, the trial court rejected Carwell and Poinsett's claims they were members of the class in *Gulf Rice, supra*.

We disagree with the trial court. The issues adjudicated in *Gulf Rice, supra* were not limited to Gulf Rice. The

decree by the trial court in *Gulf Rice, supra* declared Act 344 unconstitutional and enjoined "assessments on first buyers of Arkansas Rice pursuant to Act 344 of 1995 . . . ." Thus, it is clear the decree in the Gulf Rice case reached all first buyers of Arkansas Rice, both because it declared the assessment unconstitutional, and because it enjoined further collection of the assessment. *Gulf Rice* was a class action on behalf of all first buyers of Arkansas Rice. It is true that the injunction was stayed by the trial court in *Gulf Rice* pending appeal, however, staying the injunction does not alter the finding stated in the decree that Act 344 was unconstitutional as to all first buyers of Arkansas Rice. Nor does staying the injunction alter that the injunction enjoined all collection of the assessments, not just the assessments against Gulf Rice.

Carwell and Poinsett attempt to avail themselves of the rule that taxes paid after a complaint is filed in an illegal-exaction suit are deemed paid in protest and are recoverable. *See Elzea v. Perry*, 340 Ark. 588, 12 S.W.3d 213 (2000). Carwell and Poinsett are asserting a right to recover all assessments they paid after Gulf Rice filed its complaint in *Gulf Rice, supra.* They argue that as members of the class in *Gulf Rice* they are entitled to rely on Gulf Rice's complaint.

■ Taxes paid by a party after the filing of a complaint in illegal exaction are deemed paid in protest and are recoverable. *Elzea, supra.* However, because the trial court found that *Gulf Rice*, was not a class action, the trial court concluded Carwell and Poinsett could not rely on Gulf Rice's complaint and therefore the assessments were voluntarily paid and nonrecoverable. The trial court applied the common-law rule that taxes voluntarily paid are not recoverable. *See Elzea, supra.* Again we disagree.

■ ■ The Gulf Rice litigation was a class suit because a suit in illegal exaction is a class suit as a matter of law. *Worth v. City of Rogers*, 351 Ark. 183, 89 S.W.3d 875 (2002). Any assessments paid by Carwell and Poinsett after the filing of the complaint in *Gulf Rice* were paid in protest. *Elzea, supra.*

However, the trial court also found that recovery by Carwell and Poinsett was precluded based on laches. As discussed below, notice to Carwell and Poinsett was fatally defective. Therefore, recovery may not be precluded based on laches. The trial court also found that there was no fund from which any recovery might

be paid. We must note that the decree in the Gulf Rice case finding Act 344 unconstitutional and the injunction on behalf of all first buyers of Arkansas Rice put the Board on notice. Yet rather than put the assessments collected in escrow to safeguard them pending the outcome of the litigation, the Board spent them. Assessments, however, have been collected under a subsequent act and continue to be collected.

Carwell and Poinsett argue correctly that an illegal-exaction suit arises as a class-action suit under the constitution. *Worth, supra.* In *Martin v. Couey Chrysler Plymouth, Inc.*, 308 Ark. 325, 824 S.W.2d 832 (1992), this court stated:

> The wording of Ark. Const. art. 16, §13 is broad and not to be narrowed by statute or interpretation. We believe our cases are consistent with that concept. But we also think it clear that the provision was not intended to be the vehicle by which taxpayers air individual grievances in the methods by which taxes are assessed and collected. Rather, it was intended to be the means by which taxpayers, generally, in a collective capacity, resist illegal exaction.

Martin, 308 Ark. at 331. In *Laman v. Moore*, 193 Ark. 446, 100 S.W.2d 971 (1937), this court discussed an illegal-exaction suit where the original plaintiff who brought the suit had moved away from the city and Laman had intervened to continue the suit. An objection was raised that the only proper means for Laman to proceed was by a separate and independent action. This court stated:

> The suit as originally brought was necessarily for the benefit of all taxpayers of the city and might as well be prosecuted in the name of one as of another. No prejudice whatever resulted to the defendants (appellees) by allowing appellant to become a party plaintiff for the purpose of prosecuting the suit. Neither the original plaintiff nor the appellant could recover a personal judgment against any of the appellees (defendants) except for the benefit of all taxpayers of the city.

Laman, 193 Ark. at 447-48.

Thus, it is this clear that an illegal-exaction suit is a collective single action prosecuted on behalf of all affected taxpayers. In 1944, this court stated an illegal-exaction suit under article 16, section 13, "is made a class suit in which any citizen may sue for the benefit of himself and all other interested citizens. . . ." *Samples v. Grady*, 207

Ark. 724, 182 S.W.2d 875 (1944). *See also, Nelson v. Berry Petroleum Co.*, 242 Ark. 273, 413 S.W.2d 46 (1967); *Schuman v. Ouachita County*, 218 Ark. 46, 234 S.W.2d 42 (1950). Moreover, this court has recently stated that an illegal-exaction suit is a class suit as a matter of law. *Frank v. Barker*, 341 Ark. 577, 20 S.W.3d 293 (2000); *Carson v. Weiss*, 333 Ark. 561, 972 S.W.2d 933 (1998).

Thus, the suit in *Gulf Rice* and the suit in the present case are both class suits under article 16, section 13, of the Arkansas Constitution based on the same alleged illegal levy. This raises the question of whether considering the issue of illegal exaction under Act 344 a second time is precluded by the doctrine of *res judicata*. In *Rigsby v. Ruraldale Consol. Sch. Dist. No. 64*, 180 Ark. 122, 20 S.W.2d 624 (1929), the defendants raised *res judicata* asserting that the issues had already been litigated in a prior suit. Rigsby had sued under article 16, section 13, as had the parties to the first suit, and this court stated that "all citizens were bound by the result of the suit brought against appellees by R.M. Johnson upon all issues presented by the pleadings and testimony in the Johnson case." *Rigsby*, 180 Ark. at 124. In *McCarroll v. Farrar*, 199 Ark. 320, 134 S.W.2d 561 (1939), this court discussed that the doctrine of *res judicata* precluded a subsequent suit by another taxpayer under article 16, section 13, because a case under article 16, section 13, is a case under virtual representation and every citizen is regarded as a party to the proceedings. *McCarroll, supra. See also, Laman, supra.*

■ ■ The concept of *res judicata* has two facets, one being issue preclusion and the other claim preclusion. *Huffman v. Alderson*, 335 Ark. 411, 983 S.W.2d 899 (1998); *John Cheeseman Trucking, Inc. v. Pinson*, 313 Ark. 632, 855 S.W.2d 941 (1993). Under claim-preclusion, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim. *Huffman*, supra. *Res judicata* bars not only the relitigation of claims which were actually litigated in the first suit, but also those which could be litigated. *Id.* 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. *Id.* Issue preclusion, or collateral estoppel, bars relitigation of issues. *Crockett & Brown v. Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993). In *State v. Thompson*, 343 Ark. 135, 34 S.W.3d 33 (2000), we stated of collateral estoppel:

> When an issue of ultimate fact has once been determined by a valid and final judgment, collateral estoppel precludes relitigation of that issue between the same parties in any future proceeding. *E.g.*, *Edwards v. State*, 328 Ark. 394, 943 S.W.2d 600, *cert. denied*, 522 U.S. 950 (1997) (quoting *Schiro v. Farley*, 510 U.S. 222, 232 (1994)). In order to establish collateral estoppel, proof of the following is required: 1) the issue sought to be precluded must be the same as that involved in the prior litigation; 2) the issue must have been actually litigated; 3) the issue must have been determined by a final and valid judgment; and 4) the determination must have been essential to the judgment. *Edwards*, 328 Ark. at 401-02, 943 S.W.2d at 603.

Thompson, 343 Ark. at 139-40.

Thus, if the issue of whether the assessments amounted to an illegal exaction was not decided in *Gulf Rice*, litigation of the issue may now be precluded as an issue which could have been litigated. The concern about multiple suits in illegal exaction was discussed in *McCarroll, supra*, where this court considered the issue of a second suit alleging the same illegal exaction arising from implementation of the same alleged unconstitutional act. This court stated:

> If a suit of this character is not a bar, then one citizen after another might institute a suit for himself and others against the Commissioner of Revenues, and if the judgment in one suit was not a bar, this could continue until every citizen in the state had brought suit. The doctrine of res judicata is not only to protect the individual, but it is a matter of public policy.

McCarroll, 199 Ark. at 325. *See also*, *Rigsby, supra.*

It is clear that the issue of an illegal exaction was raised by the litigation in *Gulf Rice*, however, the trial court did not specifically rule that the assessment constituted an illegal exaction. Nonetheless, the decree in *Gulf Rice* declared Act 344, which created the assessment, unconstitutional and enjoined further collection of the assessment under Act 344. Whether the trial court declared the assessment to be an illegal exaction is not material because *res judicata* would not be a bar under the facts of this case in any event. The doctrine of *res judicata* applies against a party only when the party had a fair and full opportunity to litigate the issue in question. *Huffman, supra; Bailey v. Harris Brake Fire Protection District*, 287 Ark. 268, 697 S.W.2d 916 (1985). *See also*, *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 481 n.22 (1982);

Lovell v. Mixon, 719 F.2d 1373 (8th Cir. 1983). The trial court found that Carwell and Poinsett became aware of Gulf Rice's suit shortly after it was filed, and that they then held the belief that the assessment was illegal. The trial court also found that the plaintiff in *Gulf Rice* intentionally prosecuted its case as an individual lawsuit and not as a class suit. The mere knowledge that Gulf Rice filed suit and a belief that the assessment was illegal does not rise to the level of knowledge that would be required to apply *res judicata*.

[redacted] Notice is required in illegal-exaction cases. *Worth, supra*. Notice of an illegal-exaction suit was not provided in *Gulf Rice*. Gulf Rice attempted to proceed individually and no adequate notice of an illegal-exaction suit was provided to class members. The notice must inform the class members:

> 1. That the illegal-exaction suit is pending and what it alleges;
> 2. That the class is established by the constitution and who it includes;
> 3. That a class member may not opt out and will be bound by any judgment;
> 4. That class members may wish to become named parties to have greater input in the remedy sought;
> 5. That class members may wish to become named parties to assure there is no collusion or friendly lawsuits, and to have input in the amount of attorney's fees granted; and 6. That class members may declare any alleged illegal tax voluntarily paid so as to remove it from the illegal-exaction suit.

See generally T&T Chem., Inc. v. Priest, 351 Ark. 537, 95 S.W.3d 750 (2003); *Worth, supra*; *Martin, supra*; *Samples, supra*; *McCarroll, supra*; *Laman, supra*; *Rigsby, supra*; *Dreyfus v. Boone*, 88 Ark. 353, 114 S.W. 718 (1908).

[redacted] Further, as we stated in *Dreyfus, supra*, it is the duty of the court to construe the complaint in an illegal-exaction suit to be one for the relief of all. This was not done by the trial court in *Gulf Rice*. Also, contrary to Gulf Rice's attempt to litigate its claim individually, as the taxpayer who initiated the suit, Gulf Rice was without the authority to waive contentions that should have been asserted on behalf of the class. *Chandler v. Bd. of Tr. of the Teacher Ret. Sys. of Ark.*, 236 Ark. 256, 365 S.W.2d 447 (1963). We hold that there was a lack of notice to Carwell and Poinsett, and that neither Carwell nor Poinsett had a fair and full

opportunity to litigate the issue in question. Therefore, the present suit is not precluded by *res judicata*. *Huffman, supra.*

Laches

The trial court found that Carwell and Poinsett became aware of the Gulf Rice suit shortly after it was filed, and that they then held the belief that the assessment was illegal. Therefore, the trial court concluded the doctrine of laches applied. The doctrine of laches was laid out in *Goforth v. Smith*, 338 Ark. 65, 991 S.W.2d 579 (1999):

> The doctrine of laches is based on a number of equitable principles that are premised on some detrimental change in position made in reliance upon the action or inaction of the other party. *Andarko Petroleum v. Venable*, 312 Ark. 330, 850 S.W.2d 302 (1993). It is based on the assumption that the party to whom laches is imputed has knowledge of his rights and the opportunity to assert them, that by reason of his delay some adverse party has good reason to believe those rights are worthless or have been abandoned, and that because of a change of conditions during this delay it would be unjust to the latter to permit him to assert them. *Self v. Self*, 319 Ark. 632, 893 S.W.2d 775 (1995). Laches requires a demonstration of prejudice to the party alleging it as a defense resulting from a plaintiff's delay in pursuing a claim. *Swink v. Giffin*, 333 Ark. 400, 970 S.W.2d 207 (1998).

Goforth, 338 Ark. at 77-78. The first requirement in laches is that the party have a knowledge of his or her rights and the opportunity to assert those rights. As already noted, the present suit is not precluded by *res judicata*. The required notice was not provided in the Gulf Rice litigation. The illegal assessments were paid by Carwell and Poinsett through July 1999, and suit was brought in February 2000. Laches is inapplicable under these facts. We also must note that the Board continued to spend the money received from the assessments rather than place it in escrow even though the Board was on notice the assessment was illegal and therefore might have to be refunded. The Board may not now assert that it is unable to pay back the money it knew it was receiving under a tax declared unconstitutional by the chancery court.

Remaining Issues

Carwell and Poinsett assert that this court may order a refund. Refunds are available in illegal-exaction cases. *Hasha v. City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993). However, a decision on a refund must first be decided in the trial court. This case is remanded for the trial court to require proper notice and proceed with an illegal-exaction class suit.

Reversed and remanded.

GLAZE, IMBER, and THORNTON, JJ., concurring in part and dissenting in part.

TOM GLAZE, Justice, concurring in part and dissenting in part. I join Justice IMBER's opinion. The majority opinion is seriously mistaken in deciding *res judicata* does not apply, and then proceeds to direct that this case should be returned to relitigate the entire matter. As Justice Imber ably points out, all of the rice buyers were affected by the illegal assessment, and they are entitled to a refund of any payments they made under the unconstitutional assessment. This court has long-established law that, when a taxpayer brings an illegal-exaction suit, that taxpayer represents all other affected parties in the class-action litigation.

If the majority wishes to require a notice to all affected parties who have paid an illegal tax or assessment at the time a party commences a class-action illegal-exaction suit, this court should highlight that deviation from prior case law by applying such newly adopted notice effective prospectively. Better yet, to make matters clear, this court should promulgate a rule that requires such a notice upon filing illegal-exaction suits, if the court is convinced it should do so. This case is not the vehicle to impose such a new procedure or rule because, to do so, ignores a long list of case law on the subject and needlessly continues litigation in this case.

IMBER and THORNTON, JJ., join this opinion.

ANNABELLE CLINTON IMBER, Justice, concurring in part and dissenting in part. While I concur with the majority that this case must be reversed and remanded, I must respectfully disagree with the majority's contention that *res judicata* is not

a bar under the facts in this case. Quite the contrary, *res judicata* does apply to the appellants in this case, but *res judicata* itself does not negate the remedy they seek.

In our recent decision in *State Office of Child Support Enforcement v. Willis*, 347 Ark. 6, 59 S.W.3d 438 (2001), we set out the factors of *res judicata*:

> *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 . . . . The policy of the doctrine is to prevent parties relitigating issues on which they have already been given a fair trial.

Id. at 13, 59 S.W.3d at 443.

In this case, the original suit brought by Gulf Rice was an illegal-exaction suit; therefore, it was a class action as a matter of law. *Worth v. City of Rogers*, 351 Ark. 183, 89 S.W.3d 875 (2002). Though the appellees in this case attempt to carve the appellants out of the order of the trial court in the original suit, Gulf Rice was merely the named party who represented all other affected parties in the class action, including the appellants. *Id.*; *see also Laman v. Moore*, 193 Ark. 446, 100 S.W.2d 971 (1937) (in a class action, no plaintiff may recover a personal judgment against a defendant except for the benefit of all similarly situated taxpayers).

As to *res judicata*, the five elements are met; therefore, *res judicata* does apply. First, the original suit, *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 994 S.W.2d 481 (1999), resulted in a final judgment on the merits, in that the trial court's decree found that Act 344 was "unconstitutional as to *all* first buyers of Arkansas Rice" (emphasis added). The decree enjoined the collection of *all* assessments, not just those of Gulf Rice, the named plaintiff. Second, the *Gulf Rice* suit was based on proper jurisdiction. Third, the first suit was fully contested in good faith, as evidenced by the decree, which found the assessments unconstitutional and ordered an injunction and a refund. Fourth, both the original suit and this suit involve the same claim or cause of action — that Act 344 was unconstitutional. Finally, both suits involve the same parties

because all first buyers of rice were parties in the original suit, by virtue of its status as an illegal-exaction class-action suit. Therefore, *res judicata* applies to the appellants in this case as to the outcome of the litigation.

However, that is not to say that the appellants are without a remedy. On the contrary, because the remedy granted in the original suit was an injunction and a refund to the named plaintiff, that remedy applies to all the plaintiff parties in the original case, including the appellants in this subsequent suit, and all other rice buyers who were affected by the illegal assessment. Thus, *res judicata* applies to all affected rice buyers as to both points: the result of the litigation and the remedy, and all affected rice buyers are entitled to a refund of any payments they made under the unconstitutional assessment.[1]

The decision of the trial court should be reversed, and the case remanded for notification to all affected rice buyers so that they can make a claim for their refunds, if they so choose. I would remand this case for this notification, and for the trial court to set up a system by which claims may be made in a timely fashion.

GLAZE and THORNTON, JJ., join.

---

[1] The majority directs the trial court to "require proper notice and proceed with an illegal-exaction class suit." This direction is erroneous in that it violates the doctrine of *res judicata* and would relitigate that which has already been litigated to final judgment. As the majority notes, an illegal-exaction suit is a class action as a matter of law. *Worth v. City of Rogers*, 351 Ark. 183, 89 S.W.3d 875 (2002). To require notice now, after the completion of the suit, would undercut this principle, and would have long-reaching effects in other illegal-exaction suits. Following the majority's "notice" requirement to its logical conclusion would mean that all illegal-exaction suits could be re-litigated again and again, if a taxpayer received no notice of the suit. This flies in the face of the history of illegal-exaction suits in Arkansas, and has the potential of opening the floodgates of litigation every time a taxpayer is not happy with the results of an illegal-exaction lawsuit. In this case, no "notice" as set forth in *Worth, supra*, is required to be given to the affected rice buyers, because that notice is pre-litigation notice that is given in order that affected taxpayers in an illegal-exaction suit may intervene if they wish, in order to have greater input into the remedy sought. In this case, the greatest possible remedy, both an injunction and a refund, was granted by the trial court, so there is no need to notice the class for this purpose. The only notification necessary is that which would instruct the affected class members on how to claim their refunds.

Johnny WARREN *v.* STATE of Arkansas

CR 03-21 101 S.W.3d 247

Supreme Court of Arkansas
Opinion delivered March 20, 2003

Gina H. Reynolds, Office of the Public Defender; and *Jeff Rosenzweig*, for appellant.

No response.

PER CURIAM. On January 23, 2003, we delivered a per curiam opinion in this matter directing Mr. Warren's attorney, Gina H. Reynolds, to file within thirty days from the date of that opinion, a motion and affidavit accepting fault for an untimely notice of appeal and record. On February 20, 2003, Ms. Reynolds requested, among other things, this court's reconsideration of its January 23 per curiam. Ms. Reynolds relates that Mr. Warren refused to communicate with her immediately after his trial, and she also was not notified of Warren having filed a pro se notice of appeal. Earlier in this proceeding, on January 3, 2003, Ms. Reynolds stated that Warren had never alleged that he asked her to appeal. Ms. Reynolds requested she be relieved as counsel. On March 3, 2003, Warren filed a response, stating he did inform Ms. Reynolds that he would like to appeal, and he denied that he refused to communicate with Ms. Reynolds after his trial.

We remand this matter to the trial court for a hearing to settle the record in order to determine whether Mr. Warren had requested his trial counsel, Ms. Reynolds, to file a notice of appeal and whether Ark. R. App. P.—Crim. 16 had been complied with. *See Strom v. State*, 346 Ark. 160, 55 S.W.3d 297 (2001).

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY *v.* BRIGHTON CORPORATION; Coltec Industries, Inc.; Entergy Arkansas, Inc.; First Electric Cooperative Corporation; Kamo Electric Cooperative, Inc.; Kuhlmen Corporation, On Behalf of Kulhman Electric Corporation; Magnetic Electric Company; Missouri Public Service; Pirelli Cable Corporation; Reed & McClain Electrical Works, Inc.; Reynolds Metals Company; San Angelo Electric Service Company; Southern Cotton Oil Co.; T&N Electric Company, Inc.; Texas Eastern Transmission Corporation

02-321 102 S.W.3d 458

Supreme Court of Arkansas
Opinion delivered April 3, 2003

[Petition for rehearing denied May 8, 2003.*]

[redacted]

* BROWN, IMBER, and HANNAH, JJ., would grant.

Hill, Gilstrap, Perkins & Trotter, PC, by: *G. Alan Perkins* and *Julie D. Greathouse*, for appellant.

Mark Pryor, Att'y Gen., by: *Eric B. Estes* and *Charles L. Moulton*, Ass't Att'ys Gen., for appellee.

TOM GLAZE, Justice. The Arkansas Department of Environmental Quality ("DEQ") appeals from an order of the Jefferson County Circuit Court dismissing its complaint with prejudice. This appeal requires us to construe Ark. Code Ann. § 8-7-501 *et seq.* (Repl. 2000), the Remedial Action Trust Fund Act ("RATFA"), and jurisdiction is therefore proper in this court under Ark. Sup. Ct. R. 1-2(b)(6).

On March 15, 2001, DEQ filed a lawsuit against fifteen separate defendants,[1] seeking a declaratory judgment. The fifteen defendants were alleged to be customers of a defunct corporation called Utility Services, Inc. ("USI"), a company that, from 1975 until 1984 or 1985, had operated on a thirty-acre site in Jefferson County. According to DEQ's complaint, USI engaged in the repair and maintenance of various electrical equipment and components. One of the activities conducted by USI was the treating and filtering of spent oil containing polychlorinated biphenyls, or PCBs, from electrical transformers and other electrical equipment at the site for the purpose of reclaiming the oil or restoring it to or near its original properties. USI also bought or otherwise acquired used PCB-containing oil from other facilities that wished to dispose of the oil and treated or filtered it, as described above, to use in its operations or to sell to other facilities. The treating, filtering, and reclaiming process removed hazardous substances and hazardous wastes from the oil, which was then disposed of at the site. USI additionally operated a wood-treating operation at the site; in that process, the PCB-containing oil was used to preserve wood products.

The complaint further alleged that the defendants, who were individual USI customers, generated and/or transported hazardous substances and hazardous wastes, including PCB-containing oil, to

[1] The defendants named in the original complaint were Brighton Corporation; Coltec Industries, Inc.; Entergy Arkansas, Inc.; First Electric Cooperative Corp.: Kamo Electric Cooperative, Inc.; Kuhlmen Corporation on behalf of Kuhlmen Electric Corporation; Magnetic Electric Company; Missouri Public Service; Pirelli Cable Corporation; Reed & McClain Electrical Works, Inc.; Reynolds Metals Company; San Angelo Electric Service Company; Southern Cotton Oil Co.; T&N Electric Company, Inc.; and Texas Eastern Transmission Corporation. They are referred to collectively herein as "the defendants."

the site for disposal. DEQ alleged that the disposal of the hazardous substances and hazardous wastes was conducted in such a manner as to constitute unsound disposal and management practices. DEQ claimed that USI used oil disposed of by the defendants at the site to conduct its wood-treating operations, and as a result of these processes, hazardous substances and hazardous wastes were spilled on the ground, thereby contaminating surface and subsurface waters around the site.

In November of 1990, according to the complaint, DEQ personnel conducted an investigation on the USI property. The investigation revealed a number of drums and tanks, some of which were deteriorating, and which contained high levels of PCB-containing oils, trichloroethene, and tetrachloroethene. In addition, the investigation revealed that the soil in and around the site was contaminated with oil, PCBs, and pentachlorophenol. DEQ asserted that its investigation was limited, but other hazardous wastes were also likely to be present at the site.

On February 21, 1991, DEQ entered into a Consent Administrative Order with Entergy Arkansas, Inc., one of the named defendants, to perform certain preliminary actions to stabilize and secure the site and to reduce the potential for further release of hazardous substances and hazardous wastes. The Consent Administrative Order further provided that the stabilization actions undertaken by Entergy would not constitute final action at the site and that a final remedial action would be negotiated.

On May 12, 1993, DEQ entered into a second Consent Administrative Order with the "Utility Services PRP Committee," primarily for the purpose of removing drums of hazardous substances from the site. On that same day, pursuant to Ark. Code Ann. § 8-7-508(a)(1) and § 8-7-511, DEQ issued an "Administrative Notice of Liability and Request for Information" to a number of entities, including the defendants; however, none of the parties notified of responsibility accepted responsibility for final remediation of the site.

DEQ took no further action regarding this site until it filed suit in March of 2001, seeking a declaratory judgment that the defendants were liable parties under RATFA as either generators or transporters of hazardous substances. The complaint also sought a declaratory judgment that the defendants committed an

unlawful act under Ark. Code Ann. § 8-7-201 *et seq.* (Repl. 2000), the Arkansas Hazardous Waste Management Act ("AHWMA"), by storing, collecting, transporting, treating, or disposing of hazardous waste in such a manner or place as to create, or which was likely to create, a public health hazard.

In response, twelve of the defendants filed motions to dismiss under Ark. R. Civ. P. 12(b)(6), raising four primary issues: 1) DEQ's complaint failed to allege specific facts upon which relief could be granted; 2) the conduct complained of in DEQ's complaint arose before the passage of RATFA, and RATFA's provisions could not be applied retroactively; 3) the "recycling presumption" for used oil contained in DEQ Regulation 23 applied to the defendants; and 4) DEQ was precluded from initiating its action due to the three-year statute of limitations. On September 18, 2001, the trial court conducted a hearing on the defendants' motion to dismiss.

Subsequently, on November 21, 2001, the trial court issued a letter order in which it agreed with the defendants that DEQ failed to state sufficient facts in its complaint on which relief could be granted, that RATFA could not be applied retroactively to conduct that occurred before its passage, and that the recycling provision of Regulation 23 exempted the defendants' conduct at the USI hazardous-substance site. However, the trial court agreed with DEQ that the case was not barred by the three-year statute of limitations. The letter order was reduced to an Order of Dismissal, filed on December 12, 2001, which dismissed DEQ's complaint without prejudice. DEQ then elected to appeal from that order.

On appeal, DEQ first contends that the trial court erred in granting the defendants' motion to dismiss, asserting that it stated sufficient facts in its complaint to make the complaint legally sufficient. In a related issue, DEQ urges that RATFA extends liability to "generators" and "transporters" who cause the disposal of hazardous substances; on this point, DEQ takes issue with the trial court's conclusion that its complaint did not sufficiently allege that any of the defendants actively "disposed" of any hazardous substances at the USI site. Because these two points are so closely linked, we treat them together.

As an initial matter, although DEQ suggests that this court should apply a *de novo* standard of review to its determina-

tion of the propriety of the trial court's granting the defendants' motion to dismiss, our standard of review in such appeals is well-settled. In reviewing the trial court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002); *Martin v. Equitable Life Assurance Soc'y*, 344 Ark. 177, 40 S.W.3d 733 (2001). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Clayborn, supra.* Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.*; Ark. R. Civ. P. 8(a). We look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled. *Country Corner Food & Drug, Inc. v. First State Bank & Trust Co.*, 332 Ark. 645, 966 S.W.2d 894 (1998).

Arkansas's rules of civil procedure make it clear that a pleading which sets forth a claim for relief "shall contain . . . a statement in ordinary and concise language of *facts showing that the . . . pleader is entitled to relief*[.]" Ark. R. Civ. P. 8(a) (emphasis added). Rule 12(b)(6) provides for the dismissal of a complaint for "failure to state facts upon which relief can be granted." This court has stated many times that these two rules must be read together in testing the sufficiency of the complaint; we have stated with equal frequency that facts, not mere conclusions, must be alleged. *Brown v. Arkansas Dep't of Correction*, 339 Ark. 458, 6 S.W.3d 102 (1999); *Malone v. Trans-States Lines, Inc.*, 325 Ark. 383, 926 S.W.2d 659 (1996); *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 846 S.W.2d 176 (1993); *Rabelais v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985). This court has specifically and deliberately rejected the theory of notice pleading. *See McKinney v. City of El Dorado*, 308 Ark. 284, 824 S.W.2d 826 (1992); *Treat v. Kreutzer*, 290 Ark. 532, 720 S.W.2d 716 (1986); *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 610 S.W.2d 582 (1981) (noting that the Arkansas Rules of Civil Procedure contain a "significant departure from the Federal Rules of Civil Procedure" in both Rule 8 and Rule 12; the federal rule speaks only in terms of a "claim," whereas the Arkansas rules specifically require a statement of "facts").

This court has frequently had the opportunity to consider what constitutes a statement of facts sufficient to survive a Rule 12(b)(6) motion to dismiss. In *Malone v. Trans-State Lines, supra,* appellant Malone filed a complaint alleging that his employer had discriminated against him in violation of the Arkansas Civil Rights Act. In his complaint, Malone averred that he "had a disability within the meaning of the Arkansas Civil Rights Act." Noting that "disability" was defined within the Act as a "physical or mental impairment that substantially limits a major life function," *see* Ark. Code Ann. § 16-123-2102(3), this court affirmed the trial court's dismissal of the complaint, holding that Malone's complaint contained no allegation of facts to support the conclusion that he met the definition of "disability." *Malone,* 325 Ark. at 386.

Similarly, in *Hollingsworth v. First Nat'l Bank & Trust Co., supra,* this court affirmed the dismissal of Hollingsworth's complaint. Hollingsworth filed a complaint alleging malicious prosecution and the tort of outrage against First National Bank. The bank had previously instituted a "RICO" action against her in federal court, where Hollingsworth prevailed. In her complaint, Hollingsworth set out the RICO allegations the bank leveled against her, stated that she had been absolved of those allegations, and further asserted that the bank had commenced the federal action maliciously and without probable cause. She also complained that the bank was liable for the tort of outrage because its actions were extreme and outrageous beyond the bounds of decency. The bank moved to dismiss under Rule 12(b)(6), and the trial court granted the motion. *Hollingsworth,* 311 Ark. at 639.

On appeal, this court affirmed, first setting out the elements of the torts that Hollingsworth alleged the bank had committed. The court then concluded that the complaint fell short of pleading a cause of action for malicious prosecution because it failed to plead sufficient facts to show either malice or lack of probable cause, writing as follows:

> In their complaint, [Hollingsworth] mention[s] no facts bearing on the background for [the bank] having filed the RICO action. [Hollingsworth] merely allege[s] [she] prevailed against [the bank's] allegations which is not the same as saying [the bank] had no probable cause to file the action in the first place. Concerning appellant Hollingsworth, the federal court obviously ruled sufficient evidence had been presented to send

> her case to the jury. Such a ruling itself indicates probable cause accompanied the RICO action that the [bank] filed against her. Regardless, [Hollingsworth's] merely stating that the [bank's] actions were malicious is not sufficient to meet the pleading requirements under ARCP Rule 8(a)(1). The only facts . . . set out in the complaint were that Hollingsworth had been served while she was working at a school in front of some of her students and this manner of service was used to embarrass and humiliate her. Again, such an allegation has little to do with whether [the bank] had probable cause to bring the earlier RICO action against appellants. Likewise, [Hollingsworth] failed to plead any facts to support [her] cause of action for tort of outrage besides merely stating in summary fashion that the [bank's] actions were "extreme and outrageous beyond the bounds of decency." Accordingly, we uphold the trial court's decision to dismiss [the] complaint.

Hollingsworth, 311 Ark. at 640-41.

In *Brown v. Arkansas Department of Correction*, *supra*, this court again affirmed the trial court's granting of a motion to dismiss. There, Elizabeth Brown filed suit against the Department of Correction, alleging that the Department had violated her due-process rights in numerous ways. In affirming, this court noted that, although Brown's complaint was lengthy and referenced numerous statutory and constitutional provisions, it failed to set forth facts sufficient to state a claim. Specifically, the *Brown* court held that she had "merely claim[ed] in conclusory fashion that her due-process rights were violated, but she fail[ed] to set forth the facts necessary to support her claim." *Brown*, 339 Ark. at 461.

On the other hand, in *Rabalais v. Barnett*, *supra*, this court reversed the trial court's decision to grant a motion to dismiss with respect to one count in the complaint. The Rabalaises sued five members of the First United Methodist Church in Batesville for breach of contract and for the tort of outrage. This court agreed that the Rabalaises failed to state facts to support the outrage claim, where the complaint only asserted that the defendants "wilfully and wantonly breached the contract . . . to repair and rebuild the church organ causing the Rabalaises emotional distress." *Rabalais*, 284 Ark. at 528.

However, the court reversed the trial court's dismissal of the breach-of-contract claim. This court stated that, in order to state a cause of action for breach of contract, the complaint need only

assert the existence of a valid and enforceable contract between the plaintiff and defendant, the obligation of defendant thereunder, a violation by the defendant, and damages resulting to plaintiff from the breach. *Id.* at 528-29. In their complaint, the Rabalaises alleged that they entered into a contract with the defendants to rebuild the church organ, that the defendants discontinued their services prior to rebuilding the organ, and that the Rabalaises were entitled to damages. An amended complaint had attached to it a copy of the contract and the notice of termination. This court held that the complaint stated a cause of action for breach of contract: "The Rabalaises did not explain in detail all of the reasons for the disagreement, but that is not required. The [Rabalaises] should not be denied their right to the claim." *Id.* at 529.

In the present case, DEQ claims it did all that was required to state a cause of action under RATFA. Under RATFA, any one of four parties may be liable to the State for all costs of remedial actions under the Act: (1) the owner and operator of a facility; (2) any person who, at the time of disposal of any hazardous substance, owned or operated a hazardous substance site; (3) any generator of hazardous substances who, at the time of disposal, caused such substance to be disposed of at a hazardous substance site or who causes a release or threatened release of the hazardous substances; or (4) any transporter of hazardous substances who causes a release or threatened release of the hazardous substances or who, at the time of disposal, selected a hazardous-substance site for disposal of the hazardous substances. Ark. Code Ann. § 8-7-512(a) (Repl. 2000).

DEQ urges this court to conclude that DEQ stated sufficient facts in its complaint, setting forth the elements of a claim under RATFA, to establish a prima facie case that the defendants were liable under these statutes. Specifically, DEQ claims that it was required to allege only that a person generated or transported hazardous substances, caused disposal, or otherwise selected a hazardous substance site for disposal.

In its brief, DEQ asserts that it specifically alleged a number of facts, as follows: 1) the activities at the USI site began in or about 1975; 2) the activities continued until 1984 or 1985; 3) each of the defendants were USI customers who generated and/or transported hazardous substances and hazardous wastes to the site for disposal; 4) the activities that USI performed "on behalf of the defendants in this matter fit into distinct RATFA and AHWMA

liability categories"; 5) in conducting these activities "on behalf of the defendants," USI removed hazardous substances and hazardous wastes from defendants' oil; 6) these hazardous substances and hazardous wastes were then disposed of on the USI property; and 7) the USI property is contaminated with hazardous substances and hazardous wastes that threaten public health and the environment.

However, despite DEQ's contention that its complaint made reference to certain activities being conducted "on behalf of the defendants," a close reading of the complaint reveals that no such allegations were actually made, and the complaint's allegations almost exclusively refer to USI's activities and performance, and fails to describe the defendants' involvement. For example, paragraph 26 of the complaint states that, "[i]n conducting its business, USI provided some or all of the following services." That paragraph then goes on to list certain services USI performed, including, among other things, the following: treating and filtering spent PCB-containing oil from electrical equipment; testing PCB-containing transformer oil; buying or otherwise acquiring used PCB-containing oil from other facilities that wished to dispose of the oil and treating or filtering that oil; and salvaging and reclaiming component parts of used electrical equipment, including disposing of and reclaiming used PCB-containing oil from that equipment. The complaint then goes on to read that the treating, filtering and reclaiming process removed hazardous substances and hazardous wastes from the oil, and that these hazardous substances and wastes were then disposed of at the site.

Paragraph 31 of DEQ's complaint is the only averment that the defendants were "individual USI customers who generated and/or transported hazardous substances and hazardous wastes, including, but not limited to, PCB-containing oil, to the site for disposal." In paragraphs 33, 34, and 35 of the complaint, DEQ alleged that, "[o]n information and belief, USI used oil disposed of by [the] defendants at the site to conduct wood-treating operations. As a result of these processes, hazardous substances and hazardous wastes were spilled on the ground. As a result of this spillage, the surface and subsurface waters around the site were contaminated."

After describing the investigation undertaken by DEQ in the next several paragraphs, DEQ's complaint then contains paragraphs 46 through 67, setting out statutory provisions from RATFA and AHWMA, captioned "Violations of Law." This

portion of the complaint includes two paragraphs that purport to state DEQ's legal claim against the defendants. The RATFA claim, found in paragraph 57, reads as follows:

> The Defendants are "persons" that generated or transported "hazardous substances," and who disposed of such substances at a "hazardous substance site," or otherwise selected a "hazardous substance site" for disposal, where a "release of hazardous substances" or a "threatened release" occurred, and are therefore liable to the State for all costs of "remedial action."

Additionally, paragraph 67, concerning the AHWMA claims, states the following:

> The Defendants are "persons" who have "transported" and/or "disposed" of "hazardous wastes" contrary to the rules, regulations, permits, or orders issued under the HWMA or in such a manner or place as to create or as is likely to be created a public nuisance or a public health hazard or to cause or is likely to cause water or air pollution within the meaning of the Arkansas Water and Air Pollution Control Act, and are therefore liable for all costs, expenses, and damages to DEQ and any other agency or subdivision of the State in enforcing or effectuating the provisions of this law, including, but not limited to, natural resource damages.

In granting the motion to dismiss, the trial court focused on these foregoing paragraphs captioned "Violations of Law," and concluded that, "at the most, [DEQ's] complaint . . . [consists of] nothing more than generalities and conclusions of law with no specifics alleged as to the individual defendants. [DEQ] has done nothing more than set out in great detail the provisions of RATFA [and AHWMA] and, in effect, alleged that defendants have violated th[ese] statute[s]." We agree with the trial court on this issue.

As we pointed out above, the only paragraph directly linking the defendants to USI is paragraph 31, and clearly, that paragraph states only that the defendants were customers who brought their waste oil to USI for disposal. It contains no factual allegations specifying which, if any, of the defendants contributed any PCB-containing oil to the site, how much or when any given defendant may have contributed used oil, or the purposes for which the defendants conducted business with USI. The mere recitation that the defendants were "generators" or "transporters" who brought hazardous substances or hazardous waste to the USI site "for disposal," without any further facts to support a conclusion that the

defendants came within the meanings of these terms, simply fails to comport with our fact-pleading requirements. *See Malone, supra.*

The question of whether the defendants brought their oil to USI "for disposal" brings us to DEQ's second point, wherein DEQ argues that the defendants "caused" a "disposal." As noted above, in order to be subject to liability under RATFA, one must have been a generator of hazardous substances who, "*at the time of disposal*, caused such substance to be disposed of at a hazardous substance site or who causes a release or threatened release of the hazardous substance." § 8-7-512(a)(3) (emphasis added). Alternatively, one may be liable as a "transporter of hazardous substances who causes a release or threatened release of the hazardous substances or who, *at the time of disposal*, selected a hazardous substance site for disposal of the hazardous substances." § 8-7-512(a)(4) (emphasis added).

The word "disposal" has a specific meaning within the context of RATFA. Although the word itself is not defined in RATFA, that Act provides that the word "shall have the meaning provided in § 3 of the Arkansas Hazardous Waste Management Act." The AHWMA, in turn, defines disposal as the "discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous waste into or on any land or water in whatever manner so that such hazardous waste or any constituent thereof might or might not enter the environment or be emitted into the air or discharged into any waters including groundwaters." Ark. Code Ann. § 8-7-203(4) (Repl. 2000).

In considering the meaning of a statute, our first rule 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, supra* (citing *State v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994)). Finally, the ulti-

mate 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).

Here, we are called upon to determine what is meant by the word "disposal." The defendants urge an interpretation that requires some temporal link between the causation and the disposal. The defendants focus on the phrase "at the time of disposal," contained in subsections (a)(3) and (4) of § 8-7-512. This language, they contend, requires direct, active involvement, and further requires that the actions of the generator or transporter of the hazardous substances in "causing" the substance to be disposed of must take place at the same time the disposal actually occurs. Because DEQ failed to allege facts that the defendants were present at the time USI actually disposed of the hazardous substances, the defendants urge that they did not "cause" the disposal of any such substances.

DEQ, on the other hand, argues in its brief that there should be no temporal limitations on activity, and maintains that, as a result, it should not be required to aver facts of actual disposal. Further, at oral argument, DEQ contended that the "at the time of disposal" language is merely surplus verbiage that means nothing. However, we cannot so lightly dispose of language that the General Assembly must have inserted to serve some purpose. In construing a statute, it is our duty to construe it just as it reads, giving the words their plain and ordinary meanings. *See ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998); *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998). To simply ignore this clause would be to disregard our rules of construction.

We conclude that the phrase "at the time of disposal," taken in conjunction with the definition of "disposal" found in the AHWMA, should be construed to mean, "at the time the hazardous substances were discharged, deposited, injected, dumped, spilled, leaked, or placed any hazardous substances into or on any land or water." Given this interpretation, it is glaringly apparent that DEQ's complaint is bereft of any factual allegations that, *at the time of disposal*, any of the defendants caused hazardous substances to be disposed of at a hazardous-substance site, or selected a hazardous substance site for disposal of the hazardous substances. Consistent

with this view, we point out that the General Assembly, in enacting RATFA, provided that "[n]o person, including the state, may recover under the authority of this section for any remedial action costs or damages resulting solely from an act or omission of a third party[.]" Ark. Code Ann. § 8-7-515(b) (Repl. 2000). Here, that third party was USI. In sum, the General Assembly never intended an innocent customer to be found liable resulting from unlawful conduct by an owner/operator like USI.[2] Therefore, we affirm the trial court's dismissal of DEQ's complaint.[3]

Before turning to the defendants' cross-appeal, we must address what is to befall DEQ's complaint. When a complaint is dismissed under Rule 12(b)(6) for failure to state facts upon which relief can be granted, the dismissal should be — and here was — without prejudice. *See Ratliff v. Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984). The plaintiff then has the election to either plead further or appeal. *Id.* When the plaintiff chooses to appeal, he or she waives the right to plead further, and the complaint will be dismissed with prejudice. *See Arkhola Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987). Therefore, the dismissal of DEQ's complaint is modified to be with prejudice.

On cross-appeal, the defendants argue that the trial court erred in finding that DEQ's RATFA and AHWMA claims were not barred by the three-year statute of limitations. The defendants urge that the general three-year statute of limitations, found in Ark. Code Ann. § 16-56-105(3) (1997) (governing "all actions founded on any contract or liability, expressed or implied"), should apply to the State, as well as to any private parties that might bring an action under RATFA. In particular, the defendants point to Ark. Code Ann. § 8-7-507 (Repl. 2000), which provides as follows:

---

[2] On this point, we note that the defendants offered an apt analogy: if one took one's car to a garage for a tune-up, and the mechanic dumped the used oil on the ground behind the garage instead of disposing it properly, it could not fairly be said that the car owner "caused" an improper disposal.

[3] DEQ raised two other issues on appeal, challenging the trial court's conclusions that RATFA could not be applied retroactively to cover events that occurred before that Act's passage, and that used oil intended for recycling cannot be considered a "hazardous substance" within the meaning of RATFA. However, because we agree that the complaint was factually insufficient, we do not reach or address these last two issues.

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the federal government and *the state government shall be subject to, and comply with, this part in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.*

(Emphasis added.) This, according to the defendants, means that the General Assembly has subjected the State, including DEQ, to all provisions of the statute, including liability, in the same manner as any private entity; to argue that this does not include the statute of limitations would require the court to "ignore the clear and simple words of the state." The defendants argue that, because every alleged illegal activity took place before 1984 or 1985, the statute should have run over a decade ago.

In response, DEQ points out that, ordinarily, the statute of limitations does not run against the State. *See Ark. State Hosp. v. Cleburne County*, 271 Ark. 94, 607 S.W.2d 61 (1980); *Alcorn v. Arkansas State Hosp.*, 236 Ark. 665, 367 S.W.2d 737 (1963); *Jensen v. Fordyce Bath House*, 209 Ark. 478, 190 S.W.2d 977 (1945). In *Jensen*, this court held that it was "well-established that statutes of limitation do not run against sovereign states unless by the terms of the limitation statute it is made applicable to the state[.]" This principle was further explained in *Alcorn*, *supra*, as follows:

> In a discussion of the question in 34 Am. Jur. p. 309, it is said: "It has been said that the maxim "*nullum tempus occurrit regi*"[4] is an attribute of sovereignty only, and cannot be invoked by counties or other subdivisions of the state. In many cases, probably a majority, a distinction is drawn between cases where a subordinate political subdivision or agency is seeking to enforce a right in which the public in general has an interest and those where the public has no such interest, and it is held that the statute of limitations, while applicable to the latter character of actions, cannot be interposed as a bar where the municipality is seeking to enforce the former type of action. In these decisions, the view is taken that the plaintiff, in seeking to enforce a contract right, or some right belonging to it in a proprietary sense, may be defeated by the statute of limitations; *but as to rights belonging to the public and pertaining purely to governmental affairs, and in respect to which the political subdivision represents the public at large or*

[4] "Time does not run against the king." *Black's Law Dictionary* 1068 (6th ed. 1990).

> *the state, the exemption in favor of the sovereignty applies, and the statute of limitations does not operate as a bar.*

Alcorn, 236 Ark. at 670-71 (quoting *Jensen*, *supra*) (emphasis provided in original).

In the present case, the "rights" at issue belong to the public — i.e., the enforcement of environmental regulations intended to improve the environment for the benefit of the public — and the state agency represents the public at large; therefore, the exemption applies, and the statute of limitations does not bar the action. The trial court did not err in reaching this conclusion, and we therefore affirm on cross-appeal.

BROWN, IMBER, and HANNAH, JJ., dissent.

ROBERT L. BROWN, Justice, dissenting. The majority opinion affirms the dismissal of the Arkansas Department of Environmental Quality's complaint brought against twelve Arkansas corporations. The Department's complaint sought to declare those corporations in violation of the Arkansas Remedial Action Trust Fund Act for disposing of hazardous substances, specifically polychlorinatedbiphenyls (PCBs), in violation of the Act. The majority goes farther and dismisses the Environmental Quality Department's complaint "with prejudice," thus foreclosing it from bringing the same complaint against these business corporations in an amended form. I disagree that the Department failed to allege facts sufficient to state a cause of action under the Act. I further am convinced that the limited interpretation placed on the Act by the majority, requiring the defendant corporations to actively participate in the dumping of hazardous substances, eviscerates much of what the Act was intended to correct.

I. Facts Alleged

To decide whether the Department has pled a cause of action, we must turn to the complaint itself. What follows are the factual allegations set out in the complaint, and the alleged violations of the Remedial Action Trust Fund Act:

IV. *Factual Allegations*

> 22. Beginning in or about 1975, Utility Services, Inc. ("USI") operated a business on a site of approximately thirty (30) acres in Jefferson County, Arkansas ("the site" or "the USI property").

23. USI continued its business operations until 1984 or 1985.

24. USI is no longer in operation and has no assets.

25. During the time it was in business, USI engaged in the repair and maintenance of various electrical equipment and components.

26. In conducting its business, USI provided some or all of the following services:

(a) treating and filtering spent oil containing polychlorinatedbiphenyls ("PCB-containing oil") from electrical transformers and other electrical equipment at the site for the purpose of reclaiming the oil or restoring it to or near its original properties;

(b) testing PCB-containing transformer oil, which included the disposal of the oil after sampling;

(c) re-gasketing and repairing transformer bushings, which includes draining and disposing of the old PCB-containing oil from the bushing and refilling it with new oil;

(d) buying or otherwise acquiring used PCB-containing oil from other facilities that wished to dispose of the oil and treating or filtering it as described in (a) above to use in its operations or to sell to other facilities; and

(e) salvaging and reclaiming component parts of used electrical equipment, including disposing of and reclaiming used PCB-containing oil from that equipment.

27. The treating, filtering and reclaiming process, as described in paragraph 26, removed hazardous substances and hazardous wastes from the oil.

28. These hazardous substances and hazardous wastes were then disposed of at the site.

29. In addition to those business operations described in paragraph 26, USI conducted a wood treating operation at the site.

30. In this process, the PCB-containing oil and pentachlorophenol were used to preserve wood products.

31. The Defendants were individual USI customers who generated and/or transported hazardous substances and hazardous wastes, including, but not limited to, PCB-containing oil, to the site for disposal.

32. The disposal of these hazardous substances and hazardous wastes was conducted in such a manner as to constitute unsound disposal and management practices.

33. On information and belief, USI used oil disposed of by Defendants at the site to conduct wood treating operations.

34. As a result of these processes, hazardous substances and hazardous wastes were spilled on the ground.

35. As a result of this spillage, the surface and subsurface waters around the site were contaminated.

36. On or about November 2, 1990, ADEQ personnel conducted an investigation on the USI property.

37. This investigation revealed a number of drums and tanks, some of which were deteriorating, that contained high levels of PCB-containing oils, trichloroethene, and tetrachloroethene.

38. In addition, the investigation revealed that the soil in and around the site was contaminated with oil, polychlorinatedbiphenyls ("PCBs"), and pentachlorophenol.

39. ADEQ's investigation was limited, and other hazardous substances and hazardous wastes, including, but not limited to, trichloroethene, and tetrachloroethene, are also likely to be present at the site.

40. On February 21, 1991, ADEQ entered into a Consent Administrative Order ("CAO") with EAI to perform certain preliminary actions to stabilize and secure the site and reduce the potential for further release of hazardous substances and hazardous wastes. (This CAO is attached hereto as "Exhibit A".)

41. The CAO referenced in paragraph 40 further provided that the stabilization actions undertaken by EAI would not constitute final action at the site and that a final remedial action would be negotiated.

42. ON May 12, 1993, ADEQ entered a second CAO with the "Utility Services PRP Committee," primarily for the purpose of removing drums of hazardous substances and hazardous materials from the site. (This CAO is attached hereto as "Exhibit B".)

43. On May 12, 1993, in accordance with ARK. CODE ANN. § 8-7-508(a)(1) and ARK. CODE ANN. § 8-7-511, an Administrative Notice of Liability and Request for Information was issued to a number of entities, including the Defendants, and an opportunity for a hearing was provided. (A sample Administrative Notice of Liability and Request for Information is attached hereto as "Exhibit C".)

44. None of the parties notified of responsibility accepted responsibility for final remediation of the site.

45. Although remedial actions to date have resulted in the removal of all of the drums and tanks from the site, the soil and groundwater of the site remain contaminated with hazardous substances and hazardous wastes that continue to threaten public health and the environment.

V. *Violations of Law*

A. *Violations of the Remedial Action Trust Fund Act*

46. Plaintiff incorporates by reference the allegations set forth in paragraphs 1 through 45 above.

47. ARK. CODE ANN. §§ 8-7-501, *et seq.*, otherwise known as the Remedial Action Trust Fund Act, sets forth the State regulatory program governing the liability for and the remediation of hazardous substance sites.

48. Under ARK. CODE ANN. § 8-7-512(a)(3), any generator of hazardous substances who, at the time of disposal, caused such substance to be disposed of at a hazardous substance site or who causes a release or threatened release or [sic] the hazardous substances, shall be liable to the State for all costs of remedial actions.

49. Likewise, under ARK. CODE ANN. § 8-7-512(a)(4), any transporter of hazardous substances who causes a release or threatened release of hazardous substances or who, at the time of disposal, selected a hazardous substance site for disposal of the hazardous substances, shall be liable to the State for all costs of remedial actions.

50. A "person" is defined as any individual, corporation, company, firm, partnership, association, trust, joint-stock company or trust, venture, state or federal government agency, or any other legal entity, however organized. ARK. CODE ANN. § 8-7-503(8).

51. The term "hazardous substance" includes a variety of substances, elements, compounds, mixtures, solutions, and pollutants as designated pursuant to any of the following laws: (1) the Federal Water Pollution Control Act, (2) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, (3) the Arkansas Hazardous Waste Management Act of 1979, (4) the federal Clean Air Act, or (5) the federal Toxic Substances Control Act. ARK. CODE ANN. § 8-7-503(6).

52. As defined in paragraph 51, the term hazardous substance includes PCBs, pentachlorophenol, trichloroethene, tetrachloroethene, and petroleum based products.

53. As used in RATFA, "hazardous substance sites" are any sites or facilities where hazardous substances have been disposed of or from which there is a release or threatened release of hazardous substances. ARK. CODE ANN. § 8-7-503(7).

54. The term "releases of hazardous substances" means any spilling, leaking, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of hazardous substances into the environment. ARK. CODE ANN. § 8-7-503(9).

55. A "threatened release" is any situation where a nonsudden release of hazardous substances can be reasonably expected, unless prevented by change of operation or installation or construction or [sic] containment or treatment devices or by removal or other remedial action. ARK. CODE ANN. § 8-7-503(11).

56. As defined by RATFA, the term "remedial action"' means action necessary to effect permanent control, abatement, prevention, treatment, or containment of releases and threatened releases, including the removal of hazardous substances from the environment where removal is necessary to protect public health and the environment. ARK. CODE ANN. § 8-7-503(10).

57. The Defendants are "persons" that generated or transported "hazardous substances," and who disposed of such substances at a "hazardous substance site," or otherwise selected a "hazardous substance site" for disposal, where a "release of hazardous substances" or a "threatened release" occurred, and are therefore liable to the State for all costs of "remedial action."

Without question, the complaint alleges that :

- USI operated a site for disposal of hazardous substances from 1975 to 1984 or 1985;
- During this time frame the defendant corporations were generators and transporters of hazardous substances to the site;
- The defendant corporations, at the time of disposal (1) caused disposal of hazardous substances at the site, or (2) caused a release of hazardous substances, or (3) selected a hazardous substance site for disposal of the substances.

These allegations track the liability provisions of the Remedial Action Trust Fund Act, which reads:

(a) Any of the following shall be liable to the state for all costs of remedial actions under this subchapter:

(1) The owner and operator of a facility;

> (2) Any person who, at the time of disposal of any hazardous substance, owned or operated a hazardous substance site;
>
> (3) Any generator of hazardous substances who, at the time of disposal, caused such substance to be disposed of at a hazardous substance site or who causes a release or threatened release of the hazardous substances; or
>
> (4) Any transporter of hazardous substances who causes a release or threatened release of the hazardous substances or who, at the time of disposal, selected a hazardous substance site for disposal of the hazardous substances.

Ark. Code Ann. § 8-7-512(a) (Repl. 2000).

And what constitutes "disposal"? According to the Hazardous Substances subchapter of the Environmental Law Code, "disposal" means: "the discharge, deposit, injection, dumping, spilling, leaking, or *placing* of any hazardous waste into or on any land or water *in whatever manner* so that such hazardous waste or any constituent thereof *might or might not enter the environment* or be emitted into the air or discharged into any waters including groundwaters; . . ." Ark. Code Ann. § 8-7-203 (Repl. 2000).[1] The definition of "disposal" could not be broader. Without question, the defendant corporations caused hazardous substances to be placed at the USI site which constitutes a disposal under § 8-7-203(4).

I frankly do not know what additional allegations needed to have been made by the Department of Environmental Quality to state a viable cause of action. The Department specified the time frame for the alleged violation: 1975 to 1984-1985. It specified where the hazardous substances were disposed of — the USI treatment facility. It specified what hazardous substances were involved — PCBs.

We are indeed a fact-pleading state, but filing a complaint is the first step in litigation. Discovery will ensue, and additional facts will be developed. What the majority has required in the way of fact-pleading is simply too restrictive and severely hampers the ability of the Department to enforce the Act.

---

[1] The definition of "disposal" is contained within the Hazardous Waste Management Act, but is the definition to be used for the entire Hazardous Substances subchapter. *See* 8-7-203 (Repl. 2000).

The allegations are clear. The defendant corporations are alleged to have disposed of PCB-contaminated oil by generating it, transporting, and placing it with USI for elimination. Accordingly, they are liable under the Act, according to the Department, for any resulting damage to the environment.

II. Limited Liability

The majority also severely limits corporate liability by interpreting "at the time of disposal" in the Act to mean that generators and transporters of hazardous substances must actively participate in the specific disposal of hazardous substances, such as the dumping or spillage, which results in damage to the environment. This reading is completely at odds with the broad "disposal" definition in § 8-7-203, which speaks of placing such substances on land *in whatever manner* so that the waste *might or might not enter the environment.* Any placement violates the Act, if damage to the environment occurs. The majority fails to confront this broad definition of disposal in its opinion.

Again the two relevant subsections are these:

> (a) Any of the following shall be liable to the state for all costs of remedial actions under this subchapter:
>
> . . . .
>
> (3) Any generator of hazardous substances who, at the time of disposal, caused such substance to be disposed of at a hazardous substance site or who causes a release or threatened release of the hazardous substances; or
>
> (4) Any transporter of hazardous substances who causes a release or threatened release of the hazardous substances or who, at the time of disposal, selected a hazardous substance site for disposal of the hazardous substances.

Ark. Code Ann. § 8-7-512(a) (Repl. 2000).

The majority reads "at the time of disposal" to mean disposal by the generator or transporter corporation. The Department reads the phrase to refer to disposal by USI. The Department is correct; otherwise, subsections (3) and (4) would make no sense. Generators and transporters are liable if they cause hazardous substances to be placed at a hazardous-substance site, which substances are then improperly treated by the operator of the site, in

this case USI. Placement at the site by generators or transporters like the appellant corporations and improper treatment by USI are two separate acts that occur in different time frames, not simultaneously. The majority's limiting interpretation undercuts much of what the Act was intended to rectify.

The majority also wanders far afield when it suggests that the instant case compares to one where a person having a tuneup for his car could be in violation of the Act, if the service station improperly dumps the used oil. That analogy is far from apt. Individual persons do not take their used oil laced with PCBs to service stations for disposal. The Department has alleged that the defendant corporations in the case before us did exactly that. The allegation is that they took their PCB-contaminated oil to USI for elimination.

According to the Department, the onus was on those businesses to assure that proper treatment and elimination of those hazardous substances later transpired, or else they would be liable under the Act. The Department alleges that pollution did occur. That is sufficient, in my judgment, to mount a complaint under the Act. I respectfully dissent.

IMBER and HANNAH, JJ., join.

JIM HANNAH, Justice, dissenting. I respectfully dissent. I believe that DEQ's complaint was legally sufficient. "A pleading which sets forth a claim for relief. . . shall contain . . . a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief." Ark. R. Civ. P. 8(a) (2002). Rule 12(b)(6) provides for dismissal of a complaint for "failure to state facts upon which relief can be granted." Ark. R. Civ. P. 12(b)(6) (2002). We have stated that the two rules must be read together in testing the sufficiency of a complaint; *facts*, not mere conclusions must be alleged. *Malone v. Trans-States, Lines, Inc.*, 325 Ark. 383, 926 S.W.2d 659 (1996); *Hollingsworth v. First Nat'l Bank & Trust Co.*, 311 Ark. 637, 846 S.W.2d 176 (1993).

The court recently outlined its standard of review of motions to dismiss under Ark. R. Civ. P. 12(b)(6) in *Clayborn v. Bankers Standard Insurance Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002). The court wrote:

> In reviewing the trial court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. We look to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently pled.

Clayborn, 348 Ark. at 561-62 (citations omitted).

The appellees argue that DEQ's complaint contains only one factual allegation, which is contained in Paragraph 31, related to the conduct of the appellees. Paragraph 31 states:

> The Defendants were individual USI customers who generated and/or transported hazardous substances and hazardous wastes, including, but not limited to, PCB-containing oil, to the site for disposal.

In *Rabalaias v. Barnett*, 284 Ark. 527, 683 S.W.2d 919 (1985), the court reversed the lower court's finding that the appellants had failed to state a claim upon which relief could be granted. In *Rabalaias*, the appellants sued church members for breach of contract and for the tort of outrage. This court held that the allegations regarding the tort of outrage were meritless; however, the court held that the appellants had stated sufficient facts in the complaint for the breach-of-contract claim. The court held that

> the trial court was treating the motion to dismiss like a motion to make more definite and certain rather than testing the sufficiency of the complaint as required by our rules. In this case the complaint stated a cause of action for breach of contract. The Rabalaises did not explain in detail all of the reasons for the disagreement, but that is not required. The appellants should not be denied their right to the claim.

Rabalaias, 284 Ark. at 529. In addition, the court stated that "[p]leadings . . . are sufficient if they advise a defendant of his obligations and allege a breach of them." *Id.* at 528 (citing *Allied Chem. Corp. v. Van Buren Sch. Dist.*, 264 Ark. 810, 575 S.W.2d 445 (1979)).

In the present case, DEQ's complaint advised the appellees that transporters and generators of hazardous substances are responsible for remedial clean-up of hazardous sites. The complaint also alleged that the appellees, as customers of USI, were either transporters or generators from which the State could seek funds for clean-up purposes.

I disagree with the majority's statement that "the General Assembly never intended an innocent customer to be found liable resulting from unlawful conduct by an owner/operator like USI." We must look no further than Ark. Code Ann. § 8-7-502 (Repl. 2000) to determine the legislative intent of RATFA. Ark. Code Ann. § 8-7-502 provides, in part:

> (a) It is the intent of the General Assembly to provide the state with the necessary authority and funds to investigate, control, prevent, abate, treat, or contain releases of hazardous substances necessary to protect the public health and the environment, including funds required to assure payment of the state's participation in response actions pursuant to the federal Comprehensive Environment Response, Compensation and Liability Act of 1980, and to encourage the reduction of hazardous waste generation.
>
> (b) The purpose of this subchapter is to encourage privately funded remedial action and to clarify that persons who have undertaken remedial action at a hazardous substance site in response to an action initiated by the Arkansas Department of Environmental Quality pursuant to § 8-7-508 may obtain contribution from any other person who is liable for remediation of the hazardous substance site.
>
> (c) A further purpose of this subchapter is to clarify the General Assembly's intent to provide the department with the necessary funds for remedial action at a hazardous substance site, recognizing that both public and private funds must be expended to implement remedial action at the hazardous substance sites which exist in this state. . . . .

The General Assembly has determined that it is the policy of this State that the hazardous-waste sites shall be cleaned up. RATFA was promulgated, in part, to fund response actions pursuant to Comprehensive Environment Response, Compensation and Liability Act of 1980 ("CERCLA"). This court has stated that the federal courts' construction of federal statutes upon which

state statutes have been patterned should be accorded "great weight" in our own construction of those state statutes. *Gurley v. Mathis*, 313 Ark. 412, 856 S.W.2d 616 (1993); *Dicken v. Missouri Pac. R.R. Co.*, 188 Ark. 1035, 69 S.W.2d 277 (1934). CERCLA, also known as "Superfund," was enacted by Congress in 1980 "to ensure prompt and efficient cleanup of hazardous waste cites and to place the costs of those cleanups on the [responsible parties]." *United States v. Azko Coatings of America, Inc.*, 949 F.2d 1409, 1416-17 (6th Cir. 1991). The provisions of RATFA provide that generators and transporters of hazardous substances who cause disposal of those substances are liable for clean-up costs.

Liability to Generators and Transporters Who Cause Disposal

DEQ argues that its complaint should be deemed legally sufficient and that it should not be required to aver facts of actual disposal. The appellees argue that they did not cause a disposal and that DEQ failed to allege facts supporting any such claim. DEQ contends that the trial court "incorrectly believed that in order for liability to attach under RATFA, DEQ would have to present evidence that the Appellees actively participated in hazardous substance disposal at the USI site." DEQ argues that active participation in hazardous substance disposal at a hazardous-substance disposal site is not a prerequisite to liability. The appellees argue that direct involvement is required for liability.

Arkansas Code Annotated § 8-7-512 (Repl. 2000) provides, in part:

> (a) Any of the following shall be liable to the state for all costs of remedial actions under this subchapter:
>
> (1) The owner and operator of a facility;
>
> (2) Any person who, at the time of disposal of any hazardous substance, owned or operated a hazardous substance site;
>
> (3) Any generator of hazardous substances who, at the time of disposal, caused such substance to be disposed of at a hazardous substance site or who causes a release or threatened release of the hazardous substances; or
>
> (4) Any transporter of hazardous substances who causes a release or threatened release of the hazardous substances or who, at the time of disposal, selected a hazardous substance site for disposal of the hazardous substances.

> "'Releases of hazardous substances' means . . . any spilling, leaking, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of hazardous substances into the environment.

Ark. Code Ann. § 8-7-503(9) (Repl. 2000).

> "'Threatened release' means . . . any situation where a nonsudden release of hazardous substances can be reasonably expected, unless prevented by change of operation or installation or construction of containment or treatment devices or by removal or other remedial action."

Ark. Code Ann. § 8-7-503(11) (Repl. 2000).

"Disposal" is defined as:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous waste into or on any land or water in whatever manner so that such hazardous waste or any constituent thereof might or might not enter the environment or be emitted into the air or discharged into any waters including groundwaters.

Ark. Code Ann. § 8-7-203(4) (Repl. 2000).

The issue is whether the appellees *caused* disposal of hazardous wastes and hazardous substances. The appellees argue that all of the factual allegations in the complaint that could be construed as "causing" a disposal apply only to USI. In addition, the appellees argue that there is a "temporal requirement" for liability under RATFA because a party's actions that cause "disposal" must take place at the same time the disposal occurs. The appellees state that "[t]o prevail, DEQ must allege and prove that Defendants *at the time of disposal, caused the disposal*, or *at the time of disposal, selected the hazardous substance site for disposal.*" DEQ argues that the appellees can be liable if DEQ shows that the appellees "'caused' disposal or otherwise 'selected a hazardous substance site for disposal' by sending waste oil to the USI site."

The problem with the "temporal requirement" argument is that it ignores the fact that the statute imposes liability for generators or transporters that *cause* the disposal or select the site for disposal. The statute does not require that generators or transporters be the *proximate cause* of disposal. "Cause" is defined as "[s]omething that produces an effect or result," whereas "proximate cause" is defined as "[a] cause that directly produces an

event and without which event would not have occurred." *Black's Law Dictionary* 212-13 (7th ed. 1999).

The appellees state that they "have no quarrel with DEQ's apparent position that USI, and the individuals operating USI, might have handled materials in a manner violative of these statutes." However, the appellees contend that the statutes upon which DEQ relies specifically prohibit imputation of liability to a third party. RATFA contains a provision which provides:

> No person, including the state, may recover under the authority of this section for any remedial action costs or damages resulting *solely* from an act or omission of a third party or from an act of God or an act of war.

Ark. Code Ann. § 8-7-515(b) (Repl. 2000) (emphasis added). Similarly, AHWMA contains a provision which provides:

> No person, including the state, may recover under the authority of this section for any response costs or damages resulting *solely* from an act or omission of a third party or from an act of God or an act of war.

Ark. Code Ann. § 8-7-416(b) (Repl. 2000) (emphasis added). The appellees argue that these provisions clearly express the General Assembly's intent to exclude liability for the acts of third parties under both RATFA and AHWMA, and that the General Assembly never intended an "innocent customer" to be saddled with liabilities resulting from conduct resulting from an owner or operator like USI. These statutes do not automatically exclude customers from liability; rather, customers will not be liable for costs or damages resulting *solely* from an act or omission of a third party. The alleged disposal of hazardous substances did not result *solely* from an act or omission of USI. Before USI could dispose of a hazardous substance, it had to be in possession of a hazardous substance. The complaint alleges that USI acquired hazardous substances from the appellees — the alleged generators and transporters.

In the present case, the issue of whether Ark. Code Ann. § 8-2-416(b) bars the appellees' liability is a question that should be developed by discovery or proof at trial. The appellees generated hazardous wastes or hazardous substances or transported hazardous substances or hazardous wastes. While USI *actually disposed* of the used oil, but for the delivery of the used oil to USI from the

appellees, there would be no disposal. Surely the General Assembly did not intend for customers of hazardous waste sites, upon delivering used oil to the hazardous waste sites, to be able to wash their hands of responsibility for the used oil.

The majority focuses on the statutory language which provides that in order to be subject to liability under RATFA, a generator or transporter must cause disposal "at the time of disposal." The majority states that "we cannot so lightly dispose of language that the General Assembly must have inserted to serve some purpose." While it is true that we must construe a statute just as it reads, we do not engage in interpretations that defy common sense and produce absurd results. *See Green v. Mills*, 339 Ark. 200, 205, 4 S.W.3d 493 (1999). Moreover, in construing statutes, we look to the language under discussion in the context of the statute as a whole. *Id.*

The majority's interpretation of the statute would create an absurd result and frustrate the intent of the General Assembly. Under the majority's interpretation, customers of hazardous waste sites would bear no responsibility in cleaning up the hazardous substances that they helped create. According to the majority, a customer may wash its hands of any responsibility for clean-up the moment it delivers the hazardous substance to the owner or operator of a hazardous waste site unless there is specific proof that the customer knew how the hazardous substance was to be disposed of or was present and participated in the disposal of the hazardous substance. Again, the purpose of the statute is "to protect the public health and the environment. . . ." Ark. Code Ann. § 8-7-502.

Hazardous-waste sites become hazardous-waste sites after the disposal of hazardous substances. DEQ's complaint is legally sufficient to withstand a Rule 12(b)(6) challenge. Whether the appellees should be responsible as generators or transporters of hazardous substances to a hazardous-waste site is a question of fact that should be developed by discovery or proof at trial.

For the above reasons, I respectfully dissent.

BROWN and IMBER, JJ., join this dissent.

Robert D. HOLLOWAY *v.*
ARKANSAS STATE BOARD OF ARCHITECTS

02-1096 101 S.W.3d 805

Supreme Court of Arkansas
Opinion delivered April 3, 2003

[Petition for rehearing denied May 8, 2003.]

Hankins & Hicks, by: *Stuart W. Hankins* and *A. Vaughn Hankins*, for appellant.

Mark Pryor, Att'y Gen., by: *Warren Readnour*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. We granted the Arkansas State Board of Architects' petition for review in this appeal to resolve an apparent conflict between the court of appeals' decision in this case and prior case law.

Appellant Robert Holloway is a licensed professional engineer. In 1999, Holloway prepared and filed plans for a pre-engineered metal building to be assembled for the Rosenbaum

Industrial Supply Facility on Doyle Venable Road in North Little Rock. On September 21, 1999, Tim Yelvington, an architect, filed a complaint with the Arkansas State Board of Architects, alleging that Holloway, as a non-architect, had designed and stamped different aspects of the project. Acting on Yelvington's complaint, the Board sent a letter to Holloway on November 10, 1999, notifying him of Yelvington's complaint. Holloway responded to the Board's letter, asserting that it was his understanding that his work on the facility was well within the realm of activity of engineering.

On March 1, 2000, the Board served an order and notice of hearing on Holloway, alleging that Holloway had practiced architecture without a license, in violation of Ark. Code Ann. § 17-15-301 (Repl. 2001). The Board conducted a hearing on May 11, 2000. At that hearing, the only witness to testify was John Harris, Director of the Board. Holloway did not appear, but his attorneys were present. The Board found that Holloway had practiced architecture without a license, and it imposed a fine of $5,000 pursuant to Ark. Code Ann. § 17-15-203(d)(4)(A)(i) (Repl. 2001).

Holloway filed a timely appeal to the Pulaski County Circuit Court, and reasserted the arguments he had raised before the Board. In that appeal, Holloway alleged first that the statutes defining the practice of architecture and the practice of engineering are void for vagueness and, as applied to him, the statutes violated his due-process rights. In addition, Holloway argued that the Board had failed to make necessary findings of fact, and that the civil penalty imposed upon him was arbitrary, capricious, and an abuse of discretion. Finally, he asserted that the Attorney General's office should be disqualified as counsel for the Board of Architects due to a conflict of interest. On November 22, 2000, the circuit court heard the matter, and, on December 11, 2001, it affirmed the Board on all four issues.

Holloway then appealed to the court of appeals, which considered the same four arguments that were presented to the Board and the circuit court. The court of appeals held that Holloway did not preserve his constitutional issue because the Board did not rule on it; that court remanded the case to the Board for further fact finding and for a ruling on the constitutional question. The court of appeals also remanded the case so the Board could make further findings of fact concerning whether Holloway's actions fell within

the definition of the practice of engineering. That court also held that, because it was remanding the case, it was vacating the civil-penalties argument. The court of appeals did address and affirm the trial court's final ruling that the Attorney General's office was not disqualified merely because it represented both the Board of Architects and the Board of Engineers. We subsequently granted the Board's petition for review.

Upon a petition for review, we consider a case as though it has been originally filed in this Court. *Sharp County Sheriff's Office v. Ozark Acres Improvement Dist.*, 349 Ark. 20, 75 S.W.3d 690 (2002); *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001). Our review is directed not toward the circuit court, but toward the decision of the agency. *Arkansas State Police Comm'n v. Smith*, 338 Ark. 354, 994 S.W.2d 456 (1999). 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 Board v. Moncebaiz*, 332 Ark. 67, 962 S.W.2d 797 (1998). 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*; *Wright v. Arkansas State Plant Board*, 311 Ark. 125, 842 S.W.2d 42 (1992).

Holloway's first argument on appeal is that the statutes defining the practice of architecture and the practice of engineering are void for vagueness. We initially need to mention that our review of the record reflects that Holloway's counsel, at the Board hearing, raised this constitutional issue challenging the statutes defining the practices of architecture and engineering. Counsel made his point as follows:

> "We are challenging also the definition of the practice of architecture in [section] 17-15-102, in that it is unconstitutionally vague and is in direct conflict with Arkansas statute[s] 17-30-101 and 17-30-104. So that it is our assertion that it is void for vagueness."

Sections 17-30-101 and 17-30-104 pertain to the practice of engineering. The Board, through its hearing officer, responded that it noted Holloway's objection and overruled it. Because Holloway

raised this constitutional issue before the Board and obtained the Board's ruling on it, we conclude that Holloway preserved his argument on appeal. *See Arkansas Contractors Licensing Bd. v. Pegasus Renovation Co.*, 347 Ark. 320, 64 S.W.3d 241 (2001); *AT&T Communications of the Southwest v. Arkansas Pub. Serv. Comm'n.*, 344 Ark. 188, 40 S.W.3d 273 (2001).

We turn now to Holloway's first point for reversal: the statutes defining the practice of architecture and engineering are void for vagueness and, as applied in this case, constitute a violation of Holloway's due-process rights. Holloway first cites Ark. Code Ann. § 17-15-102(5)(A)(i) and (ii) (Repl. 2001), which read as follows:

> (A)(i) The "practice of architecture" means the provision of, or offering to provide, those services hereinafter described in connection with the design and construction, enlargement, or alteration of a building or group of buildings, and the space within and surrounding such buildings, which is designed for human occupancy or habitation. The services referred to include planning, providing preliminary studies, designs, drawings, specifications, and other technical submissions, and administration of construction contracts.
>
> (ii) Provided, that *the practice of architecture shall not include the practice of engineering* as defined in the Arkansas Engineering Act, § 17-30-101 *et seq.*, or the practice of contracting as defined in the Contractors Licensing Law, § 17-25-101 *et seq.*, but a registered architect may perform such engineering work as is incidental to the practice of architecture, and *an engineer may practice such architectural work as is incidental to the practice of engineering.*

(Emphasis added.) Section 17-15-102(5)(B) further provides the following:

> (B) The provisions of this chapter *affirm the legal authority of an engineer* licensed under the Arkansas Engineering Act, § 17-30-101 *et seq.*, *to provide consultation, investigation, evaluation, planning, and design of buildings intended for the accommodation of equipment, vehicles, goods, and/or processes or other utilitarian function, with human occupancy including office space as required for the support of these functions*, provided the engineer is practicing within his or her area of competency as defined in the Arkansas Engineering Act, § 17-30-101 *et seq*[.]

(Emphasis added.)

Also pertinent to Holloway's argument is Ark. Code Ann. § 17-15-302(a)(1) (Repl. 2001), which exempts licensed engineers from the provisions governing architects so long as the engineer's work is incidental to the practice of engineering and provided the engineer does not use the designation "architect."

Holloway next refers to Ark. Code Ann. § 17-30-101(4)(A) (Repl. 2001), which defines the practice of engineering as follows:

> [The] "[p]ractice of engineering" means any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge in the mathematical, physical, and engineering sciences to services or creative work such as consultation, investigation, evaluation, planning, and design of engineering works and systems relating to the use of air, land, water, municipal and regional planning, forensic services, engineering teaching of advanced engineering subjects or courses related thereto, engineering surveys, and the inspection of construction for the purpose of assuring compliance with drawings and specifications, any of which embraces service or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, or projects *including such architectural work as is incidental to the practice of engineering.*

(Emphasis added.) The engineering statutes further provide the following:

> The provisions of this chapter affirm the legal authority of an engineer licensed under its provisions to *provide consultation, investigation, evaluation, planning, and design of buildings intended for accommodation of equipment, vehicles, goods, and/or processes or other utilitarian functions, with human occupancy including office space as required for the support of these functions, provided the engineer is practicing within his or her area of competency* as defined by this chapter.

Ark. Code Ann. § 17-30-104 (emphasis added).

In making his argument that his due-process rights are violated because the foregoing statutory provisions are vague, Holloway cites *Thompson v. Arkansas Social Services*, 282 Ark. 369, 669 S.W.2d 878 (1984), for his proposition that statutes governing architects and engineers fail to provide a person of ordinary intelligence fair notice as to what conduct is forbidden. For example, Holloway alludes to language contained in § 17-30-104 that permits a licensed engineer to plan and design "buildings intended for

accommodation of equipment, vehicles, goods, and/or processes or other utilitarian functions, with human occupancy including office space as required for the support of these functions." This same language is found in § 17-15-102(5)(B), which governs architects. Holloway submits that the ambiguity and vagueness of the language used in these statutes is readily apparent, asking rhetorically, "How much 'human occupancy including office space' do these provisions permit? To what does 'other utilitarian functions' refer? When does an engineer cross the line and design a building with too much 'human occupancy including office space?'" He urges that the statutes involved fail to give any guidance to determine the answers to these questions. Instead, he says, the legal definitions of the practice of architecture and engineering must turn on the facts of each case.

The Board rejoins Holloway's argument by first reiterating the settled law that a statute is presumed constitutional, and the party challenging it must demonstrate otherwise. *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998). Because statutes are presumed to be framed in accordance with the United States Constitution, we do not hold them invalid unless the conflict with the Constitution is clear and unmistakable. *Shoemaker v. State*, 343 Ark. 727, 38 S.W.3d 350 (2001). Moreover, all doubts are resolved in favor of a statute's constitutionality. *See State of Washington v. Thompson*, 339 Ark. 417, 6 S.W.3d 82 (1999); *Foster v. Jefferson County Bd. of Election Comm'rs*, 328 Ark. 223, 944 S.W.2d 93 (1997).

For a statute to avoid being vague, it must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden and it must not be so vague and standardless that it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis. *Thompson v. Arkansas Social Servs.*, 282 Ark. 369, 669 S.W.2d 878 (1984). The subject matter of the challenged law also determines how stringently the vagueness test will be applied. For instance, if the challenged law infringes upon a fundamental right, such as liberty or free speech, a more stringent vagueness test is applied; in contrast, however, if the law merely regulates business activity, a less stringent analysis is applied and more flexibility is allowed. *Craft, supra* (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982)). A statute is not to be struck down

as vague only because marginal cases could be put where doubts might arise. *Thompson, supra* (citing *Davis v. Smith*, 266 Ark. 112, 583 S.W.2d 37 (1979)).

A critical element of the definition of the practice of architecture is that the building be designed for human occupancy or habitation. .On the other hand, the statutes governing the practice of engineering and the practice of architecture both recognize that a licensed engineer has the authority to perform work on buildings that are "intended for accommodation of equipment, vehicles, goods, and/or processes or other utilitarian functions, with human occupancy including office space as required for the support of those functions." § 17-30-104. In addition, there are instances in which an engineer can perform services which would fall into the definition of architectural services if those services are "incidental to the practice of engineering." § 17-30-101(4)(A). "Incidental" means "depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal[.]" *Black's Law Dictionary* 762 (6th ed. 1990).

While it is true that the statutes governing engineers do not specify what is meant when they state that an engineer may provide services and consultation on buildings intended for "utilitarian functions, with human occupancy including office space as required for the support of these functions," a person of ordinary intelligence could easily conclude that this would mean that "human occupancy" is not to be the primary purpose of a building planned by an engineer. Supporting this conclusion is the language in the architecture statutes that provides that the practice of architecture includes the planning of buildings "which [are] designed for human occupancy or habitation." § 17-15-102(5)(A)(i). Reading these together, a person of ordinary intelligence can glean that architects plan and design buildings primarily intended for people to live and work in, and engineers plan and design buildings primarily "intended for accommodation of equipment, vehicles, goods, and/or processes." In sum, the statutes Holloway challenges are not void for vagueness.

Holloway's second point on appeal is that the Board failed to make necessary findings of fact. He asserts specifically that the Board was required to "make a finding that the 'human occupancy including office space' was not required for the support of the 'utili-

tarian function' being made in the space in the building that was not office space." The Board made five findings of fact, as follows:

1. Robert D. Holloway is not a licensed architect in the State of Arkansas.
2. Mr. Holloway prepared drawings and specifications for the Rosenbaum Industrial Supply facility on Doyle Venable Road, North Little Rock, Arkansas. The project is a pre-engineered metal building with a dry-vit facade.
3. The approximate size of the project is 144 feet by 93 feet. The building consists mainly of office space with a small amount of storage.
4. The primary purpose of the facility is for human occupancy or habitation and the cost is in excess of $100,000.
5. The work performed by Mr. Holloway [was] not incidental to the practice of engineering.

In support of his arguments, Holloway points out that the only witness to testify, Board Director John Harris, never testified that the "human occupancy" part of the building, comprising approximately 70% of the building, was not required for the support of a utilitarian function that could take place in the part of the building that was not office space. He also suggests that there are situations where a building might need up to 75% of its office space to support some "utilitarian function" that only takes up 25% of the building; however, he does not provide examples of such situations.

The Administrative Procedures Act, Ark. Code Ann. § 25-15-201 *et seq.* (Repl. 2002), requires that a "final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." § 25-15-210(b)(2) (Repl. 2002).

The court of appeals has described a "finding of fact" as "a simple straightforward statement of what happened. A statement of what the Board finds has happened; not a statement that a witness, or witnesses, testified thus and so. . . . [W]hen the reader is a reviewing court the statement must contain all specific facts relevant to the contested issue or issues so that the court may determine whether the Board has resolved those issues in conformity with the law." *Nesterenko v. Arkansas Bd. of Chiropractic Exam'rs,*

76 Ark. App. 561, 69 S.W.3d 459 (2002). The purpose of requiring such factual findings is that they benefit the court in the following way: facilitating judicial review; avoiding judicial usurpation of administrative functions; assuring more careful and administrative consideration; aiding the parties in planning for hearings and judicial review; and keeping an agency within its jurisdiction. *Gordon v. Cummings*, 262 Ark. 737, 561 S.W.2d 285 (1978).

The Board's findings in this case contain sufficient facts relevant to the contested issue so that this court can determine whether the Board has resolved those issues in conformity with the law. These findings were based on the testimony of John Harris, the Director of the Board, who stated that he went to the site, walked around the building, measured it, and looked inside. He averred that it appeared to consist largely of office space, including restrooms, and although there was a large empty space, comprising the 20-25% of the building that was not obviously office space, the space looked like it could be partitioned out into office space at a later date. Harris also testified about the customary cost per square foot for a building of that sort, opining that it would go for $85.00 to $100.00 per square foot. Although Holloway objected to Harris's testifying about the cost of the building, he offered no testimony or evidence to rebut Harris's figures. On cross-examination, Harris conceded that he did not call anyone to ask what the building's purpose was, but insisted that, based on the plans and his own observation of the building, it was "obviously office space."

The Board's findings reflected the facts to which Harris testified: the Board found that Holloway was not a licensed architect; Holloway had prepared drawings and specifications for the building; the building was approximately 144 by 93 feet and consisted mainly of office space; the primary purpose of the facility was for human occupation and the cost was in excess of $100,000; and the work was not incidental to the practice of engineering. Because the findings incorporate a "proper and acceptable finding of the basic or underlying facts drawn from the evidence," *Nesterenko*, 76 Ark. App. at 567, the Board's factual findings were sufficient; therefore, we reject Holloway's second point as having no merit.

Holloway's third point is that the penalty imposed by the board was arbitrary, capricious, and an abuse of discretion, because the statute authorizing the imposition of a civil penalty does not

provide any guidelines or standards for imposing the penalty, and because the findings of the Board and the imposition of the penalty are not supported by substantial evidence.

Section 17-15-203(d)(4)(A)(i) provides as follows:

> After providing notice and a hearing, the examining body may levy civil penalties, in an amount not to exceed five thousand dollars ($5,000) for each violation, against those individuals or entities found to be in violation of this chapter or rules and regulations promulgated thereunder.

Holloway argues that, because the foregoing statute does "not provide any guidelines or standards for determining when and under what circumstances the imposition of the maximum civil penalty is appropriate," it bestows "unbridled discretion on [the Board] to levy the maximum civil penalty in any manner it chooses, regardless of the nature or severity of the violation." He relies on *Alcoholic Beverage Control Division v. R.C. Edwards Distributing Co.*, 281 Ark. 336, 681 S.W.2d 356 (1984), for his argument that such a degree of discretion is an unlawful delegation of legislative powers.

In delegating legislative authority, the General Assembly must spell out appropriate standards for the guidance of the administrative body by which the power is to be exercised. *Arkansas St. Bd. of Pharmacy v. Hall*, 243 Ark. 741, 421 S.W.2d 888 (1967). Further, although discretionary power may be delegated by the legislature to the licensing authority, it is essential that reasonable guidelines be provided. *McQuay v. State Bd. of Architects, supra.* In *R.C. Edwards, supra*, on which Holloway relies, this court invalidated a liquor-distributorship regulation that provided, in part, that "[n]o person holding a wholesale permit shall add an additional brand to his stock without first securing the written approval of the Director, and no manufacturer shall transfer a brand from one wholesale distributor to another or create dual distributorships on the same items without first securing the written approval of the Director." Because the regulation did not define "dual distributorship," and because it did not set out a time frame or limit to regulate timely approval or disapproval of a petition, this court held that the statute was too vague and indefinite. *R.C. Edwards*, 284 Ark. at 339.

Here, however, the statute defines the prohibited activity — i.e., the practice of architecture by one not licensed to

do so — and provides that penalties will be imposed for the violation of the statute. In addition, the statute explicitly provides for notice and a hearing prior to the levying of civil penalties, and there must be a finding that the person has committed the unauthorized practice of architecture, as defined by the legislature. Further, the penalty is capped at $5,000. If the court were to accept Holloway's apparent suggestion that the General Assembly should specify the exact amount of a fine for every type of violation, then the Board would have no discretion at all, even though discretionary power may be delegated by the legislature to the licensing authority. *See McQuay v. State Bd. of Architects, supra.*

Holloway further argues that the penalty should be reversed because the Board did not make a specific finding that property or the public's health or safety was threatened or continue to be threatened as a result of Holloway's unauthorized practice of architecture. However, as the Board points out, the statute itself contains a legislative determination that the unauthorized practice of architecture *is* a threat to the public health and safety. Ark. Code Ann. § 17-15-301 (Repl. 2002), which sets out the license requirement for architects, provides as follows:

> *In order to safeguard life, health, and property, no person shall practice architecture in this state, . . . unless the person shall have secured from the examining body a certificate of registration and license in the manner hereinafter provided* and shall thereafter comply with the provisions of this chapter governing the registration and licensing of architects.

(Emphasis added.) The legislature determined that the unauthorized practice of architecture is a threat to the public; therefore, in order to safeguard life, health, and property, no person may practice architecture without having secured a certificate of registration and a license.

Finally, Holloway asserts that the imposition of the civil penalty was not supported by substantial evidence. However, a reviewing court will not substitute its judgment for that of an administrative agency unless the decision of the agency is arbitrary and capricious. *See Arkansas Appraiser Licensing & Certification Bd. v. Biles*, 320 Ark. 110, 895 S.W.2d 901 (1995). The testimony offered by John Harris, discussed above, supports the conclusion that the Board's findings were supported by substantial evidence, and this court has held that, where a decision is so supported, it automatically follows that the decision cannot be classi-

fied as unreasonable or arbitrary. *See Wright v. Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992).

Holloway's fourth principal argument is that the Attorney General's office had an irreconcilable conflict of interest in representing the Board of Architects, because it also represents the State Board of Registration for Professional Engineers and Land Surveyors ("the Board of Engineering") in disciplinary proceedings against engineers. He asserts that it is "manifestly unjust for the Attorney General to advocate and aid in the imposition of a civil penalty against a licensed engineer pursuant to the [Board of Architects'] subjective interpretation of the legal definitions of the practices of architecture and engineering while, at the same time, the Attorney General is called upon to advocate and aid in the imposition of a civil penalty against a licensed architect pursuant to the Board of Engineers' subjective interpretation of the legal definitions of the practices of engineering and architecture."

In the present case, however, the Attorney General is only representing the Board of Architects, not the Board of Engineering; that Board is in no way involved in this case. There is no "call to advocate and aid in the imposition of a civil penalty against a licensed architect" by the Board of Engineers. There is only the proceeding by the Board of Architects against Holloway. Therefore, it is not immediately apparent that there is a conflict, since the Attorney General is not representing two sides with conflicting interests.

Secondly, the Attorney General is not precluded from representing opposing agencies. Ark. Code Ann. § 25-16-702(a) (Repl. 2002) establishes that "the Attorney General shall be the attorney for all state officials, departments, institutions, and agencies." Section 25-16-702(b) further states that "[a]ll office work and advice for state officials, departments, institutions, and agencies shall be given by the Attorney General and his or her assistants." Finally, Ark. Code Ann. § 17-15-203(c) (Repl. 2001) expressly provides that the Board of Architects shall be entitled to the services of the Attorney General; and Ark. Code Ann. § 17-30-205 (Repl. 2001) provides that the Attorney General or his or her assistant shall act as legal advisor to the Board of Engineers.

Therefore, because the Attorney General is statutorily obligated to represent these state agencies, and because there is no

indication that the Board of Architects and the Board of Engineers will develop adverse interests in this litigation, there was no error in either the Board of Architects' or the circuit court's refusal to disqualify the Attorney General.

Affirmed.

CORBIN, J., not participating.

Dan M. GRAY *v.* Nancy Coleman GRAY

02-524 101 S.W.3d 816

Supreme Court of Arkansas
Opinion delivered April 3, 2003

[Petition for rehearing denied May 15, 2003.*]

* CORBIN, J., not participating.

Ronald W. Metcalf, P.A.; and *Hardin, Jesson & Terry, PLC*, by: *J. Rodney Mills*, for appellant.

Jones, Jackson & Moll, PLC, by: *Mark Moll*, for appellee.

ROBERT L. BROWN, Justice. Appellant Dan M. Gray appeals that part of the circuit court's divorce decree dealing with division of appellee Nancy Coleman Gray's pension plan and his retirement benefits.[1] He urges that it was clear error to value and divide Nancy Gray's pension plan based on contributions made rather than based on its present value. He further contends that a portion of his Civil Service Retirement pension should be exempted from division, because that portion is in lieu of Social Security benefits, which are not subject to division as marital property. We affirm the decision of the circuit court on both points.

On January 4, 1980, Dan Gray and Nancy Gray were married. Dan Gray was born on July 26, 1938, and was forty-one years old at the time of the marriage. Nancy Gray was born on January 11, 1950, and was twenty-nine years old when they married. Their age difference, accordingly, was about eleven-and-a half years.[2]

Dan Gray started working for the Internal Revenue Service during July of 1965 and continued working with the IRS until July of 2001. His retirement when married to Nancy Gray made her eligible for a guaranteed survivor's benefit, which could be waived by her but not by him. Nancy Gray is a special education teacher and has been since 1977. The Grays never had children, although Dan Gray has a daughter from a previous marriage.

The parties separated in early 1996. According to Nancy Gray's testimony, the relationship was always discordant. She filed a complaint for divorce on December 1, 2000, on grounds that she and Dan Gray had been separated for over eighteen months. Dan

---

[1] Nancy Coleman Gray has been using her maiden name, Coleman, since her divorce but, for ease of reference, she will be referred to as Nancy Gray in this opinion.

[2] Both Dan and Nancy Gray testified that she was age 27 and Dan Gray was age 38 when they married, but that does not correspond with their birthdates.

Gray answered, admitted the grounds, and asked the circuit court for an equitable division of the parties' marital property and debt. Later, Dan Gray filed a counterclaim for divorce and asserted his own grounds of eighteen-months separation and general indignities.

The parties accumulated substantial assets during their marriage, including a house and furnishings valued at $102,500; mineral interests on a section of real property; multiple checking and savings accounts at various banks; money market accounts; a certificate of deposit at Bank of the Ozarks valued at approximately $30,000; an AARP Capital Growth Fund investment valued at approximately $15,700; a Soloman Smith Barney account containing cash and shares of Wal-Mart, Acxiom, and Ozark Gas & Electric valued at approximately $380,000; various vehicles including a 1993 Pontiac Sunbird, a 1998 Ford Pickup, a 1997 Chevrolet Blazer, a Mazda Miata, and a boat, motor and trailer; liquidated sick leave accumulated by Dan Gray at the IRS worth $10,000; Individual Retirement Accounts of various amounts; and retirement plans (including plans not at issue in this case)[3]. Additionally, Dan Gray had nonmarital property assets, including a farm located near Paris, Arkansas, where he was living while the parties were separated. Nancy Gray stayed in the marital home in Fort Smith during the parties' separation and lengthy pre-divorce litigation.

The parties have two pension plans. Dan Gray participated in the federal Civil Service Retirement System benefit program throughout his career with the IRS. He now contends that a portion of his civil service pension benefits was given to him in lieu of Social Security. Since his retirement, he receives a monthly pension check in the amount of $4,033. At his death, Nancy Gray will receive the surviving spouse's benefit, which will be a monthly check from Dan Gray's civil service pension equal to fifty-five percent of his monthly pension entitlement, or $2,455. Dan Gray's retirement account with the federal government is fully vested, but under the Civil Service Retirement System law, he is not able to liquidate his retirement account and receive the amount that he has contributed to it.

Nancy Gray, on the other hand, has contributed throughout her career to a retirement account administered by the Arkansas

[3] Unless otherwise noted, the dollar amounts given in this opinion are approximate, as the circuit court noted in its decree.

Teacher Retirement System. She must wait until retirement to be able to draw a monthly retirement benefit. Her account is also fully vested, but she is able to liquidate her retirement account if she chooses and receive the value of her contributions made plus taxes. The Arkansas Teacher Retirement System was able to detail exactly how much Nancy Gray had contributed to her retirement account at the time of the divorce hearing. Her plan was described as a "defined-benefit plan."

At trial on October 15, 2001, Nancy Gray asked to be given $1,204 per month from Dan Gray's Civil Service Retirement System retirement check. That amount represented one-half of her marital-property portion (21/35ths, because the parties were married for 21 years out of the 35 that Dan Gray contributed to his retirement system) of Dan Gray's monthly retirement in the amount of $4,033. She also asked the court to include language in the decree to secure for her the "former spouse survivor annuity" in an amount of $2,455. With respect to her own pension plan, Nancy Gray stated that she had no objection to the court's awarding Dan Gray his proportionate interest in her pension benefits when she began receiving them. She also argued that *Skelton v. Skelton*, 339 Ark. 227, 5 S.W.3d 2 (1999), where this court held that a portion of a contractual fireman's retirement benefit plan that replaced Social Security was included in the marital estate, foreclosed any attempt by Dan Gray to exempt the Social Security replacement portion of his retirement pay.

Nancy Gray also testified that her income from her day job teaching for the school district netted her approximately $48,000 a year, and that her income from part-time tutoring of disabled children amounted to around $2,000 a year. She told the court that her expenses outstripped her income by a considerable amount.

She added that she had worked for the school system for twenty-four years, twenty-one of which she was married to Dan Gray. She testified that she had contributed to the pension plan every year of her employment except for four years, when she paid approximately eight thousand dollars in dental work for her husband, which ordinarily would have been paid into her retirement plan.

With respect to when she would retire, she stated that she knew that her retirement system allowed her to begin drawing

monthly retirement benefits after twenty-eight years with the school system, which would put her age at fifty-nine. Other testimony established that her monthly retirement benefit, if she retired at the minimum age of fifty-nine, would be approximately $1,872.39. She maintained, however, that she intended to work until she was sixty-five or sixty-seven years old (the date of social-security and medicare eligibility), because her health insurance premium was $457 a month and she needed Medicare protection.

When asked about Dan Gray's proposal to reduce the future value of her retirement account to present value and divide that amount by one-half, she said: "I will be penalized by doing it the way that he wants to do it. He wants to project my fifty-three or thirty-five thousand dollars to a hundred and seventy-one thousand and me give him half my assets, current assets at this time." She admitted that because her retirement plan was a defined-benefit plan, if she died between the time of the divorce and the time of retirement, the benefits would pass to no one.

Dan Gray argued on the other hand that the age difference between Nancy Gray and him made her proposed division of the pension plans fundamentally unfair. He contended that if the circuit court adopted her proposal that, based on the actuarial tables predicting his and her life spans, he would only enjoy the marital part of her retirement plan for approximately eight years. By contrast, if she survived to her life expectancy, she would enjoy payments under his pension plan for over thirty-one years. He asked the court to reduce her pension to present value of what she will receive in retirement benefits and give him an immediate payment of one-half of that amount. Dan Gray also argued that it would be unfair not to offset the Social Security replacement portion of his retirement pay and not consider that marital property, since Nancy Gray had social security benefits which were off-limits for the purpose of dividing the marital property.

Donna Young, a certified financial planner for Morgan Stanley, testified at trial as an expert for Nancy Gray. She stated that the liquidated value of Nancy Gray's pension account would be approximately $55,000. When asked about the methods used by Dan Gray's expert, Dr. Robert Marsh, and the results he obtained, she stated that the assumptions made by Dr. Marsh were faulty. First, she stated that Dr. Marsh assumed that her client would retire at her earliest opportunity, age fifty-nine, when it was not

likely in her opinion that she would do so until age sixty-five or sixty-seven because of the high cost of medical insurance.

Ms. Young stated that a valuation of Nancy Gray's pension plan using an "immediate offset" method, which would reduce the future value of her pension account to present value and give Dan Gray one-half of its value, would be unfair to her client, because she may not receive the full benefit of her pension plan due to a premature death. She added that a second method that could be used to divide the property equitably would be to let each party simply collect his or her own pension, and the non-owning spouse would receive one-half of the amount received. This method is known as the "deferred distribution method." Under this method, she calculated that Nancy Gray would receive $1,203.85 per month until Dan Gray died, and then the survivor benefit would activate, and she would receive approximately $2,455 per month.

Ms. Young testified about the financial interest that both parties had in advocating their proposed methods of valuing Nancy Gray's pension plan. She testified that it would be in Dan Gray's interest, because of the age discrepancy between them, to use present value calculations and ask for an immediate distribution, but not in Nancy Gray's interest due to the possibility of her premature death. She said, with respect to Nancy Gray's premium plan, " . . . if Nancy were to quit today and collect her money that she has in her plan which is fifty-five thousand, then half of that could be used today to offset Nancy's future pension benefits." She went on to say that Dan Gray would receive, under that method, one-half of eighty-nine percent of the value of the current value of her retirement account. (The eighty-nine percent was used because she was married to Dan Gray for eighty-nine percent of the time that she had worked for the school system.) In return, she would be entitled to the marital portion of Dan Gray's retirement benefits that he was currently receiving, followed by the surviving spouse benefit when he died. She concluded: "I'm not sure why [Nancy Gray] should be penalized for the age discrepancy." With respect to the effect of the age difference on the marital distribution, she added: "[T]hat was a decision that they both made when they got married. They knew they were eleven years different in ages and I know that it may be unfair that Dan has to wait, but Nancy shouldn't be penalized for that."

Dr. Robert E. Marsh, an economist, testified for Dan Gray by way of deposition and gave his opinion on how the parties' pensions might be equitably divided. He first testified that the full monthly retirement benefit that Dan Gray would receive was approximately $4,464 per month.

He further stated that he had calculated the present value of Nancy's pension plan using data provided by the Arkansas Teacher Retirement System. Under his calculations, Dan Gray would be expected to live approximately seventeen years from the date of the hearing, and Nancy Gray would be approximately seventy years old when he died. Dr. Marsh also provided some calculations that treated a portion of Dan Gray's retirement benefit as being equivalent to Social Security. With respect to the age difference of the parties, he testified:

> I don't think Dan Gray is going to be able to draw anything on Nancy Gray's teacher retirement benefit unless she predeceases him. Her life expectancy is so much longer. . . . She has an additional thirty years of life expectancy in comparison to Dan's life expectancy of seventy years, so the likelihood of her predeceasing Dan is slim and none, which means that he is not going to be eligible for any sort of retirement benefit out of the Arkansas Teacher Retirement System. . . .

On October 22, 2001, the circuit court issued a letter opinion. The opinion first granted Nancy Gray a divorce based on the eighteen-month separation and usage of her maiden name, Coleman. The opinion next divided the parties' property. The court's reasoning regarding the valuation of Nancy Gray's pension largely followed the recommendation of Ms. Young:

> The current value of Nancy Coleman Gray's pension plan is $55,321. Testimony indicated that 21.5/24 of the pension plan is marital property. Ordinarily, a division using this figure would be very beneficial to the Plaintiff and accordingly very unfavorable to the Defendant. However, considering the age difference of the parties, the Court has determined that this is how I should divide the Plaintiff's pension. The Court is awarding the Defendant one-half of $55,321.00 or $27,660.50. This award will be made by adjusting the division of the IRA accounts later in this letter opinion so that as far as the Plaintiff and her pension plan are concerned, she will receive it in its entirety. Because a division of this nature is extremely advantageous to the Plaintiff, the

> Court is dividing 100% of the current value of the pension rather than 21.5/24, or 89%.

The opinion also directed that Nancy Gray be named the beneficiary of the surviving spouse's benefit at the time of Dan Gray's death, in order to allay her fears of the benefit's being challenged if he remarried.

The opinion explained the circuit court's reasoning on the division of Dan Gray's pension. The opinion stated that his monthly benefit from his Civil Service Retirement System pension was $4,033 per month and recognized that Nancy Gray's request of a percentage of his Civil Service pension, or $1,204 per month, was based on their years of marriage. The court noted that the value of the pension payment would be approximately $4,440 per month but for the cost of funding the future survivor's benefit. The court held that the amount that it took to fund the survivor's benefit, approximately $407 a month, should be deducted from the amount that Dan Gary was required to pay. This led the court to the conclusion that Nancy Gray should be paid $797 per month.

The court then explained its belief that this division of property balanced the equities in the case:

> The Court recognizes that by deducting the $407.00 from Plaintiff's requested $1,204.00 per month, the Defendant is benefitted by approximately $121.00 per month. However, based on the Court's division of the Plaintiff's pension which is extremely beneficial to the Plaintiff, this benefit to the Defendant is equitable. . . . I divided the pension this way to address the Defendant's concerns about the age difference of the parties, the Plaintiff's anticipated retirement date, and the parties' life expectancies.

Ultimately, the court determined that Nancy Gray was to pay $25,137.27 to Dan Gray to make the accounts divide evenly. A decree was entered later reflecting the findings and conclusions of the letter opinion.

I. Nancy Gray's Pension Plan

The first issue on appeal is whether the circuit court's decision to award Dan Gray one-half of the current value of Nancy Gray's pension plan, based on her contributions as opposed to the present value of full pension benefits, was clearly erroneous.

This court has previously discussed the standard of review for the division of property in a divorce case:

> On appeal, chancery cases, such as divorces, are reviewed *de novo*. With respect to the division of property in a divorce case, we review the chancellor's findings of fact and affirm them unless they are clearly erroneous, or against the preponderance of the evidence; the division of property itself is also reviewed, and the same standard applies. 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. In order to demonstrate that the chancellor's ruling was erroneous, an appellant must show that the trial court abused its discretion by making a decision that was arbitrary or groundless. We give due deference to the chancellor's superior position to determine the credibility of witnesses and the weight to be given their testimony.

Skokos v. Skokos, 344 Ark. 420, 425, 40 S.W.3d 768 (2001) (citations omitted).

The Arkansas marital-property statute requires that marital property be divided evenly between the parties unless the circuit court finds that such a division would be inequitable. Ark. Code Ann. § 9-12-315(a)(1)(A) (Repl. 2002). If the circuit court decides that an even division is inequitable, it is required to make a written finding to that effect and explain its reasoning. Ark. Code Ann. § 9-12-315(a)(1)(B) (Repl. 2002). The statute lists non-exclusive factors that the circuit court may consider in modifying an even distribution, including the length of the marriage; the age, health, and station in life of the parties; the occupation of the parties; the amount and sources of income available to the parties; the parties' vocational skills; their employability; the estate, liabilities, and needs of each party; the opportunities before them to acquire further assets and income; and the parties' past contributions in the acquisition and maintenance of marital property. Ark. Code Ann. § 9-12-315(a)(1)(A)(i)-(vii) (Repl. 2002). "Marital property" includes payments made under a deferred compensation plan and individual retirement accounts as well as survivor benefits. Ark. Code Ann. § 9-12-315(b)(1) (Repl. 2002); *see also Skelton v. Skelton*, 339 Ark. 227, 231, 5 S.W.3d 2, 4 (1999).

The issue before us is what method should be used to value Nancy Gray's pension. This case deals with the valuation of a vested pension plan, which is a type of retirement plan. *See*

Black's Law Dictionary 115 (7th ed. 1999) (defining "pension" as "A fixed sum paid regularly to a person (or to the person's beneficiaries) esp. by an employer as a retirement benefit.") There are two relevant types of retirement plans:

> If the employee's benefits are defined as a certain amount per period of time, the plan is known as a *defined benefit plan.* It is not necessary that the amount of the benefit be known, and many plans compute this amount using a formula. By contrast, if the employee and the employer both make contributions to a retirement plan account, and the employee's benefits are expressed in terms of the present balance in his account, the plan is known as a *defined contribution plan.*

Brett R. Turner, *Equitable Distribution of Property* § 6.02 at 289 (2nd ed. 1994) (emphasis in original). Turner further notes:

> While a defined contribution plan expresses the employee's interest in terms of the balance remaining in the plan account, the employee need not necessarily receive his or her interest in that form. Many defined contribution plans use the balance in the plan account on the date of retirement to purchase an annuity, which will yield periodic benefit for the employee's entire remaining lifetime. The distinction between defined benefit and defined contribution plans therefore lies in how the plan benefits are defined *before* retirement, and not in the form in which the benefits are received after retirement.

Turner, *supra*, § 6.02 at 289 n.4 (emphasis added) (citations omitted).

There are several ways of valuing a pension plan. One is the "immediate offset" method, which is advocated by Dan Gray in this case and which consists of reducing the lifetime value of the pension benefits to present value and awarding the marital share of that present value to the non-owning spouse in the form of cash or other property. Turner, *supra*, § 6.11 at 347. The other method is the "deferred distribution" method, where the trial court does not divide the pension immediately but instead determines a percentage of the monthly pension benefit that the non-owning spouse is entitled to; the non-owning spouse then enjoys that share when the owning spouse begins drawing retirement. Turner, *supra*, § 611 at 347.

The Connecticut Supreme Court has outlined the advantages and disadvantages of both methods:

> The offset method has the advantage of effecting a "clean break" between the parties. It also avoids extended supervision and enforcement by the courts.
>
> The drawback to the offset method is that it places the entire risk of forfeiture before maturity on the employee spouse. Further, this method is not feasible when there are insufficient other assets by which to offset the value of the pension; or where no present value can be established [by expert testimony] and the parties are unable to reach agreement as to the value of the pension. If there are sufficient other assets, however, several courts have favored this approach.
>
> . . . .
>
> Alternatively, under the "reserved jurisdiction" method [or deferred distribution method], the trial court reserves jurisdiction to distribute the pension until benefits have matured. Once matured, the trial court will determine the proper share to which each party is entitled and divide the benefits accordingly.
>
> Both the present division and reserved jurisdiction methods have the advantage of imposing on the parties equally the risk of forfeiture, but have the cost of prolonging the parties' entanglement with each other. These methods are favored when there are insufficient assets to offset the award of the pension to the employee spouse alone or when the evidence is inadequate to establish present value.

Krafick v. Krafick, 234 Conn. 783, 802-804, 663 A.2d 365, 374-375 (1995) (citations and quotations omitted).

[redacted] The proper method for valuing a defined-contribution plan is by ascertaining the current account balance, or "total contributions." As long as the court recognizes appreciation in prior contributions, the total-contributions method can properly be used to value a defined-contribution plan. Turner, *supra*, § 6.12 at 374-375.

[redacted] Mr. Turner in his treatise notes that, although it is generally disfavored, the total-contribution method of determining value is proper in an appropriate defined-benefit plan case. "When there is no better evidence in the record, the number of decisions reluctantly accept a value based upon the total contributions method." Turner, *supra*, § 6.12 at 374 (citing *Addis v. Addis*, 288 Ark. 703 S.W.2d 852 (1986)). As Mr. Turner notes, our court has seen fit to use the total-contributions method in an appropriate case. *See Addis v. Addis, supra.* In *Addis*, this court

observed that the total-contribution method chosen was a sound alternative under the facts of that case:

> Three basic methods are available for disposing of vested but non-matured retirement interests upon divorce: (1) assign the whole of the interest in the plan to the employee, and assign assets of equivalent value to the other spouse; (2) divide the interest in the plan itself on a percentage formula; and (3) reserve jurisdiction until retirement to divide the actual monetary benefit when received. *See* B. Goldberg, Valuation of Divorce Assets, § 9.5 at 254. The chancellor chose the first method, an appropriate method. The appellant does not question the method, but instead questions the valuation. However, at trial no actuarial valuations were offered. The trial court could value the rights only upon the evidence presented, which was the amount of cash that appellant had contributed to the fund at the time of the hearing. We affirm the trial court's action.

Addis, 288 Ark. at 207-208, 703 S.W.2d at 854. In the case before us, however, Dan Gray did present ample evidence of the value of the plan reduced to present value, which distinguishes the facts in this case from the facts in *Addis*.

Hence, the question becomes whether the circuit court abused its discretion in treating Nancy Gray's pension as a defined-contribution plan. In other words, was the circuit court's decision arbitrary or groundless?

We conclude that from the testimony presented at trial, Nancy Gray's pension plan could be considered a defined-contribution plan. First, Nancy Gray testified that she would be able to liquidate the pension and receive exactly what she contributed to it. Indeed, she referred to the retirement plan as if it were an account, which is indicative of a defined-contribution plan, rather than speaking in terms of a specific benefit tied to a period of time in the future, which is indicative of a defined-benefit plan. Secondly, the Arkansas Teacher Retirement System was able to tell her precisely how much she personally had contributed to her plan, which makes the plan appear to be more like an account and hence a defined-contribution plan. Nancy Gray did testify that she would not be allowed to withdraw a monthly retirement check until she had been employed with the school system for twenty-eight years, but this is relevant only to how the plan is treated *after* retirement, which, as Mr. Turner notes in his treatise,

is not relevant. The question is how the plan is treated *before* retirement. On the other hand, running contrary to this reasoning is the Arkansas Teacher Retirement System's letter, which states that her plan is a "defined-benefit program."

The circuit court's opinion specifically stated that the total contribution method was used *because* of the age difference between the parties. In deciding as it did, the court met Dan Gray's concern about the length of his enjoyment of her pension fund by giving him an immediate cash benefit in the amount of half of the current value of her pension contributions. Dan Gray, after all, requested an immediate payment of value, although he advocated a division of present value, not total contributions. A rough estimate of the present value of Nancy Gray's pension plan, according to Dr. Marsh, was approximately $173,000, meaning he would be entitled to approximately $87,000 from her marital estate. This offset would have reduced Nancy Gray's assets considerably. Plus, as the circuit court noted, there was no assurance that she would live to full life expectancy and be able to enjoy full retirement benefits. We conclude that the circuit court exercised its discretion in a good-faith effort to balance the equities of the case. The circuit court's decision was not arbitrary; nor was it groundless. There was no abuse of discretion by the court.

II. Dan Gray's Pension Plan

Dan Gray next asserts that $1,365 of the $4,033 received each month as his retirement benefit under his Civil Service Retirement System pension is paid to him in lieu of Social Security benefits. He points out that the reason that he does not receive Social Security benefits is because he participates in the Civil Service Retirement System, and participants in that program are foreclosed from receiving benefits under Social Security. He argues that it would be unfair not to exempt this portion of his pension which corresponds to Social Security benefits.

Nancy Gray contends, in opposition, that Dan Gray had a choice of whether to enter the Civil Service Retirement program or the Federal Employees Retirement System, which includes Social Security, and that she should not be penalized because of his choice. She again emphasizes the circuit court's balancing of the equities in this case, which involved considerable assets accu-

mulated over a lengthy period of marriage and separation. She argues that Arkansas case law controls this case, specifically *Skelton v. Skelton, supra,* and that Dan Gray's argument urges this court to adopt the reasoning in cases that this court has specifically rejected. She also points out that the United States Congress has provided for the treatment of civil service pensions as marital property and has refused to exempt them in the same way that Social Security has been exempted. She claims that this lack of action is indicative of Congressional intent and implies that the adoption of Dan Gray's position may well violate the Supremacy Clause of the United States Constitution.

Our standard of review is *de novo*, as the issue involves a legal conclusion by the circuit court that the pension benefits were part of the marital estate under the Arkansas marital property statutes. *See Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). Moreover, we believe that there is an Arkansas case directly on point. In *Gentry v. Gentry*, 282 Ark. 413, 668 S.W.2d 947 (1984), this court treated a federal employee's civil service retirement pension as marital property. There, the wife of a former administrative law judge for the Social Security Administration claimed a marital interest in her husband's civil service retirement benefits. The trial court held that the pension plan was not marital property, and this court reversed, stating:

> The husband's retirement plan is subject to division. Congress has wisely anticipated that this treatment would be given by the various state courts (see 94 A.L.R.3d 176) through the passage of 5 U.S.C.A. § 8345(j)(1) (1976), to wit:
>
> > Payments under this subchapter which would otherwise be made to an employee, Member or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment or legal separation. Any payment under this paragraph to a person bars recovery by any other person.
>
> By holding these retirement benefits to be marital property, we are not laying down a rigid and inflexible rule for the future. § 34-1214 expressly provides for equal distribution "unless the court finds such a division to be inequitable." Any exception to

> the rule of equal distribution will always depend upon the specific facts as reflected by the trial court's findings and conclusions.

Gentry, 282 Ark. at 414-415, 669 S.W.2d at 948. *See also McDermott v. McDermott*, 336 Ark. 557, 562, 986 S.W.2d 843, 845 (1999) (recognizing that in *Gentry*, "we held that a husband's civil service retirement benefits were marital property subject to distribution."). This court thus held in *Gentry* that under the congressional act, a trial judge is permitted to consider Civil Service Retirement benefits as marital property, if appropriate under the equities of the specific case.

The United States Code section cited in our *Gentry* decision, although it was amended by Congress in 1994, nevertheless appears to apply to the case at hand as well. The pertinent section which governs Civil Service Retirement reads:

> (j)(1) Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based on service of that individual shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of—
>
> > (A) any *court decree of divorce*, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation . . . . (emphasis added).

5 U.S.C. §8345(j)(1) (2000). The circuit court's divorce decree expressly provided that the payments to be made to Dan Gray, a member of the Civil Service Retirement System, should be made in part to Nancy Gray. The decree thus falls directly within the purview of the statute.

Moreover, in *Skelton v. Skelton, supra*, this court rejected an argument that a fireman's pension fund was deserving of the same protection as Social Security and instead held that the pension was marital property. In *Skelton*, the husband had been a Fayetteville firefighter for approximately thirty years at the time of the divorce and had contributed to a relief and pension fund during his employment. Under the terms of the plan, the husband was not allowed to contribute to Social Security. He was thus ineligible for Social Security benefits and was covered only by the fireman's pension plan. The trial court held that the pension benefit was

marital property and awarded his ex-wife half of the marital portion of his retirement benefit.

On appeal, the husband argued that the retirement benefit was made in place of Social Security benefits and, therefore, should be treated the same as Social Security and exempted from the marital estate. This court disagreed:

> We recognize that Mr. Skelton appears to be placed at a disadvantage because he was prohibited from contributing to social security under his fireman's pension plan; however, the minority view on which he relies does not take into account the fundamental difference between social security and pension plans. A Florida court makes this distinction in *Johnson v. Johnson*, 726 So.2d 393 (Fla.Dist.Ct.App.1999). Florida's equitable distribution statute provides that "[a]ll vested and non-vested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs are marital assets subject to equitable distribution." Fla. Stat. Ann. § 61.076(1) (West 1997). In *Johnson*, the court held that the husband's social security replacement plan was a marital asset. *Id.* The *Johnson* court, persuaded by the decision in *Mack v. Mack*, supra, further reasoned that social security replacement pension plans were not so similar to federal social security benefits as to render them exempt from the Florida statutes.
>
> In the *Mack* case, the Wisconsin Court of Appeals provided the following rationale:
>
>> Although an employee's social security account increases in relative value over his working life, social security is not a property like a pension. It is a system of social insurance. 'To engraft upon the social security system a concept of accrued property rights would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands.'
>
> *Id.* (citing *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)).
>
> Since the courts are divided on this issue, we further examine the purposes behind social security benefits and pension plans. In the United States Supreme Court case of *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), a railroad-benefits case, the Court discussed the contractual nature of pension plans vis-a-vis the noncontractual nature of social security. Writing for the majority, Justice Blackmun states:

> Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time. This vulnerability to congressional edict contrasts strongly with the protection Congress has afforded recipients from creditors, tax gatherers, and all those .who would 'anticipate' the receipt of benefits. . . .

Id. The possibility of changes in benefits is expressly stated in the Social Security Act: "The right to alter, amend, or repeal any provision of this [Act] is reserved to Congress." 42 U.S.C. § 1304 (1994). This language emphasizes the difference between social security benefits and pension plans. As the *Mack* case points out, social security benefits are a type of public welfare, or social insurance. Social security benefits provide revenue or income; however, social security is not contractual in nature and does not become a property interest. It is subject to change by congressional act at any time.

According to *Hisquierdo*, most private pension plans are contractual agreements between the employer and employee. In Mr. Skelton's case, the contributions to his pension plan were made during the marriage and became a property interest during the marriage. *See* Ark. Code Ann. § 9-12-315; *Day*, *supra*. Mr. Skelton's pension was not designed to replace noncontractual social security benefits; rather, it provided a pension benefit which exceeded that of the social security system. We note that Ms. Skelton, by foregoing compensation which would otherwise have been received during marriage, contributed indirectly to the pension plan. Because the purposes of social security and the retirement plan are fundamentally different, they are not interchangeable. Therefore, we affirm the trial court on this issue.

Skelton, 339 Ark. at 232-234, 5 S.W.3d at 4-5.

Dan Gray urges that the *Skelton* case is distinguishable because (1) the firefighters' plan was contractual, and (2) in *Skelton*, the non-owning spouse would not receive Social Security. We disagree that those factors render *Skelton* inapposite precedent. The essence of the *Skelton* decision is that pension plans differ from Social Security, which is more in the nature of public welfare or social insurance. The Civil Service Retirement pension, albeit established by congressional act, establishes a pension plan and is not social insurance. The policies governing the two programs are

entirely different. Moreover, our case law is clear, as evidenced by the *Gentry* and *McDermott* decisions discussed earlier in this opinion, that the circuit court had statutory authority to divide Civil Service Retirement benefits. Congress could easily decide that Civil Service Retirement benefits should not be subject to division as marital property. It has not done so.

As for Dan Gray's characterization of Nancy Gray's receipt of both Social Security and retirement benefits as "unfair," he made a choice to contribute to the Civil Service Retirement System rather than Social Security, and the Civil Service Retirement System provided more benefits. Moreover, he had a chance to convert his retirement system over to a Social Security eligible system in 1982. He testified that he studied the matter and decided not to join the new plan.

We cannot say the circuit court abused its discretion in ruling as it did.

Affirmed.

CORBIN, J., dissents.

DONALD L. CORBIN, Justice, dissenting. I dissent from that part of the majority opinion that views all of Dan Gray's pension as marital property, even that portion that is in lieu of social security benefits. It is irrelevant that the benefits are not actually labeled social security, as they are the equivalent of social security benefits. Thus, because social security benefits are exempted from the definition of marital property, equivalent benefits should likewise be exempted. There is no logical reason to treat such benefits differently.

The majority opinion distinguishes these benefits by label, but not by substance. This distinction, or lack thereof, results in an inequitable division of property. In my dissent in *Skelton v. Skelton*, 339 Ark. 227, 5 S.W.3d 2 (1999), I urged this court to adopt the approach used by the courts in Ohio and Pennsylvania, which have held that because social security benefits are exempted from marital property, a spouse who receives a pension but no social security benefits may be entitled to have exempted from the marital property that portion of the spouse's pension that might

figuratively be considered in place of social security benefits. The rationale behind this approach is best stated in *Cornbleth v. Cornbleth*, 580 A.2d 369, 371-72 (Pa. Super. 1990) (emphasis added):

> One of our goals with regard to equitable distribution must be to treat different individuals with differing circumstances in a fashion so as to equate them to one another as nearly as possible, thus, eliminating a bias in favor of, or against, a class of individuals. To the extent individuals with Social Security benefits enjoy an exemption of that "asset" from equitable distribution we believe those individuals participating in the [civil service retirement programs] must, likewise, be so positioned. Consider for example an individual being divorced at approximately age fifty. Assuming a normal work history, that person will likely have accrued a substantial pension as well as a right to Social Security. When the pension is divided in equitable distribution there will be a diminution of the expected retirement income. However, the presence of Social Security will help offset the diminution. *In contrast, an individual who was a civil service participant for many years will, if the trial court's approach is approved, be dealt a double blow of sorts. The pension will become part of the marital estate and, thus, divided, yet there will be no Social Security benefit waiting to cushion this financial pitfall.*

Here, by participating in the Civil Service Retirement System, Dan is being dealt a double blow. His pension is divided between he and Nancy, and while Nancy has social security to bolster her retirement funds, Dan is without this benefit. In my opinion, the majority is misguided in relying on the fact that Dan chose to participate in this particular retirement plan, instead of one that would have left his social security benefits intact. As the majority's opinion notes, the plan that Dan chose provided more benefits. Thus, Dan's choice benefitted both he and Nancy. By holding as it does today, this court is effectively forcing Dan to pay the price for having made a choice that benefitted both of them. This, in my opinion is patently unfair.

In sum, lest my position on this matter be misunderstood, I believe that social security benefits and their pension equivalents should be off limits to divorcing spouses and should never be considered marital property. For this reason, I respectfully dissent.

CROOKED CREEK, III, INC., and J.L. Clements Construction, Inc. *v.* CITY of GREENWOOD, EHP Corporation, and Joe Siegmund

02-1136 101 S.W.3d 829

Supreme Court of Arkansas
Opinion delivered April 3, 2003

Pryor, Robertson & Barry, PLLC, by: *Kenneth W. Cowan*, for appellant.

Walters, Hamby & Verkamp, by: *Michael Hamby*, for appellee/cross-appellant City of Greenwood.

Warner, Smith & Harris, PLC, by: *Joel D. Johnson*, for cross-appellee EHP Corporation.

JIM HANNAH, Justice. Crooked Creek, III, Inc. ("Crooked Creek"), appeals an order of summary judgment entered in favor of EHP Corp. ("EHP"), and a judgment entered in favor of the City of Greenwood ("the City") and Joe Siegmund. Crooked Creek argues that the trial court erred in finding that under the doctrine of *res judicata*, an order of dismissal without prejudice on a motion for nonsuit barred suit later on the same issues. The City cross-appeals, alleging that the trial court erred in finding a contract existed between the City and Crooked Creek. Finally, Crooked Creek moves for costs on appeal.

We hold that the 1999 order of dismissal without prejudice does not constitute an order definitely and finally settling and determining the issues on the merits. Therefore, *res judicata* does not apply. The trial court's finding that *res judicata* barred suit is reversed, as are the consequent findings by the trial court that the cross-claim against EHP was barred by *res judicata*, and that the action against Siegmund was barred by estoppel based on the finding of *res judicata*. Because we hold that *res judicata* does not bar suit, we need not address the issues of a contract between Crooked Creek and the City or any breach of a contract. Any ruling on the existence of a contract would have no effect in this case because the 1999 order of dismissal does not bar suit, and, therefore, the City could not have breached any contract by agreeing to the 1999 order of dismissal. Crooked Creek's motion for costs is granted.

Facts

In 1995, developers Crooked Creek and J.L. Clements Construction Co. (Clements) constructed a fifteen-inch gravity-fed sewer line that was larger than required to serve the subdivision that was being built. In building the fifteen-inch sewer line, an existing six-inch forced sewer line was abandoned. Crooked Creek asserts that the City wanted a larger sewer to accommodate future development in the area. There was also evidence that Crooked Creek anticipated undertaking future development in the area and wanted the larger sewer line to facilitate its future activities. Crooked Creek alleges, however, that the larger sewer line was constructed pursuant to an agreement with the City, and that as a part of the agreement, the City was to collect future tie-

on fees and pass those fees on to Crooked Creek and Clements as compensation for constructing the larger sewer line. As evidence of this agreement, Crooked Creek offers three ordinances passed by the City providing for collection of the tie-on fees and distribution of the collected fees to Crooked Creek and Clements.

EHP owned property that was tied on to the new sewer line installed by Crooked Creek and Clements. Siegmund purchased a portion of the property initially owned by EHP. In 1999, the City began to collect tie-on fees. However, EHP and Siegmund refused to pay the tie-on fees, arguing that its property was not covered by the ordinances, and that the ordinances were invalid. Nonetheless, the City continued to seek the tie-on fees from EHP and Siegmond. EHP responded by threatening suit. The City then reconsidered EHP's claims and determined that EHP's property was not subject to the ordinances. When the City notified EHP of the decision that the ordinances did not apply to its property, counsel for EHP informed the City that suit had already been filed. However, because of the decision that the ordinances did not apply to its property, EHP agreed to nonsuit its action. EHP filed a motion for nonsuit. An order of dismissal was filed on the nonsuit which provided not only that the action was dismissed without prejudice, but also included the parties' agreement that the City's ordinances did not apply to EHP's property.

After the nonsuit, Crooked Creek began pressuring the City to collect the tie-on fees. The City then filed the present declaratory judgment action seeking a determination of the court regarding the enforceability and applicability of the ordinances. EHP answered asserting *res judicata* based on the order dismissing the 1999 suit. Siegmund answered arguing that he also enjoyed the benefit of the 1999 dismissal because his property was purchased from EHP and was part of the property covered by the 1999 dismissal. Crooked Creek cross-claimed against EHP and Siegmund for the amount of the tie-on fees Crooked Creek alleged EHP and Siegmund owed, and against the City for breach of contract.

EHP filed a motion for summary judgment alleging that the 1999 order of dismissal conclusively established that the ordinances did not apply to EHP. The trial court agreed and granted summary judgment to EHP based on *res judicata*. The remainder of the case was then tried to the court and the trial court found that because

Siegmund purchased its property from EHP, the City was estopped from seeking tie-on fees from Siegmund because the finding of *res judicata* in favor of EHP inured to Siegmund's benefit. The trial court further found no breach of contract by the City.

Crooked Creek alleges several points on appeal. Crooked Creek first alleges that the trial court erred in finding that the declaratory relief action was barred by *res judicata*. Crooked Creek's remaining four points assert trial error in finding the cross-claim against EHP was barred, trial error in concluding Siegmund was not subject to the tie-on fees based on estoppel, trial error in finding the City did not breach its agreement with Crooked Creek in entering into a dismissal compromising Crooked Creek's right to tie-on fees, and trial error in finding that the counterclaim against the City for *quantum meruit* was without merit. The City asserts trial error in finding a contract exists between Crooked Creek and the City.

Standard of Review

This case comes to this court by a petition for review. When this court grants a petition to review a decision by the court of appeals, this court reviews the appeal as if it had been originally filed in this court. *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002).

This case was decided partially on summary judgment and partially by bench trial. 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. *Spears v. City of Fordyce*, 351 Ark. 305, 92 S.W.3d 38 (2002); *Baldridge v. Cordes*, 350 Ark. 114, 85 S.W.3d 511 (2002). 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. *Spears, supra.* 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 pre-

ponderance of the evidence. *Reding v. Wagner*, 350 Ark. 322, 86 S.W.3d 386 (2002).

Res Judicata

We must first consider the effect of an order dismissing the action by EHP against the City that both dismisses the case without prejudice, and also purports to provide judicial sanction to an agreement by the parties that the ordinances passed by the City to collect tie-on fees do not apply to EHP's property. The question presented is whether the language purporting to provide judicial sanction to the agreement of the parties is to be given *res judicata* effect where the order dismisses the case without prejudice.

In *JeToCo Corp. v. Hailey Sales Co.*, 268 Ark. 340, 596 S.W.2d 703 (1980), this court stated:

> *Res judicata* means a thing or matter that has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction. *Knutson v. Ekren, supra.* Freely translated, it means "the matter has been decided," *Hastings v. Rose Courts, Inc.*, 237 Ark. 426, 373 S.W.2d 583. *See also, Hammond v. State*, 244 Ark. 186, 424 S.W.2d 861, *cert. den.* 393 U.S. 839 (1968).

JeToCo, 268 Ark. at 346.

However, the law is well settled that a dismissal without prejudice is not an adjudication on the merits and will not bar a subsequent suit on the same cause of action. *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001); *Magness v. McEntire*, 305 Ark. 503, 808 S.W.2d 783 (1991); *Benedict v. Arbor Acres Farm, Inc.*, 265 Ark. 574, 579 S.W.2d 605 (1979); *Forschler v. Cash*, 128 Ark. 492, 194 S.W. 1029 (1917).

Where a dismissal is with prejudice, it is conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff. *Hicks v. Allstate Ins. Co.*, 304 Ark. 101, 799 S.W.2d 809 (1990); (quoting *Union Indem. Co. v. Benton County Lumber Co.*, 179 Ark. 752, 18 S.W.2d 327 (1929)). The words "with prejudice," when used in an order of dismissal, "have a definite and well known meaning; they indicate

that the controversy is thereby concluded." *Harris v. Moye's Estate*, 211 Ark. 765, 767, 202 S.W.2d 360 (1947).

The order plainly states that the cause of action is dismissed without prejudice. The controversy was not concluded by the order. Therefore, the order is not an adjudication on the merits and will not support a plea of *res judicata*. EHP, however, asserts that the order is more than a dismissal because it contains the agreement of the parties in settling the dispute. As the court of appeals stated in *Brandon v. Arkansas Western Gas Co.*, 76 Ark. App. 201, 61 S.W.3d 193 (2001), "*Res judicata* will apply to a settlement agreement after it is approved by the court and the case is dismissed with prejudice." *Brandon*, 76 Ark. App. at 210.

EHP also argues that the order on the dismissal should be construed to be a consent judgment. A consent judgment is a judgment sanctioned by the court, but one that is comprised of terms and provisions agreed to by the parties. *Selig v. Barnett*, 233 Ark. 900, 350 S.W.2d 176 (1961). Consent excuses error and ends all contention between the parties. *Vaughan v. Brown*, 184 Ark. 185, 40 S.W.2d 996 (1931); (citing *Schmidt v. Oregon Gold Mining Co.*, 28 Ore. 9, 40 Pac. 406 (1895)). It leaves nothing for the court to do, but to enter what the parties have agreed upon, and when so entered, the parties themselves are concluded. *Id.* However, as already discussed, the order provides that the cause of action was dismissed without prejudice. We also note that EHP's motion was captioned, "Motion for Nonsuit." Therefore, the contention between the parties was not concluded by the order, and the order could not be a consent judgment.

Finally, Crooked Creek has moved for costs on appeal. Costs on appeal are largely within the sound discretion of the reviewing court. *Grable v. Grable*, 307 Ark. 410, 821 S.W.2d 16 (1991). The motion for costs is granted in the amount of $2322.90.

Reversed and remanded.

CORBIN, J., not participating.

Lonnie BEULAH *v.* STATE of Arkansas

CR 02-704 101 S.W.3d 802

Supreme Court of Arkansas
Opinion delivered April 3, 2003

Jeff Rosenzweig, for appellant.

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

Quattlebaum, Grooms, Tull & Burrow PLLC, by: *Leon Holmes*, for *amicus curiae* Arkansas Right to Life.

PER CURIAM. Appellant was charged with capital murder in the death of Heaven Pace, a fetus in its ninth month of gestation, and battery of the mother, Shiwona Pace. Appellant was charged under Act 1273 of 1999, the Arkansas Fetal Protection Act, which redefines "person" for purposes of the state's homicide statutes to include a fetus beyond twelve weeks of development. *See* Ark. Code Ann. § 5-1-102(13)(B)(i)(b) (Supp. 1999). Ark. Code Ann. § 5-1-102(13) provides in pertinent part:

> (B)(i)(a) For the purposes of §§ 5-10-101—5-10-105, "person" also includes an unborn child in utero at any stage of development;
>
> (b) "Unborn child" means a living fetus of twelve (12) weeks or greater gestation.

Appellant challenged the statute as unconstitutional; however, the trial court denied the claim. Appellant then sought a writ of prohibition, which was denied. *See Beulah v. State*, CA CR 00-506 (Ark. App. July 7, 2000).

Appellant subsequently pleaded guilty to murder in the first degree and battery and was sentenced to forty years' imprisonment. According to appellant, he entered into the plea agreement with the condition that he could pursue his constitutional challenge under Ark. R. Crim. P. 37. Appellant filed a timely petition for postconviction relief, alleging (1) that a fetus or unborn child is not a person and that the state is not free to define its homicide statutes, particularly its capital homicide statutes, to include a fetus and (2) that the definition of "unborn child" as contained in the statute is contradictory, and thus void for vagueness. According to appellant, his claims are cognizable because Rule 37.1 provides relief when a sentence is imposed "in violation of the Constitution and laws of the United States or this state" or "is otherwise subject to collateral attack." The Attorney General was served and declined to intervene.[1]

---

[1] The Attorney General's waiver of his statutory right of response under Ark. Code Ann. § 16-111-106(b) (1987) does not affect the controlling principles cited in this opinion. It is simply a waiver of a right to appear in circuit court to defend a statute. *See generally Carney v. State*, 305 Ark. 431, 434-35, 808 S.W.2d 755, 756-57 (1991). It is not acquiescence to jurisdiction or to the cognizability of a claim.

The trial court found that when appellant entered his plea of guilty, a Rule 37 petition was contemplated and that it was agreed that the filing of the petition "would not abrogate the plea agreement." However, in denying the petition, the court found that the state is free to define the killing of a fetus as a homicide and that the definition of "unborn child" is not void for vagueness. From that order comes this appeal.

It is well settled that a defendant ordinarily does not have a right to appeal a guilty plea except as provided in Ark. R. Crim. P. 24.3(b). *Payne v. State*, 327 Ark 25, 28, 937 S.W.2d 160, 161 (1997). Rule 24.3(b) provides:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

This court has interpreted the language of Rule 24.3(b) to permit the review of a conditional guilty plea solely with respect to the denial of a motion to suppress illegally obtained evidence. *Payne, supra.* Strict compliance with Rule 24.3(b) is required to convey appellate jurisdiction. *Id.*

Moreover, when a guilty plea is challenged under Rule 37, the sole issue is whether the plea was intelligently and voluntarily entered with the advice of competent counsel. *Mills v. State*, 338 Ark. 603, 606, 999 S.W.2d 674, 675 (1999). Rule 37 does not provide an avenue to raise matters that could have been raised on direct appeal, including constitutional claims. *E.g., Nooner v. State*, 339 Ark 253, 256, 4 S.W.3d 497, 498-99 (1999). A constitutional claim is not in itself sufficient to trigger application of Rule 37. *Cigainero v. State*, 321 Ark. 533, 536, 906 S.W.2d 282, 284 (1995).

As stated, appellant claims he entered into the plea agreement with the condition that he could pursue his constitutional challenge under Rule 37. However, an agreement between parties does not convert an otherwise incognizable claim into a cognizable one, just as subject-matter jurisdiction cannot be conferred by consent of the parties. *See State v. J.B.*, 309 Ark. 70, 72, 827 S.W.2d 144, 145 (1992). "The proper administration of the

law cannot be left merely to the stipulation of the parties." *Burrell v. State*, 65 Ark. App. 272, 276, 986 S.W.2d 141, 143 (1999).

Because appellant's claims are not cognizable under Rule 37, postconviction relief is not warranted.

Affirmed.

BROWN, J., dissents.

CORBIN, J., not participating.

ROBERT L. BROWN, Justice, dissenting. I disagree with the majority's analysis in this case. Appellant Lonnie Beulah did indeed plead guilty but apparently this was done with the understanding that he would be allowed to pursue his constitutional challenge by way of a Rule 37 petition. As the circuit court said in its order denying Rule 37 relief on the merits:

> The Court acknowledges that it was agreed when Beulah entered a plea of guilty that his [Rule 37] petition was contemplated, and that it was agreed that the filing of the petition herein would not abrogate the plea agreement.

The circuit court then considered the petition on the merits and denied it. Now this court refuses to entertain an appeal from that denial for the reason that Rule 37 does not provide an avenue to raise matters that could have been raised on direct appeal.

Of course, ordinarily, there is no direct appeal from a guilty plea except for certain limited exceptions. *See* Ark. R. App. P.—Crim. 1; Ark. R. Crim. P. 24.3(b). And it is blackletter law, as the majority points out, that Rule 37 petitions cannot serve as a substitute for direct appeals. Here, however, it appears that Beulah's plea was induced by an understanding that he could avail himself of a constitutional challenge by means of a Rule 37 petition. It seems the judge and prosecutor were both aware that this was a condition of his plea.

Under the circumstances, I question whether we should cast a blind eye on what actually transpired in this case. It appears that Beulah was misled by the State in entering his plea and therefore, it was not freely and voluntarily made. Under these circumstances, I would consider the appeal on the merits.

For these reasons, I respectfully dissent.

Alisa D. EFURD *v.* STATE of Arkansas

CR 03-140 101 S.W.3d 800

Supreme Court of Arkansas
Opinion delivered April 3, 2003

J.F. Atkinson, Jr., for appellant.

No response.

PER CURIAM. Attorney J. F. Atkinson, Jr., counsel for appellant Alisa Danieal Efurd, who was convicted of first-degree murder by a jury in Sebastian County Circuit Court and was sentenced to twenty-five years in the Arkansas Department of Correction, appeared before this court on March 20, 2003, to show cause why he should not be held in contempt for failing to timely perfect the appeal.

During the hearing conducted on March 20, 2003, we accepted Mr. Atkinson's guilty plea for failing to timely perfect his client's appeal. Mr. Atkinson has taken responsibility for his failure to timely perfect the appeal, and submitted statements in mitigation of his actions when making his plea.

The facts are that on February 23, 1999, the Arkansas Court of Appeals issued a mandate affirming Efurd's conviction; and, on March 19, 1999, Efurd filed a timely *pro se* Rule 37 petition, petition to proceed *informa pauperis*, and a motion for appointment of counsel. On April 9, 1999, the trial court issued an order to appoint J. F. Atkinson, Jr., to represent Efurd in her Rule 37 proceeding; and, on April 12, 1999, the trial court sent a notice to

counsel stating, "Please find an order appointing you (Jeff Atkinson) to represent Ms. Efurd in her Rule 37 Petition. No hearing has been scheduled as of this date." On August 31, 1999, Efurd's Rule 37 petition was summarily denied without making written findings specifying the parts of the files and records relied upon in denying the petition.

On September 9, 1999, the trial court entered an order awarding attorney fees to J. F. Atkinson, Jr. Efurd notified Atkinson of her desire to appeal; and, on November 10, 1999, Atkinson filed Efurd's notice of appeal and designation of record. The court reporter filed the transcript with the Sebastian County Circuit Court Clerk and tendered to counsel the transcript on or about February 10, 2000.

Atkinson thereafter failed to timely file the transcript with the clerk of this court, due to the file and transcript sitting therein, having been misfiled or lost and forgotten about according to Atkinson. Atkinson asserts that while searching for another file which was misfiled, Atkinson came across Efurd's file. Then, on February 7, 2003, Atkinson filed a motion to file belated appeal and rule on the clerk.

Based on the foregoing, we accept Mr. Atkinson's guilty plea for failing to timely perfect his client's appeal, and we fine him $500.00. However, the motion to file a belated appeal is denied.

■ ■ Belated appeals in criminal cases are governed by Rule 2(2) of the Rules of Appellate Procedure—Criminal. The rule provides in pertinent part that "no motion for belated appeal shall be entertained by the Supreme Court unless application has been made to the Supreme Court within eighteen (18) months of the date of entry of . . . the order denying postconviction relief . . . ." Atkinson tendered Efurd's motion for belated appeal in February 2003, some three years after the order was entered, and three years after he filed a notice of appeal. It is incumbent to file the motion for belated appeal in a timely manner. *Hayes v. State*, 328 Ark. 95, 940 S.W.2d 886 (1997). Here, Atkinson did not act with diligence and thus waived the right to appeal from the order. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion dismissed.

BROWN and HANNAH, JJ., dissent.

ROBERT L. BROWN, Justice, dissenting. What bothers me about denying Ms. Efurd's *pro se* motion for belated appeal as well as her counsel's motion is that her Rule 37 appeal has been thwarted by ineffective counsel. The operative times are these:

- February 23, 1999 — Mandate issued affirming Ms. Efurd's first-degree murder conviction.
- August 31, 1999 — Her Rule 37 petition was denied.
- September 27, 1999 — She filed a petition for reconsideration which was denied on October 4, 1999.
- October 14, 1999 — She filed a petition to amend her reconsideration motion which was denied on October 22, 1999.
- November 10, 1999 — Ms. Efurd's counsel filed her notice of appeal.
- December 12, 2002 — She filed her motion for belated appeal *pro se*.
- February 7, 2003 — Ms. Efurd's counsel filed a Motion for Belated Appeal and Rule on Clerk.

During 1999, Ms. Efurd had counsel. After filing an untimely notice of appeal, her counsel did nothing more until February 7, 2003. He then filed a motion for belated appeal and rule on clerk. However, this was only *after* Ms. Efurd filed her *pro se* motion for belated appeal almost two months earlier.

The majority denies her motion for belated appeal because our Criminal Appellate Rules state that "no motion for belated appeal shall be entertained by the Supreme Court unless application has been made to the Supreme Court within eighteen (18) months of the date of entry . . . of the order denying postconviction relief[.]" Ark. R. App. P.—Crim. 2(e). Here, Ms. Efurd, understandably, believed her notice of appeal was timely and on track. As it happens, the notice was not timely because petitions for reconsideration do not extend the time for filing an appeal from an order denying postconviction relief. *See* Ark. R. Crim. P. 37.2(d). In short, her appeal has been sandbagged by ineffective counsel.

Under these facts, I do not believe our 18-month rule should be read so strictly as to deny due process to Ms. Efurd. The only reason her appeal was not timely filed was due to ineffective counsel.

In a similar situation, the Florida Supreme Court entertained an appeal where the defendant wanted to appeal the denial of his postconviction motion but was not properly advised by counsel about how to do so. *See Williams v. State*, 777 So. 2d 947 (Fla. 2000). The court noted that the proper remedy for the defendant now was to petition for a writ of *habeas corpus*. The court further observed the need to amend its rule to permit certain belated appeals from denials of postconviction relief. The relevant rule was amended and now permits a belated appeal from the denial of postconviction relief "upon the allegation that the petitioner timely requested counsel to appeal the order denying petitioner's motion for postconviction relief and counsel, through neglect, failed to do so." Fla. R. Crim. P. 3.850(g). A second Florida rule, Fla. R. App. P. 9.141(c)(4), was also added. That rule limits the time period in which a defendant may seek a belated appeal to two years after the expiration of time for filing the notice of appeal from a final order, but it contains an exception:

> (4) *Time Limits.*
>
> (A) A petition for belated appeal shall not be filed more than 2 years after the expiration of time for filing the notice of appeal from a final order, unless it alleges under oath with a specific factual basis that the petitioner
>
> (i) was unaware an appeal had not been timely filed or was not advised of the right to an appeal; and
>
> (ii) should not have ascertained such facts by the exercise of reasonable diligence.

I agree with the sanction against Mr. Atkinson, but I would read into our rules a comparable exception and afford Ms. Efurd a belated appeal. For these reasons, I respectfully dissent.

HANNAH, J., joins.

Jason McCONNELL *v.* STATE of Arkansas

CR 03-262 101 S.W.3d 835

Supreme Court of Arkansas
Opinion delivered April 3, 2003

Michael L. Allison, for appellant.

No response.

PER CURIAM. Jason McConnell, by and through his attorney, has filed a motion for a rule on the clerk.

His attorney, Michael L. Allison, admits in his motion that the record was tendered late due to a mistake on his part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion, which we will treat as a motion for belated appeal. *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.

Terrick NOONER *v.* STATE of Arkansas

CR 94-358 101 S.W.3d 834

Supreme Court of Arkansas
Opinion delivered April 3, 2003

Petitioner, *pro se.*

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for respondent, on Motion to Lift Stay of Execution.

PER CURIAM. Terrick Nooner was found guilty by a jury of capital murder and sentenced to death. We affirmed. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d 677 (1995). Mr. Nooner subsequently filed in the trial court a petition pursuant to Criminal

Procedure Rule 37. The petition was denied, and the order was affirmed. *Nooner v. State*, 339 Ark. 283, 4 S.W.3d 497 (1999).

Now before us are eight *pro se* motions filed by Nooner that pertain entirely to the original appeal of the judgment of conviction, which was affirmed approximately seven years ago. Only two of the motions, the motion to lift stay of execution and the motion for a copy of the mandate issued on affirmance of the judgment, are cognizable by this court at this time. The remaining motions are dismissed inasmuch as this court no longer has jurisdiction of Mr. Nooner's case. As we are without jurisdiction to revisit the issues which were raised, or which could have been raised, in the direct appeal, our clerk is directed to file no further motions from petitioner Nooner that pertain to the direct appeal.

The motion to lift the stay of execution is moot because there is no stay of execution as such in effect at this time. The circuit court was obligated to vacate the stay of execution it issued when petitioner's Rule 37 petition was affirmed on appeal. *See* Ark. R. Crim. P. 37.5(g)(2). The State in its response to the motion states that it does not intend to request that the Governor set another execution date until such time as petitioner has exhausted his federal remedies.

The motion for a copy of the mandate at public expense is denied. A petitioner is not entitled to a free copy of material on file with this court unless he or she demonstrates some compelling need for specific documentary evidence to support an allegation contained in a petition for postconviction relief. *See Austin v. State*, 287 Ark. 256, 697 S.W.2d 914 (1985). Indigency alone does not entitle a petitioner to photocopying at public expense. *Washington v. State*, 270 Ark. 840, 606 S.W.2d 365 (1980). Petitioner here has not demonstrated a compelling need for a copy of the mandate.

Motion to lift stay of execution moot; motions for copy of mandate at public expense denied; motions for other relief dismissed.

Fannie FIELDS, Annetta Carruth, Casey Cox, Loretta Jarrett, and Willie Spriggs *v.* MARVELL SCHOOL DISTRICT

02-1336 102 S.W.3d 502

Supreme Court of Arkansas
Opinion delivered April 10, 2003

J.F. Valley, Esq., P.A., by: *J.F. Valley*, for appellant.

Brazil, Adlong & Winningham, PLC, by: *William Clay Brazil*, for appellee.

DONALD L. CORBIN, Justice. This case involves a dispute over a school board election. Appellants Fannie Fields, Annetta Carruth, Casey Cox, Loretta Jarrett, and Willie Spriggs

appeal the order of the Pulaski County Circuit Court, declaring that the positions that they had filed for as candidates on the Marvell School Board were not open for election. On appeal, they argue that the trial court erred in determining that the school district was not required to elect an entirely new school board in compliance with Ark. Code Ann. § 6-13-631 (Repl. 1999). As this is an appeal involving an issue of statutory construction, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(6). We find no error and affirm.

Appellee Marvell School District previously elected its school board via an at-large election system. Because its black voting-age population totaled 53.04% after the 1990 decennial census, the District, pursuant to section 6-13-631, changed to a zone-election system, meaning that five of the seven board members were elected from zoned districts, while the remaining two members were elected at-large. According to section 6-13-631(b)(2), each zone must have a "substantially equal population" and have boundaries based on the most recent federal decennial census information. Section 6-13-631(e) also requires that after a new school board is elected, the members must draw lots to determine the length of their terms, so that no more than two positions are open for election at the same time. This has been the election method for the school district's board members since 1994.

The 2000 decennial census showed that the district's black voting-age population was 54.87% and that zones one, two, and three had a black majority population, just as they did in the previous census. The school district hired Dr. David England, a demographer at Arkansas State University, to review its election zones and determine if the school district still remained in compliance with section 6-13-631 and the Voting Rights Act of 1965. Dr. England had drafted a report for the district in 1994 in order to bring it into initial compliance with the requirements of section 6-13-631.

According to Dr. England's 2000 report, Marvell School District remained in compliance because it maintained a plan for five single-member zones as required by section 6-13-631. Because the 2000 census information revealed a population change in zones three and four, Dr. England recommended realigning those two zones by shifting their boundary line by approximately one block. The population change was the result of construction of a housing project in zone four. After Dr.

England's study was complete, the board voted to adopt his plan, which thereby resulted in the adjustment of the boundary line separating zones three and four. Black voters, however, continued to be in the majority in three of the five single-member zones, specifically zones one, two, and three. Thereafter, on May 21, 2002, the District sent a letter to the Arkansas Department of Education, stating that it was in compliance with the requirements of the section 6-13-631.

In August 2002, Appellants filed as candidates for unexpired positions on the District's board of directors. Only one of the incumbents, running for the open at-large position, filed as a candidate. Each Appellant was certified by the Phillips County Election Commission as candidates to be placed on the September 17, 2002 ballots. Thereafter, the District filed a lawsuit seeking a temporary restraining order or preliminary injunction to prevent Appellants from appearing on the ballot, because it was the District's contention that the only seat open for election was one at-large position with an expired term.

A hearing was held in the circuit court on September 6, 2002. Testifying at this hearing was Ulicious Reed, superintendent of the school district. He testified that the school district continues to operate under a desegregation order from 1971. He stated that although the school was now fully integrated, it had to continue to monitor student placement because of a decrease in student enrollment, particularly of white students. He also testified that the election procedures instituted in 1994, pursuant to section 6-13-631, brought the district into compliance with the Voting Rights Act. Reed further testified that it was the school district's position that there was only one school board seat open for election.

Appellants took the position at this hearing that section 6-13-631 required the election of an entirely new school board after the district rezoned. The school district asserted that it was exempt from the requirements of section 6-13-631 because it met two exceptions set forth in the statute, namely that it was operating under a desegregation order and that it was in compliance with the Voting Rights Act.

After considering the testimony and arguments of counsel, the trial court ruled that the school district was in compliance

with the Voting Rights Act, as well as the court's desegregation order of 1971. The court further ruled that there was only one position on the board open for election. In a subsequent written order, dated September 11, 2002, the trial court reiterated its finding that section 6-13-631 did not require the school district to elect an entirely new school board because it was still operating under a federal desegregation order, was in compliance with the Voting Rights Act, and was in compliance with the requirements of section 6-13-631. The order directed the county clerk to count only those votes cast for the at-large position.

Appellants filed an appeal of the trial court's order with this court on the same day as the trial court's written order was filed. Appellants sought a writ of certiorari and a stay of the election scheduled for September 17. In a *per curiam* opinion, this court denied the writ and motion on the basis that this court did not have the authority to enjoin a regularly scheduled election. *See Fields v. Plegge*, 350 Ark. 57, 84 S.W.3d 446 (2002). This appeal followed.

Appellants raise only one point on appeal. They argue that the trial court erred in its interpretation of section 6-13-631. Specifically, Appellants argue that a plain reading of the statute reveals that a new school board must be elected any time a district engages in rezoning of its boundaries, as did Marvell School District in the present case. The school district counters that it is exempt from the provisions of section 6-13-631, because it is in compliance with the Voting Rights Act, as it already has a zone-elected board of directors. It claims an additional exemption based on the fact that it was operating under a 1971 federal desegregation order. We agree with the school district.

■ We review issues of statutory interpretation *de novo*, as it is for this court to decide what a statute means. *Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002); *Fewell v. Pickens*, 346 Ark. 246, 57 S.W.3d 144 (2001). 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).

Section 6-13-631 provides in relevant part as follows:

> (a) Beginning with the 1994 annual school election, the qualified electors of a school district having a ten percent (10%) or greater minority population out of the total population, as reported by the most recent federal decennial census information, shall elect the members of the board of directors as authorized in this section, utilizing selection procedures in compliance with the federal Voting Rights Act of 1965, as amended.

The statute then sets forth a method for electing a brand new school board from five zoned districts, with two at-large positions. Once the new school board is elected, each member must draw lots to determine the length of his or her term; thus, preventing more than two seats being up for election at the same time.

The statute further provides:

> (f)(1) After each federal decennial census and at least ninety (90) days before the annual school election, the local board of directors, with the approval of the controlling county board of election commissioners, shall divide each school district having a ten percent (10%) or greater minority population into single-member zones. The zones shall be based on the most recent federal decennial census information and substantially equal in population.
>
> (2) At the annual school election following the rezoning, a new school board shall be elected in accordance with procedures set forth in this section.

In subsection (g)(1), however, school districts meeting any of the following criteria are specifically exempted from the provisions of this section:

> (A) A school district that is currently operating under a federal court order enforcing school desegregation or the federal Voting Rights Act of 1965, as amended;
>
> (B) A school district that is operating under a preconsolidation agreement that is in compliance with the federal Voting Rights Act of 1965, as amended;
>
> (C) A school district that has a zoned board meeting the requirements of the federal Voting Rights Act of 1965, as amended; and
>
> (D) A school district that a federal court has ruled is not in violation of the federal Voting Rights Act of 1965, as amended, so long as the court order is in effect.

Thus, there are clear exemptions that allow a school district to deviate from the requirements of section 6-13-631. The 1971 federal desegregation order was introduced at trial, and Superintendent Reed testified that the school was still operating under that order. Specifically, he stated that they constantly monitored student placement. He also testified that he sends reports to the federal court when requested and recently submitted a recruitment report. Dr. England's report stating that the school district was in compliance with the Voting Rights Act because it elected its school board members from zoned districts was also introduced at the hearing. Appellants produced no evidence to dispute the fact that these two exceptions applied in this case.

Appellants now assert that it is absurd for the school district to claim that it is entitled to exemptions when it took the action of hiring someone to study the population information and undertake a rezoning as the statute requires. According to Appellants, because the school district took the action of rezoning it is now required to comply with the remainder of the statute and hold a new school board election as set forth in section 6-13-631(f)(2). Appellants, however, failed to raise this argument before the trial court. Likewise, Appellants did not argue below that the school district's act of rezoning constituted a waiver of any claimed exemption. It is well settled that this court will not consider arguments raised for the first time on appeal. *See, e.g., Arkansas Blue Cross & Blue Shield v. Hicks*, 349 Ark. 269, 78 S.W.3d 58 (2002); *Laird v. Shelnut*, 348 Ark. 632, 74 S.W.3d 206 (2002).

We agree with the trial court's determination that the school district meets the exception set out in section 6-13-631(g)(1)(A), as operating under the 1971 federal desegregation order, as well as the exception set forth in subsection (g)(1)(C), having a zoned school board meeting the requirements of the Voting Rights Act. Accordingly, we cannot say that the trial court erred in determining that the only seat open for election on the September 17 ballot was the one expired at-large position.

Affirmed.

Karl Douglas ROBERTS *v.* STATE of Arkansas

CR 02-22 102 S.W.3d 482

Supreme Court of Arkansas
Opinion delivered April 10, 2003

Buckley & McLemore, P.A., by: *Tim Buckley*, for appellant.

Mike Beebe, Att'y Gen., by: *Jeffrey A. Weber*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Karl Douglas Roberts was convicted in the Polk County Circuit Court of the cap-

ital murder of twelve-year-old Andria Brewer, for which he was sentenced to death by lethal injection. Roberts filed a waiver of his rights to appeal and to pursue postconviction remedies. Following a hearing on the waiver, the trial court determined that Roberts had the capacity to knowingly and intelligently waive his appeal rights. This is an automatic review of the entire record pursuant to our holding in *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999).[1] We find no error and affirm both the conviction and sentence.

The record reflects that on May 15, 1999, Andria Brewer was reported missing from her home, near Mena. She was last seen leaving her house in a small red pickup truck. Police initially thought that Andria may have run away from home. After a day or so, however, they decided that was unlikely, and they called in the FBI and the Arkansas State Police to help investigate. They first looked for people known to the family that drove small red pickup trucks. The only two people who fit that description were Roberts and Bobby Stone. Both men agreed to voluntarily go to the police station to be interviewed on May 17, and both submitted to polygraph examinations.

Roberts's polygraph exam was conducted by Corporal Ocie Rateliff of the Arkansas State Police. Rateliff read Roberts his *Miranda* rights prior to the exam and explained to him how the polygraph test worked. At the conclusion of the exam, Rateliff allowed Roberts to go outside to smoke a cigarette while he analyzed the polygraph. Before speaking with Roberts, Rateliff informed FBI Special Agent Mark Jessie that Roberts was being deceptive on the exam.

Rateliff then called Roberts back into the interview room and told him that the test revealed that he was being deceptive. Roberts immediately dropped his head and said, "I messed up." He then confessed that he took Andria from her home, drove her out on an old logging road, raped her, and then strangled her to

[1] On July 9, 2001, this court adopted an amendment to Ark. R. App. P.—Crim. 10 that effectively codified the mandatory review in death cases provided in *Robbins*, 339 Ark. 379, 5 S.W.3d 51. That amendment became effective for all cases in which the death penalty is imposed on or after August 1, 2001. Roberts's death sentence was imposed on May 23, 2000, prior to the effective date of the amendment. We thus review this case under *Robbins*.

death. Rateliff wrote down Roberts's statements as he made them, and then Roberts signed off on the written statement.

Roberts was subsequently convicted of the capital murder of the young girl and sentenced to death, in an order entered on May 23, 2000. Following his conviction and sentence, on June 13, 2000, Roberts filed a waiver of appeal. Thereafter, the trial court held a hearing on the waiver and determined that Roberts had knowingly and intelligently waived his appeal rights. This court granted the State's petition for a writ of certiorari to review the record in this case and appointed attorney Tim Buckley to abstract the record and prepare a brief setting out any points of error. *See Roberts v. State*, CR 02-22, slip op. (February 7, 2002) (*per curiam*).

Because Roberts waived his rights to appeal and to postconviction relief, this court must conduct a review of the record in this case to determine whether there is reversible error. In doing so, we must consider and determine: (1) whether Roberts properly waived his rights to appeal; (2) whether any errors raised in the trial court are prejudicial to Roberts in accordance with Ark. Code Ann. § 16-91-113(a) (1987) and Ark. Sup. Ct. R. 4-3(h); (3) whether any plain errors covered by the exceptions provided in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), have occurred; and (4) whether other fundamental safeguards were followed. *See Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001); *Robbins*, 339 Ark. 379, 5 S.W.3d 51.

Appointed counsel raises four points of error. The first two points concern the trial court's refusal to suppress Roberts's statement and the physical evidence gained as a result thereof. The third point concerns the seating of a juror that the defense attempted to remove for cause. The fourth point challenges the evidence to support the aggravating circumstance that the crime was committed in an especially cruel or depraved manner. Before reviewing these points or any other potential errors, we must first determine whether the trial court erred in ruling that Roberts was competent to waive his appeal rights.

I. Knowing and Intelligent Waiver of Appeal Rights

In this state, a defendant sentenced to death will be able to forego a state appeal only if he or she has been judicially determined to have the capacity to understand the choice between life

and death and to knowingly and intelligently waive any and all rights to appeal his or her sentence. *Smith*, 343 Ark. 552, 39 S.W.3d 739. This court will not reverse the trial court's conclusion unless it is clearly erroneous. *Id.*

In the present case, the trial judge had the benefit of having heard much psychological evidence during the pretrial competency hearing and throughout the course of the trial. The defense presented testimony from Dr. Lee Archer, a neurologist from the University of Arkansas Medical Sciences, and Dr. Mary Wetherby, a neuropsychologist from Texarkana. Both doctors testified that Roberts had experienced an injury to the frontal lobes of his brain when he was hit by a dump truck at age twelve. Both doctors stated that as a result of the brain injury, Roberts suffered from hallucinations and his ability to conform his conduct to the requirements of the law was impaired. Both doctors acknowledged that Roberts knew right from wrong, but they opined that he was not able to control his emotions, and that this lack of emotional control was directly responsible for his raping and murdering the victim.

The State presented testimony from Dr. Reginald Rutherford, a clinical neurologist, and Dr. Charles Mallory, a psychologist from the Arkansas State Hospital. Dr. Rutherford opined that Roberts's brain injury did not cause him to do what he did. Rutherford explained that Roberts had no dramatic behavioral problems that would indicate that he would do something of this nature. Rutherford also stated that it was evident that Roberts was involved in a complex series of actions that culminated in the crime, and that his actions demonstrated that he appreciated the criminality of his conduct.

Mallory determined that Roberts had a full-scale I.Q. of seventy-six, which placed him within the borderline-intellectual-functioning range. Despite his lower I.Q., Mallory found that Roberts had graduated high school, could read and write on a high school level, had held the same job for the last six years, and had a wife of ten years and a family. Mallory also stated that Roberts did very well on the Georgia Court Competency Test, which measures if a person understands the criminal-justice system and the procedure of the trial. Mallory stated that Roberts's responses demonstrated that he understood his legal rights and the trial process. Mallory ultimately concluded that, based on his tests and interviews with Roberts and his review of Roberts's medical and psychological records,

Roberts knew the difference between right and wrong and that he had the ability to conform his conduct to the requirements of the law. Mallory relied on the foregoing facts as well as on Roberts's actions in the crime. Particularly, Mallory stated that Roberts was cognitive of his actions, and that he took steps to avoid apprehension both before and after the crime, by driving the girl to a remote location, raping and killing her, and then covering up her body and throwing away her clothes. Mallory also pointed to Roberts's statement that he decided to kill Andria because he knew that she could identify him as having raped her.

During the posttrial hearing, defense counsel asked Roberts if he was aware of the rights that he was waiving, specifically his right to appeal to this court, his right of postconviction challenge under Ark. R. Crim. P. 37.5, and his postconviction and *habeas* rights in federal court. Roberts stated that he understood the rights he was waiving and that it was his desire to waive any right to appeal. Roberts stated that he was not under the influence of alcohol or any other substance that would affect his ability to understand or to make a decision.

The trial judge asked Roberts a series of questions about the rights he was waiving and, specifically, if he understood what it meant to waive a right. Roberts stated that the word waiver "means to let something pass." Roberts then reaffirmed that he understood all of his appeal rights. The trial judge asked Roberts to tell him in his own words what he was asking for, and Roberts stated: "I want to die." The trial judge then asked Roberts if he was asking that the death sentence be carried out without any further action by his attorney on direct appeal, and Roberts stated: "Yes."

We conclude that the foregoing evidence demonstrates that the trial court did not clearly err in determining that Roberts knowingly and intelligently waived his rights of appeal. We now turn to the points raised by appointed counsel in his brief.

II. Errors Alleged by Appointed Counsel

A. Motion to Suppress Statement and Physical Evidence

Appointed counsel first argues that the trial court erred in denying Roberts's motion to suppress his statement to police and any physical evidence gathered afterwards, as fruit of the poisonous tree. During the proceedings below, Roberts's attorneys argued

that the statement was involuntary because the police made a false statement of leniency in order to secure Roberts's confession. At the suppression hearing, Officer Rateliff testified that when he confronted Roberts with his deceptive polygraph exam, Roberts "got that teared up look in his eye and dropped his head and said, 'I messed up last Saturday.'" Rateliff testified that Roberts also said that he needed help. Rateliff stated that he then rolled his chair over next to Roberts, put his hand on Roberts's shoulder and stated: "Get it off your chest, we'll help." When questioned by the defense, Rateliff explained that the help he was referring to was listening to Roberts and letting him get it "out in the open."

Agent Jessie testified that both he and Rateliff were present in the interview room when Roberts came back in, and that when Rateliff told him that the polygraph indicated that he was being deceptive, Roberts "teared up and began to cry and made a statement to the effect that he had done something terrible." Jessie also stated that Roberts asked for help. Jessie explained that, based on the general tone of the statement, he thought that the help Roberts was referring to was from a clergyman.

Defense counsel argued that by stating "we'll help," the officers made a false promise of leniency to induce Roberts's confession. The prosecutor responded that the statement was too vague to be a promise of leniency. The prosecutor argued that at the point that Rateliff made the statement, the officers did not even know what they were dealing with, *i.e.*, whether Andria had been kidnapped or whether she was dead. The prosecutor argued that it would be hard to make a promise of leniency if the officers did not know what they were promising. The prosecutor conceded, however, that all the physical evidence they gained was the result of Roberts's statement and that, therefore, if the statement were suppressed, the physical evidence would have to be suppressed as well.

The trial court denied the motion to suppress, finding that the statement by Rateliff amounted to nothing more than an officer being courteous. The trial court found further that Roberts was over the age of twenty-one, that he could read and write, and that he was capable of functioning in society, as demonstrated by the facts that he was married and had a family, a home, and a job. The trial court noted the testimony of Dr. Mallory that although Roberts's intelligence was not overly great, he could

function in society and was capable of understanding. The trial court also found that Roberts was not initially detained by the police, but that he came to the police voluntarily. The trial court found further that the actual period of detention, *i.e.*, from the point that Roberts stated that he had messed up and was thus no longer free to leave, was not lengthy. Based on all of these circumstances, the trial court concluded that the statement was not involuntary. We find no error on this point.

A statement induced by a false promise of reward or leniency is not a voluntary statement. *Bisbee v. State*, 341 Ark. 508, 17 S.W.3d 477 (2000). When a police officer makes a false promise that misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been made voluntarily, knowingly, and intelligently. *See Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998); *Pyles v. State*, 329 Ark. 73, 947 S.W.2d 754 (1997). In deciding whether there has been a misleading promise of reward or leniency, this court views the totality of the circumstances and examines, first, the officer's statement and, second, the vulnerability of the defendant. *Id.*

If we determine in the first step that the officer's statement is an unambiguous false promise of leniency, there is no need to proceed to the second step. *Id.* If, however, the officer's statement is ambiguous, making it difficult for us to determine if it was truly a false promise of leniency, we must proceed to the second step of examining the vulnerability of the defendant. *Id.* Factors to be considered in determining vulnerability include: (1) the age, education, and intelligence of the accused; (2) how long it took to obtain the statement; (3) the defendant's experience, if any, with the criminal-justice system; and (4) the delay between the *Miranda* warnings and the confession. *Conner*, 334 Ark. 457, 982 S.W.2d 655 (citing *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988); *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987)).

Additionally, for the statement to be involuntary, the promise must have induced or influenced the confession. *Bisbee*, 341 Ark. 508, 17 S.W.3d 477. Furthermore, the defendant must show that the confession was untrue, because the object of the rule is not to exclude a confession of truth, but to avoid the possibility of a confession of guilt from one who is, in fact, innocent. *Id.* We will not reverse the trial court's denial of a motion to suppress a statement unless it is clearly erroneous or clearly

against the preponderance of the evidence. *Conner*, 334 Ark. 457, 982 S.W.2d 655.

Here, the statement made by Officer Rateliff was, "Get it off your chest, we'll help." According to both Rateliff and Agent Jessie, the statement was made after Roberts had dropped his head and stated that he had messed up and that he needed help. The statement itself is ambiguous, especially given the context. The phrase "we'll help" could mean anything from letting Roberts cleanse his guilty conscience, as Rateliff testified, to allowing him to speak to a clergyman, as Jessie testified. It certainly was not specific enough to be viewed as a false promise to get Roberts a reduced charge or a lesser sentence if he confessed. The prosecutor's point is well taken, that at the time Rateliff made the statement, the officers did not know what Roberts was about to tell them or whether the girl was dead or alive. Because the statement is ambiguous, we proceed to the second step and assess Roberts's vulnerability.

The evidence showed that Roberts was thirty-one years old at the time and that he had graduated high school and had held a job for the last six years. The evidence also showed that Roberts had been married for ten years and that he had two children. Dr. Mallory testified that Roberts's overall I.Q. was seventy-six, which placed him in the range of borderline intellectual functioning. Mallory indicated, however, that Roberts could read and write at a high school level, and that he reads like a person who has a higher I.Q. This court has held that a low score on an I.Q. test does not mean that a suspect is incapable of voluntarily making a confession or waiving his rights. *See, e.g., Diemer v. State*, 340 Ark. 223, 9 S.W.3d 490 (2000) (upholding confession of defendant who was twenty years old and had an I.Q. of seventy-seven); *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702, *cert. denied*, 519 U.S. 898 (1996)(affirming the admission of a confession where the defendant was age seventeen, had an I.Q. of seventy-two, and was reading on a third-grade level); *Oliver v. State*, 322 Ark. 8, 907 S.W.2d 706 (1995) (affirming the admission of a confession where the defendant was fifteen years old, had an I.Q. of seventy-four, and read on a second-grade level). Accordingly, Roberts's I.Q. of seventy-six must be viewed in light of the facts that he was thirty-one years old, had graduated high school, and could read and write at a high school level.

Additionally, the record reflects that Officer Rateliff informed Roberts of his *Miranda* rights from a statement-of-rights form at 3:16 in the afternoon, before Roberts took the polygraph test. Roberts stated that he understood his rights, and he agreed to talk to the officer. Rateliff stated that the test took anywhere from forty-five minutes to an hour to complete. During this entire time, Roberts was not in custody and was free to leave. In fact, after completing the polygraph, Roberts went outside to smoke, while Rateliff evaluated the test. Roberts was told the results of his polygraph around 5:00. Thereafter, he confessed. Rateliff began writing Roberts's statement at 5:30. The statement was finally completed at 6:54. All told, Roberts was at the police station for approximately four hours, but he was only detained for a period of two hours. We agree with the trial court that this is not a lengthy period of detention. Moreover, there was not a lengthy delay between Roberts's confession and the time that he was informed of his *Miranda* rights.

As for Roberts's emotional vulnerability, there was testimony from Officer Rateliff that while Roberts was confessing, he was upset, crying, embarrassed, and mad at himself. Rateliff also stated that Roberts appeared remorseful. Agent Jessie stated that Roberts broke down and sobbed during his confession; however, he stated that Roberts's emotion and remorse seemed to stem less from the fact that he had taken the young girl's life and more because he had ruined his own life.

Appointed counsel asserts that Roberts's emotional state combined with his lower intelligence and his limited experience with the criminal-justice system demonstrate that he was especially vulnerable to the officer's statement. Appointed counsel relies on the holding in *Pyles*, 329 Ark. 73, 947 S.W.2d 754. That case, however, is distinguishable. There, the interrogating officer assured Pyles that he knew that Pyles was not a cold-blooded killer, and that he would "help him in every way in the world." *Id.* at 77, 947 S.W.2d at 755. In suppressing the statement, this court found the following facts significant: (1) that the interrogating officer had previously known the defendant through baseball and had a friendly relationship with him; (2) that the defendant was interrogated for a long period of time; and (3) that the defendant was emotional during the interrogation, as demonstrated by the fact that he held the officer's hands and wept as he confessed. This court also noted

Pyles's testimony that the officers had repeatedly told him that if the murder was done in self-defense, a court would be more lenient. Additionally, the State conceded that the officer's promise in that case was questionable. This court held that the totality of the circumstances supported the conclusion that the confession was not voluntary. The same is not true here.

In this case, the officer's statement, "Get it off your chest, we'll help," is ambiguous, at best, and the evidence does not demonstrate that this defendant was so vulnerable that the officer's statement rendered the confession involuntary. Moreover, even if the officer's statement could be considered to be a false promise of leniency, the confession was not invalid because the record does not demonstrate that the officer's statement induced or influenced Roberts's confession. This is evident from the fact that immediately after being informed that his answers on the polygraph exam were deceptive, Roberts hung his head and stated that he had messed up and that he needed help. Thus, Roberts had already incriminated himself before any alleged promise was made, and he appeared to be ready to confess to his crimes, regardless of Rateliff's statement. In contrast, the defendant in *Pyles* made no statement until after the police promised to help him.

Finally, we cannot say that the defense has succeeded in showing that Roberts's confession was untrue or that it was a false confession of guilt of one who is, in fact, innocent. To the contrary, the veracity of his confession is demonstrated by the physical evidence obtained thereafter.

We cannot leave this point without responding to the concerns raised by the dissent, regarding the brain injury that Roberts sustained when he was struck by a dump truck at age twelve. The dissent opines that this injury combined with his low I.Q. and his adolescent behavior patterns made Roberts especially vulnerable to Rateliff's statement. While we agree that the evidence of the *physical* extent of Roberts's brain injury was uncontroverted, we point out that the *effect* of the injury on Roberts's behavior was highly controverted. As noted in the previous section, the defense experts stated that his brain injury resulted in Roberts being unable to control his emotions and actions. They also indicated that the injury resulted in Roberts's behaving more like an adolescent, than an adult. However, neither defense expert opined that Roberts lacked the ability to understand his legal rights or that he

lacked the capacity to appreciate the criminality of his actions. To the contrary, Dr. Wetherby stated that Roberts knew he was in trouble after he had raped Andria, and Dr. Archer specifically stated that Roberts could understand right from wrong.

Dr. Rutherford, one of the State's experts, testified that he agreed with Dr. Archer as to the extent of the physical injury to Roberts's frontal lobe. He opined, however, that the relationship between the loss of tissue and brain function was less clear cut. He stated that from his review of the medical records and Roberts's reported history, he found no severe or dramatic behavioral problems that would indicate that his brain injury was the sole cause of his actions on the date in question. He further pointed out that the majority of the tissue loss to Roberts's brain was to the right frontal lobe, and that it was better to sustain an injury to that side of the brain, because loss on that side will result in less aberrant behavior. Finally, he stated that there are many reasons, besides a frontal-lobe injury, that a person may have behavioral problems, and that, in his opinion, Roberts's brain injury was not the cause of his criminal actions.

Based on this conflicting evidence of the effect of Roberts's brain injury on his behavior and actions, we are hard pressed to conclude, as the dissent does, that Roberts's brain injury made him especially vulnerable to Officer Rateliff's ambiguous statement of help. Instead, we conclude that the totality of the evidence in this case demonstrates that the trial court did not clearly err in denying Roberts's motion to suppress his statement. Because there was no error in refusing to suppress the statement, there is likewise no error in refusing to suppress the physical evidence gained as a result of the statement. Where the tree is not poisonous, neither is the fruit. *Jones v. State*, 348 Ark. 619, 74 S.W.3d 663 (2002); *Criddle v. State*, 338 Ark. 744, 1 S.W.3d 436 (1999).

B. Juror for Cause

Appointed counsel next argues that the trial court erred in refusing to strike for cause juror Glenda Gentry, who was seated on Roberts's jury. During jury selection, defense counsel objected to Mrs. Gentry on the ground that she had stated that she had been sexually abused by her father when she was eighteen years old. Although the exact date of the abuse is unknown, it appears to have

occurred many years earlier, given that Mrs. Gentry stated that she had children ages thirty, twenty-nine, and twenty-four. Mrs. Gentry indicated that her allegations had resulted in the prosecution of her father, but that he was ultimately acquitted of the crime.

When asked if she carried any resentment because of the incident or because of the failure of the criminal-justice system, Mrs. Gentry stated that her father was now dead, and that the matter was over and she could not change anything. When asked if she could be fair and impartial in this case, given that Roberts was charged with raping and killing a twelve-year-old girl while he was thirty-one years old, Mrs. Gentry stated that she could. She stated further that she could set aside anything that had happened to her personally and decide the case based on the facts and the law. When asked by the prosecutor if she could still be impartial in light of the fact that Roberts was the victim's uncle and there was a family relationship involved, she stated that she could. Mrs. Gentry then stated that the family relationship did not change any of the answers that she had given to defense counsel.

At the conclusion of the questioning, the prosecutor announced that the juror was acceptable to the State, but defense counsel asked to approach. At the bench, defense counsel informed the trial court that if they had any peremptory strikes left, they would use one on Mrs. Gentry. Counsel then stated: "It doesn't appear that her answers go to the level of moving for cause." However, defense counsel argued that had the trial court granted some of their prior motions to strike other jurors for cause, they would not have used up all of their peremptory strikes and would have been able to remove Mrs. Gentry from the jury.[2]

Appointed counsel now asserts as a point of error that the trial court should have excused Mrs. Gentry for cause. However, this point was not preserved for appellate review, since defense counsel essentially agreed with the trial court's ruling, conceding that there were no grounds to excuse Mrs. Gentry for cause. This court has repeatedly stated that a defendant cannot

[2] After much discussion at the bench, the trial judge indicated that he would be inclined to reverse one of his prior rulings on a motion to strike for cause, so that the defense would receive an additional peremptory strike. In response, defense counsel stated that he was satisfied with the record as it was. However, the record reflects that sometime after Mrs. Gentry's selection, defense counsel exercised an additional peremptory challenge.

agree with a trial court's ruling and then attack the ruling on appeal. *See, e.g., Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001); *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998). Accordingly, there is no reversible error reviewable under Rule 4-3(h) or section 16-91-113(a).

Nor does this point fall within one of the four plain-error exceptions set out in *Wicks*, 270 Ark. 781, 606 S.W.2d 366. Those exceptions are: (1) a trial court's failure to bring to the jury's attention a matter essential to its consideration of the death penalty itself; (2) error by the trial judge of which the defense has no knowledge and therefore no opportunity to object; (3) a trial court's failure to intervene without objection and correct a serious error by admonition or declaring a mistrial; and (4) failure of the trial court to take notice of errors affecting substantial rights in a ruling admitting or excluding evidence, even though there is no objection. Only the third exception could possibly apply to this case; however, given our law on the presumption of impartiality of jurors, it cannot be said that the trial court's failure to strike Mrs. Gentry on its own motion amounted to a serious error or grounds for a mistrial.

A juror is presumed to be unbiased and qualified to serve, and the burden is on the appellant to prove actual bias. *Spencer v. State*, 348 Ark. 230, 72 S.W.3d 461 (2002); *Smith*, 343 Ark. 552, 39 S.W.3d 739. 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 that discretion. *Id.* It is the appellant's burden to show that he or she was prejudiced by the juror being seated. *Id.* 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. *Spencer*, 348 Ark. 230, 72 S.W.3d 461; *Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998). Although the bare statement of a prospective juror that he or she can give the accused a fair and impartial trial is subject to question, any uncertainties that might arise from the juror's response can be cured by rehabilitative questions. *Id.*

The fact that Mrs. Gentry stated that she had been sexually abused by her father when she was an adolescent, in and of itself, is not sufficient evidence of bias to overcome the presumption of impartiality. Moreover, Mrs. Gentry's answers to

questions from defense counsel and the prosecutor demonstrate that she could lay aside any feelings she had about her abuse and decide Roberts's case on the merits. Accordingly, the trial court did not commit error, plain or otherwise, by declining to remove Mrs. Gentry for cause.

C. Sufficiency of the Evidence to Support the Aggravating Circumstance

Appointed counsel's last point of error is that there is insufficient evidence to support the jury's finding that the one aggravating circumstance submitted by the State existed beyond a reasonable doubt. That aggravating circumstance was that the murder was committed in an especially cruel or depraved manner, as set out in Ark. Code Ann. § 5-4-604(8) (Supp. 2001), which provides in pertinent part:

> (B)(i) For purposes of this subdivision (8)(A) of this section, a capital murder is committed in an especially cruel manner when, as part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, mental anguish, serious physical abuse, or torture is inflicted.
>
> (ii)(a) "Mental anguish" is defined as the victim's uncertainty as to his ultimate fate.
>
> (b) "Serious physical abuse" is defined as physical abuse that creates a substantial risk of death or that causes protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ.
>
> (c) "Torture" is defined as the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.

The State asserts that two of these elements were present in this case: (1) that Roberts intended to inflict mental anguish on the twelve-year-old victim by refusing to tell her what was going to happen to her, after she repeatedly inquired, and (2) that Roberts intended to and did inflict serious physical abuse on the girl when he violently raped her.

Whenever there is evidence of an aggravating or mitigating circumstance, however slight, the matter should be submitted to the jury for consideration. *Jones v. State*, 340 Ark. 1, 8 S.W.3d 482 (2000) (citing *Willett v. State*, 335 Ark. 427, 983 S.W.2d 409 (1998); *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943,

cert. denied, 519 U.S. 982 (1996); *Dansby v. State*, 319 Ark. 506, 893 S.W.2d 331 (1995)). Once the jury has found that an aggravating circumstance exists beyond a reasonable doubt, this court may affirm only if the State has presented substantial evidence in support of each element therein. *Id.*; *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998). Substantial evidence is that which is forceful enough to compel reasonable minds to reach a conclusion one way or the other and permits the trier of fact to reach a conclusion without having to resort to speculation or conjecture. *Id.* To make this determination, this court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *Jones*, 340 Ark. 1, 8 S.W.3d 482.

Here, the evidence showed that Andria was taken from her home by Roberts on May 15, 1999. According to his confession, Roberts knocked on the door, and Andria answered. Roberts knew that her parents were not home at the time. He told Andria to get into his truck. Andria then asked him what was wrong, and Roberts responded by telling her to just get in the truck. Andria complied. Roberts then proceeded on a journey of approximately ten miles that, according to Arkansas State Police Detective Lynn Benedict, would have taken twelve to thirteen minutes. Benedict also stated that the road that Roberts took continued to become darker and more remote, covered with low hanging trees and brush.

According to Roberts's statement, Andria asked him to take her home several times along the way. Roberts kept on driving. He eventually stopped his truck on an old logging road and told Andria to get out. When she asked him what he was going to do, he told her he was going to "fuck" her. He told her to take off her shirt and lay down. He then took off the girl's pants and raped her. While he was violating her, Andria tried to get away from him, but he was able to hold her down. He told police that when he finished raping her, he knew that he could not let her live, because he had ejaculated inside her. He then decided to kill her by mashing his thumbs into her throat. Once the child turned blue and passed out, he dragged her body off into the woods and covered her up with limbs and brush. He then took her clothes and threw them off a nearby bridge, into a creek.

Associate Medical Examiner Dr. Stephen Erickson testified that the child's vaginal vault was bruised in three different areas and,

in his opinion, the area was subjected to a significant amount of trauma. Erickson further stated that the sexual encounter would have to have been pretty rough to cause such "deep-seated injuries."

The foregoing is substantial evidence that the murder was committed in an especially cruel or depraved manner. Roberts's intention to inflict mental anguish on the girl is evident from his own admission that when he took Andria from her home, he would not tell her what was going to happen to her and he ignored her repeated pleas to be taken home. Instead of taking her home, Roberts drove her down a long, dark, remote logging road, which took some twelve or thirteen minutes to travel. He then violently raped her, causing deep-seated injuries to the child's vagina. Accordingly, we find no error on this point.

III. Review under Rule 4-3(h) and Section 16-91-113(a)

In addition to the issues briefed by appointed counsel, we have further reviewed the transcript of the record in this case for adverse rulings objected to by Roberts and his counsel, pursuant to Rule 4-3(h) and section 16-91-113(a), and no such reversible errors were found.

IV. Review for Plain Error under Wicks

Arkansas does not recognize plain error, *i.e.*, an error not brought to the attention of the trial court by objection, but nonetheless affecting substantial rights of the defendant. *Smith*, 343 Ark. 552, 39 S.W.3d 739; *State v. Robbins*, 342 Ark. 262, 27 S.W.3d 419 (2000). We have, however, adopted four limited exceptions in *Wicks*, 270 Ark. 781, 606 S.W.2d 366, as set out above. In *Robbins*, this court mandated consideration of the *Wicks* exceptions in death-penalty cases where, as in the instant case, the defendant has waived his or her appeal rights. Our review of the transcript of the record in this case reveals no errors under the *Wicks* exceptions.

V. Other Fundamental Safeguards

The final review requirement under *Robbins*, 339 Ark. 379, 5 S.W.3d 51, is to determine whether other fundamental safeguards were followed. This court did not define the term

"fundamental safeguards" in that case, nor do we attempt to do so here. Suffice it to say, nothing in the instant record reveals any irregularity in procedure that would call into question the essential fairness of the process afforded Roberts.

The dissent asserts that the jury in this case did not properly complete Form 2 of the sentencing instructions, which pertains to mitigating circumstances. The dissent contends that because sections B and C of that form were left blank, it cannot be determined whether the jury properly considered the mitigating evidence prior to imposing the death penalty. We note that neither trial counsel nor appointed counsel challenged the verdict forms. However, out of an abundance of caution, we will address the concern raised by the dissent.

The record reflects that the defense submitted a total of sixteen possible mitigating circumstances. Part A of Form 2 reflects that the jury unanimously found that nine of those mitigating factors existed. Part B contains no check marks, reflecting that of the remaining seven factors, none were found by any of the jurors to have been mitigating circumstances. Part C also contains no check marks, reflecting that there was no evidence presented substantiating those remaining seven factors.

The dissent is apparently concerned that because there are no check marks on Parts B and C, the jury disregarded the instructions on filling out those forms. The dissent is further concerned that the lack of marks on these forms may indicate that the jury did not properly consider the evidence on these proposed mitigating circumstances. Based on the record before us, we conclude that these concerns are not well founded.

This court has recognized that a jury may generally refuse to believe a defendant's mitigating evidence; however, when there is no question about credibility and when objective proof makes a reasonable conclusion inescapable, the jury cannot arbitrarily disregard that proof and refuse to reach that conclusion. *See Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996), *cert. denied*, 520 U.S. 1244 (1997) (citing *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), *cert. denied*, 517 U.S. 1226 (1996); *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, *cert. denied*, 434 U.S. 894 (1977)). In the present case, the jury was faced with neither unquestionable credibility nor objective proof that would make a

reasonable conclusion inescapable on any of the remaining seven proposed mitigating factors.

The first of the seven remaining factors was that the capital murder was committed while Roberts was under extreme mental or emotional disturbance. There was no credible evidence of this proposed factor. The second factor was that the murder was committed while Roberts lacked the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law due to a mental disease or defect or alcohol intoxication. There was no dispute on the first part of this factor, as all of the expert witnesses, even those for the defense, opined that Roberts knew right from wrong and therefore had the ability to appreciate the criminality of his conduct. However, there was conflicting testimony as to Roberts's ability to conform his conduct to the requirements of the law.

The third factor was that Roberts, although legally responsible, suffers from an intellectual deficit. This factor, like the first two, was the subject of conflicting testimony. Roberts's experts stated that he had low intellect and functioned like an adolescent. The State's experts, on the other hand, stated that while Roberts had a below-normal intellect, he functioned well in society, he could read and write on a high school level, and he was, as evidenced by his crimes, capable of engaging in a complex series of actions that included his efforts to conceal his crimes. Accordingly, the jury did not act arbitrarily in disregarding this conflicting proof.

The fourth and fifth factors were that as a result of Roberts's brain damage, his ability to control his emotions or impulses has been impaired and that his ability to accurately interpret social cues and communications with other persons has been impaired. Again, these factors were the subject of expert debate. As stated earlier in this opinion, there was no debate among the experts that Roberts had incurred some loss of the brain tissue in his right and left frontal lobes. However, there was strenuous debate about the effect that his brain injury had on his behavior, specifically as it pertained to his ability to control his actions and emotions and to his ability to function in society.

The sixth factor was that Roberts exhibited remorse about Andria's disappearance when interviewed by police. There was specific evidence countering this factor by Agent Jessie, who

stated that any remorse Roberts had was for himself. Jessie testified that the one thing that stuck out in his mind was Roberts's statement that he had managed to ruin *his* life in ten minutes.

Finally the seventh factor was that Roberts cooperated with police by leading them to Andria's body. Again, the evidence on this factor was conflicting. The record reflects that when Roberts was initially interviewed by police, the day after Andria was reported missing, he denied knowing anything about Andria's disappearance, and he lied to police about his whereabouts at the time. Roberts did not tell the truth until he was interviewed a second time and then only after he was confronted with the fact that he was being deceptive during the polygraph. The jury certainly could have concluded that Roberts's actions were less than cooperative.

Based on our case law, we cannot say that the jury erred in refusing to believe the defense's mitigating evidence. There was conflicting evidence presented on each of the remaining seven proposed mitigating factors. As such, the jury did not arbitrarily disregard unquestionably credible and objective proof. Accordingly, there was no error in the completion of the jury forms.

Affirmed.

THORNTON, J., dissents.

RAY THORNTON, Justice, dissenting. Because I believe that Roberts's confession was the result of a false promise to help, I must respectfully dissent. Specifically, I believe that based on the totality of the circumstances, the statements made by law enforcement officials to Roberts coupled with Roberts's vulnerability led to an involuntary confession that should have been suppressed.

Guilt Phase

Statements made while in custody are presumed to be involuntary, and the burden is on the State to show that the statements were made voluntarily, freely, and understandingly, without hope of reward or fear of punishment. *Stephens v. State*, 328 Ark. 81, 941 S.W.2d 411 (1997). In *Bisbee v. State*, 341 Ark. 508, 17 S.W.3d 477 (2000), we outlined the standards for reviewing the voluntariness of an in-custody confession. In *Bisbee*, we explained:

> The State bears the burden of proving by a preponderance of the evidence the voluntariness of an in-custodial confession. *Davis v. State*, 275 Ark. 264, 630 S.W.2d 1 (1982).
>
> * * *
>
> A statement induced by a false promise of reward or leniency is not a voluntary statement. *Clark v. State*, 328 Ark. 501, 944 S.W.2d 533 (1997). For the statement to be involuntary the promise must have induced or influenced the confession. *McDougald v. State*, 295 Ark. 276, 748 S.W.2d 700 (1988).
>
> * * *
>
> As with other aspects of voluntariness, we look at the totality of the circumstances. *Conner v. State*, 334 Ark. 457, 978 S.W.2d 300 (1998). The totality is subdivided into two main components: first, the statement of the officer, and second the vulnerability of the defendant. *Davis, supra*. We have articulated factors which we will look to in our determination of whether the defendant was vulnerable. Specifically, we have held that the factors to be considered in determining vulnerability include: 1) the age, education, and intelligence of the accused; 2) how long it took to obtain the statement; 3) the defendant's experience, if any, with the criminal-justice system; and 4) the delay between the Miranda warnings and the confession. *Conner, supra*.

Bisbee, supra.

In order to determine whether Roberts's confession was voluntarily given, it is necessary to review the facts surrounding Roberts's confession. On May 17, 1999, Karl Roberts went to the Polk County Police Station to take a polygraph exam. Following the exam, Officer Ocie Rateliff informed Roberts that the test results established that Roberts had been "deceptive" on the test. Immediately thereafter, Roberts stated that he had "messed up." Officer Rateliff testified that Roberts appeared "teary-eyed" while making this statement. Officer Rateliff also testified that after hearing Roberts's statement he moved his chair closer to Roberts, put his arm around Roberts, and told Roberts that he should "get it off your chest, we'll help."

As the majority correctly notes, the statement "get it off your chest, we'll help" is ambiguous. Because the alleged "promise" is ambiguous, we must look to Roberts's vulnerability to determine whether the officer's statement improperly induced Roberts's confession. *See Pyles v. State*, 329 Ark. 73, 947 S.W.2 d 754 (1997).

A review of the evidence established that Roberts was thirty-one years of age at the time he made the custodial statements. The evidence showed that from the time Officer Rateliff gave Roberts his *Miranda* warnings, upon arriving at the police station, until he was told "we'll help," was two hours, and that from the time Roberts stated that he had "messed up" until his confession was completed, was approximately another two hours. The record does not reveal any prior experience Roberts may have had with the criminal-justice system.

The four hours between the *Miranda* warnings and the completion of the confession following the ambiguous promise "we'll help" are not excessive, but that does not resolve the question of whether Roberts was vulnerable.

I believe that the evidence establishing that Roberts's intelligence level was well below average was significant. Dr. Charles Mallory from the State Hospital testified that he had given Roberts an IQ test and that the results from the test revealed that ninety-five percent of the population would have performed at a higher level than Roberts. Dr. Mallory also testified that Roberts's IQ score of 76 was considered to be in the range of "borderline intellectual functioning." He explained that this meant that Roberts was not mentally retarded, but was of below normal intelligence.

This psychological assessment was echoed by Special Agent Mark Jessie and Officer Rateliff. Agent Jessie was in the interrogation room at the time Officer Rateliff offered his promise and at the time Roberts made his confession. Agent Jessie testified that he considered Roberts to be a "man of below normal intelligence." He also testified that he "would have guessed [Roberts] to be a kid that would have been slow in school."

Officer Rateliff described Roberts as someone who was "a little slower than most people." He also explained that Roberts's voice was "monotone" and "not normal."

Not only was Roberts capable of only "borderline intellectual functioning," I believe it is even more significant that there was uncontroverted evidence that at age twelve Roberts suffered severe brain damage in an accident that destroyed one-fifth of his right frontal lobe and damaged other parts of his brain. Magnetic Resonance Imaging scans of Roberts's brain clearly revealed that a

significant part of his right frontal lobe, as well as the medial aspect of his left frontal lobe, and part of his temporal lobe were missing.[1]

Dr. Lee Archer, a neurologist from UAMS, testified:

> My opinion is that if it were not for the injury that Karl Roberts sustained in 1980 he would not have committed this crime. Prior to Karl's accident in 1980 he had no behavioral problems.
>
> * * *
>
> During my examination of him, Karl acted more like an adolescent than an adult. Adults will make eye contact and will engage in some small talk. Karl avoids eye contact and he makes no small talk.
>
> * * *
>
> There are also some subtle findings that indicate a dysfunction of the brain. His handwriting is very laborious, his speech has a telegraphic quality where he uses just essential words to communicate, and his gait is a little bit abnormal.

From this testimony, it is clear that the combination of a borderline I.Q. and adolescent behavior patterns resulting from severe brain damage made Roberts vulnerable to the ambiguous promise "get it off your chest, we'll help."

Evidence presented at the hearing showed that Roberts, who was emotionally upset during the interrogation, was vulnerable to Officer Rateliff's false promise. Specifically, Officer Rateliff testified that prior to making the statement to Roberts he noticed that Roberts was "teary eyed." Officer Rateliff also testified that he had moved his chair close to Roberts and placed his arm around Roberts shoulder before he promised to "help" Roberts. Officer Rateliff further testified that after he had promised to help, Roberts was "very upset" and "had a quiver in his voice."

Agent Jessie also testified about Roberts's sensibilities. He stated that after Officer Rateliff put his arm around Roberts, and told him that they would help, Roberts "broke down and began

---

[1] Uncontroverted expert testimony showed that such destruction of the frontal lobes produces an effect similar to that suffered by Phineas Gage approximately 150 years ago when a dynamite blast drove a crowbar through his frontal lobes. Before that time Mr. Gage had been a hard-working family man. Although he survived the accident, he became animal-like in his behavior and as a result of scientific study over the century and a half following the injury, the role of the frontal lobes in controlling behavior has become well documented.

to sob." Agent Jessie further explained that Roberts continued to cry for several hours.

Based on the totality of the circumstances, I would conclude that the State did not meet its burden of proving that Roberts's confession was voluntarily given. For that reason, the trial court erred in denying his motion to suppress. Because the confession was involuntarily given, any evidence recovered as a result of that confession would be fruit of the poisonous tree and would therefore be inadmissible.

I also dissent because I believe that *Pyles v. State*, 329 Ark. 73, 947 S.W.2 d 754 (1997), is indistinguishable from the case now on review. In *Pyles*, we were asked to determine whether an officer had made a false promise to Pyles which induced him to confess. The facts surrounding Pyles' confession were outlined in the opinion. We explained:

> Following a long interrogation of several hours by other officers, Officer Howard began to interrogate Pyles. Officer Howard testified that he knew Pyles prior to the arrest through baseball and that he visited with Pyles about that. He testified that he told Pyles that it was important for him to tell the truth and that "they knew he did it." He also testified that he told Pyles that he did not believe that Pyles was a cold-blooded killer and that he told Pyles that he would "do everything in the world [he] could for him." Pyles claims that he confessed after Officer Howard made this statement.

Pyles, supra.

After reviewing other cases involving confessions, we noted:

> Often it is difficult to determine whether an officer's statement is a promise of reward or leniency, a statement meant to deceive, or merely an admonishment to tell the truth. In *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979), we allowed a statement by an interrogating officer that, "things would go easier if you told the truth." However, in *Tatum v. State*, 266 Ark. 506, 585, S.W.2d 957 (1979), we determined that the statement, "I'll help you any way that I can" was a false promise. On several occasions, we have held statements to be false promises: when the officer claimed he "would do all that he can," *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1980), and when the officer said "I'll help all that I can." *Shelton v. State*, 251 Ark. 890, 475 S.W.2d 538 (1972).

Pyles, supra.

We then went on to consider Pyles' vulnerability, and wrote:

> In the case before us, the record reflects that Pyles became emotional when he was interrogated by Officer Howard. Both Pyles and Officer Howard testified that Pyles held the officer's hands and wept. Pyles testified that he was emotional and tired from a long interrogation. The statement that Officer Howard made closely resembles those which we held unacceptable in *Tatum*, *Hamm*, and *Shelton, supra*. Therefore, we must conclude that the officer's action constituted a false promise that resulted in an involuntary confession.

Pyles, supra.

Pyles is squarely on point with the case now under consideration. Specifically, the statements made by the officers in each case amounts to a wide sweeping promise of "help." The criminal defendants in both cases were emotionally distraught and subject to police inducement. Moreover, the officers in both cases used the criminal defendant's vulnerability to induce a confession. Because *Pyles* is factually indistinguishable from the case now on review, and because we determined that the confession in *Pyles* should have been suppressed, I conclude that Roberts's confession should have been similarly suppressed. I dissent and would remand this case for a new trial on the charges.

Penalty Phase

I must also dissent from the imposition of the death sentence upon Roberts in the penalty phase because I cannot say with certainty that the verdict forms were completed in accordance with statutory requirements. We have consistently held that the death sentence may not be imposed unless the jury makes the required statutory finding. *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997).

In the case now before us, Form 2 sections "B" and "C," relating to mitigating circumstances, were left blank. Because a significant portion of Form 2 is blank, we cannot determine whether the jury properly considered the mitigating evidence prior to imposing the death penalty. The majority contends that while there was conflicting evidence with regard to the existence of seven mitigating circumstances, the jury did not have to consider those circumstances as having been established. That is correct. But, the jury was statutorily required to consider the

evidence concerning those seven mitigators, and to make a written decision as to whether or not they had been established. This the jury did not do. Having failed to use Form 2B to indicate whether some jurors believed some of those mitigators existed, but that the panel did not agree that they were mitigators, the jury also failed to use Form 2C to indicate that the evidence supporting the other mitigators was not sufficient to prove the existence of those mitigators. In summary, after finding the existence of nine mitigators as marked on Form 2A, the jury did not execute any written disposition of the remaining seven mitigating circumstances for which some evidence was presented. The requirement to make this analysis is clear in Form 2B and 2C, and the jury made no use of those forms. In my view, the failure to make written findings as to the validity of those seven mitigators constitutes error requiring a new sentencing trial. Because we cannot determine whether the jury considered the seven mitigating factors for which some evidence was presented, I cannot join the majority opinion in approving Roberts's sentence even if there were no error in the guilt phase of the trial.

I respectfully dissent.

Duke E. ERVIN *v.* STATE of Arkansas

CR 03-278 102 S.W.3d 501

Supreme Court of Arkansas
Opinion delivered April 10, 2003

William R. Simpson, Jr., Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

No response.

PER CURIAM. Appellant Duke E. Ervin by and through his attorney, Clint Miller, has filed a motion for a belated appeal from his convictions of first-degree battery and being a felon in possession of a firearm. Appellant was convicted following a jury trial on September 30, 2002. The judgment and commitment order was entered on October 3, 2002. On December 3, 2002, Appellant filed an untimely *pro se* notice of appeal in the Pulaski County Circuit Court. On that same day, he also filed motions requesting permission to proceed *in forma pauperis* and requesting the appointment of counsel to pursue his appeal.

The trial court held a hearing on these motions on February 3, 2003. At that hearing, the trial court relieved John Purtle, who had represented Appellant at trial, from further representation of Appellant. The trial court further appointed the Sixth Judicial District Public Defender's Office as Appellant's counsel on appeal.

Appellant now seeks permission to file a belated appeal from this court. Attached to his petition is an affidavit from Mr. Purtle accepting complete responsibility for failing to timely file the notice of appeal. We find that such an error, admittedly made by an attorney for a criminal defendant, is good cause to grant the motion. *See Jacks v. State*, 344 Ark. 405, 39 S.W.3d 459 (2001) (*per curiam*); *Donald v. State*, 341 Ark. 803, 20 S.W.3d 331 (2000) (*per curiam*); *Harkness v. State*, 264 Ark. 561, 572 S.W.2d 835 (1978).

The motion for belated appeal 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*).

Appellant's appointed appellate counsel has also filed a motion requesting that this court appoint new counsel to represent Appellant. According to counsel, the public defender's office already has a

substantial caseload consisting of appeals of those persons it represented at the trial level. It further avers that it does not wish to become appellate counsel for those persons represented by retained counsel at trial who can no longer afford retained counsel on appeal. While we are mindful of the substantial caseload it bears, in the absence of any conflict of interest, this court will not relieve the public defender's office as Appellant's counsel on appeal.

The motion for appointment of counsel is, therefore, denied.

Richard L. HAMILTON *v.* Teddy D. JONES, *et al.*

02-749 102 S.W.3d 479

Supreme Court of Arkansas
Opinion delivered April 10, 2003

S. Butler Bernard, Jr, for appellant.

No response.

PER CURIAM. Richard L. Hamilton, through his attorney S. Bernard Butler, filed a motion for a writ of certiorari, requesting that we direct court reporter, Iris Brooks, to complete the remaining portion of the transcript to be included in the record.

On December 19, 2002, we issued a *per curiam* opinion ordering Ms. Brooks to appear before this court to show cause why she should not be held in contempt of court for failing to prepare the record on or before the appropriate time. *See Hamilton v. Jones*, 351 Ark. 382, 93 S.W.3d 694 (2002). The hearing

was held on January 16, 2003, and Ms. Brooks testified as to the mitigating circumstances. On January 23, 2003, we issued a *per curiam* order regarding a contempt citation directed to Iris Brooks in which we entered the contempt citation with a reduced fine of $100.00. *See Hamilton v. Jones*, 351 Ark. 561, 95 S.W.3d 809 (2003). We take this opportunity to correct an error in this previous *per curiam* opinion. In the January 23, 2003 order, we stated that "On January 9, 2003 the record was tendered to our clerk." *Id.* That is incorrect. In fact, only a partial record, one volume of four, was tendered to our clerk on December 9, 2002. As of this date, the record has not been completed.

Accordingly, we issue this writ of certiorari directing Iris Brooks to complete the record, which is returnable within thirty days.

Raymond C. SANDERS, JR. *v.* STATE of Arkansas

CR 01-95 102 S.W.3d 480

Supreme Court of Arkansas
Opinion delivered April 10, 2003

Jeff Rosenzweig, for appellant.

Mike Bebee, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

PER CURIAM. This is a death case. Sanders's death sentence was affirmed by direct appeal to this court. *Sanders v. State*, 318 Ark. 328, 878 S.W.2d 391 (1994). Appellant Raymond C. Sanders, Jr., through his attorney, Jeff Rosenzweig, now petitions for rehearing or clarification of this court's recent opinion of February 13, 2003, reversing the judgment of the circuit court denying Sanders a Rule 37 hearing. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003). Sanders claims in his rehearing petition that this court denied his request for appointment of counsel for the evidentiary hearing on remand on the basis that he was already represented by competent counsel. He maintains, however, that his counsel served without compensation at the trial level. He further contends that in order to comply with Ark. R. Crim. P. 37.5, appointment of counsel is required.

We noted in our recent *Sanders* opinion, the policy behind Rule 37.5 and Sanders's status regarding representation by counsel:

> As a final note, Appellant asks this court to make a determination of whether the protections of Rule 37.5 should be applied to him in this case. Rule 37.5, which became effective on August 1, 1997, provides the method for pursuing postconviction relief in death-penalty cases. The rule evolved from Act 925 of 1997, now codified at Ark. Code Ann. §§ 16-91-201 to -206 (Supp.1999), where the 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.* Appellant recognizes that the rule is inapplicable to his case, because he became eligible to file his Rule 37 petition prior to the effective date of Rule 37.5. *See* Rule 37.5(k). He argues, though, remanding his case without providing him counsel under Rule 37.5 amounts to a denial of equal protection in violation of the Fourteenth Amendment and Article 2, § 18, of the Arkansas Constitution. Although this court in *Wooten*, 338 Ark. 691, 1 S.W.3d 8, addressed the application of the principles of Rule 37.5 to a petition filed before the rule's effective date, we are unaware of such a need in the instant case. It is apparent from the record before us that Appellant is already represented by qualified counsel; thus, any discussion of appointing counsel pursuant to Rule 37.5 is moot.

Sanders, 352 Ark. at 28-29, 98 S.W.3d at 43.

The issue now presented to this court is a payment issue. Counsel for Sanders advises this court that he is not retained counsel but has served *pro bono publico.* He also indicates that failure to be formally appointed counsel under Rule 37.5 procedure would jeopardize protection against multiple federal *habeas corpus* proceedings in this case. It is true that Sanders's eligibility to file a Rule 37.5 petition predates the effective date of the rule. Nevertheless, this court has afforded Rule 37.5 protections to similarly situated petitioners where there was some procedural defect. *See, e.g., Jackson v. State,* 343 Ark. 613, 37 S.W.3d 595 (2001) (failing to meet stringent filing deadlines for Rule 37 review not dispositive of case when appellant believed he was represented by counsel and was not); *Porter v. State,* 339 Ark. 15, 2 S.W.3d 73 (1999) (pre-Rule 37.5 case; Rule 37 petition was late due to confusion over representation by counsel; held good cause was established "in the narrowest of instances where the death penalty was involved.").

We direct the circuit court to commence proceedings to determine appointment of counsel in this matter pursuant to Ark. R. Crim. P. 37.5.

Jimmy R. SMART, Jr. *v.* STATE of Arkansas

CR 02-1013 104 S.W.3d 386

Supreme Court of Arkansas
Opinion delivered April 17, 2003

[Petition for rehearing denied May 8, 2003.

John H. Bradley, public defender, for appellant.

Mike Bebee, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. Jimmy R. Smart appeals his conviction and life sentence for the October 27, 2000, capital

murder of Manila resident C.B. Murphy.[1] Smart raises three arguments, none of which has merit.

Smart's first argument on appeal is that the trial court erred in denying his motion to suppress the statement he gave to police officers. Although Smart does not contend the evidence was insufficient to support his conviction, we must first briefly discuss the facts leading to his arrest and the statement. Murphy was murdered on October 27, 2000, and his body was discovered the morning of the following day — Saturday, October 28. That Saturday afternoon, a friend called Smart to say the police were looking for Smart and several other people who had been partying the night before in the trailer park where Murphy lived. Shortly before 3:00 p.m., Smart arrived on his own at the Manila Police Department. Once there, Smart spoke with Mississippi County Sheriff's Department Investigator Robert Ephlin, who advised Smart of his *Miranda* rights. Smart executed the *Miranda* rights form at 2:55 p.m., stating that he understood what his rights were and that he was willing to answer questions and make a statement. Smart did not request an attorney, but instead proceeded to give a statement denying any involvement in the murder.

Ephlin testified at the suppression hearing that, at this time, Smart was free to go, but Smart stayed at the police station. A short while later, Ephlin decided that he wanted to question Smart again, and so he again went over the *Miranda* form with Smart. However, Smart indicated that he thought he might need an attorney, so Ephlin terminated the interview. At that point, Ephlin said, Smart was still not under arrest and was still free to leave the building. Ephlin and Chief of Police Jackie Hill left the room to talk.

After a few minutes, Smart came to the door and indicated that he wanted to talk to Ephlin again, saying, "Bobby, would you come back and talk to me? Let's get this over with." Ephlin and Hill went back into the room with Smart, and Ephlin again read Smart the *Miranda* rights form. Smart initialed and signed the form, and proceeded to give a videotaped statement, during which Smart acknowledged that he had initiated the contact with the officers. Ephlin asked Smart if he wanted to take a polygraph

[1] Smart was also convicted of burglary, but does not challenge that conviction on appeal.

test, and Smart replied that he did. Smart continued to deny any involvement in the murder.

About 8:30 p.m., Ephlin called Lieutenant Bobby Walker with the State Police and arranged for a polygraph with State Police Detective Charlie Beall; Ephlin and Beall agreed to meet at Troop C Headquarters in Jonesboro. During the interval between the videotaped statement and Ephlin's calling the State Police, Smart was fed a cheeseburger and fries, and was allowed to take a nap on a cot in an unlocked holding cell at the police station. Ephlin testified that, during this interval, Smart was still free to leave at any time.

During the drive from Manila to Jonesboro, Smart was handcuffed, but Ephlin asserted that this was due to his lack of knowledge of whether Smart may have been involved in a brutal crime. The police car in which they were driving did not have a screen between the driver and the passenger in the rear seat, so Ephlin cuffed Smart's hands in front of him as a security measure. Ephlin averred that Smart was still not under arrest at this time, and the cuffs were removed when they arrived in Jonesboro.

Detective Beall conducted a polygraph examination of Smart after advising Smart of his *Miranda* rights; Smart once more initialed and signed the waiver of rights form at 9:30 p.m. The polygraph examination lasted about an hour and forty-five minutes. After the polygraph, Beall took a tape-recorded statement from Smart, again orally advising him of his rights and securing his agreement that he understood his rights. Beall testified that he did not coerce, threaten, or promise Smart anything, that Smart never requested an attorney, and that Smart did not appear to be under the influence of drugs or alcohol. During the taped statement, which lasted from 12:30 a.m. until 12:51 a.m., Smart confessed to killing Murphy. At that time, Smart was formally placed under arrest.

At the suppression hearing, Smart argued that his confession was obtained after he was "unconstitutionally detained," and that the detention was effected without probable or reasonable cause to suspect that he had participated in the murder. As evidence of the detention, Smart pointed to the fact that he remained in the Manila police station from 3:00 in the afternoon until 7:00 that evening. As proof that he was not free to leave the police station, he pointed to the fact that he did not leave, but stayed in the

police station and waited. Finally, Smart argued that the "most telling" evidence of his detention was the fact that the officers placed him in the backseat of a police car, in handcuffs, to take him to Jonesboro.

The trial court denied the motion to suppress, finding that Smart had voluntarily gone to the police department, and never asked to leave. The court ruled that the length of time Smart was there was not unreasonable, and that the officers had treated him well — feeding him and giving him a place to nap — while he was there. The court further found that the nature of the restraint with the handcuffs was reasonable, and that Smart consented to going to Jonesboro, and did so with the understanding that it would take some time to drive there.

Smart continues his arguments on appeal, maintaining that, because his inculpatory statement was given after an extended period of detention, his statement should have been suppressed. He cites *Shields v. State*, 348 Ark. 7, 70 S.W.3d 392 (2002), and *Friend v. State*, 315 Ark. 143, 865 S.W.2d 275 (1993), in support of his argument. In *Shields*, appellant Darwin Shields had been approached by police officers in regard to the disappearance of Shields's girlfriend, but when the police discovered suspicious items in Shields's car, they asked him to go to the police station for further questioning. Once there, Shields confessed to having murdered his girlfriend. On appeal, Shields argued that his confession should have been suppressed because the police should have made it clear to him that he was under no legal obligation to accompany them to the police station. This court rejected Shields's contention, holding that a verbal admonition of a suspect's freedom to leave was but "one factor to be considered in our analysis of the total circumstances surrounding compliance with [Ark. R. Crim. P.] 2.3." *Shields*, 348 Ark. at 11-12. We further cited *United States v. Mendenhall*, 446 U.S. 544 (1980), where the Supreme Court discussed whether a person's consent to accompany police officers is voluntary or is the product of duress or coercion. Stating that such a determination is to be made in light of the totality of the circumstances, the *Mendenhall* court held that "a person has been '*seized*' within the meaning of the Fourth Amendment *only if*, in view of all of the circumstances surrounding the incident, *a reasonable person would have believed that he was not free to leave*." *Mendenhall*, 446 U.S. at 554-55 (emphasis added). Because Shields conceded that he went voluntarily to the

police station, this court rejected his argument that he had been illegally seized.

Shields raised an alternative argument that he had been arrested without probable cause, pointing to the fact that he had been handcuffed while being transported to the police station. This court likewise dismissed that argument, pointing out that the officer who handcuffed Shields informed him that such action was police department policy, and that Shields acknowledged that he understood this. We also held that our decision did not turn on the question of the handcuffing, stating that the question of whether a confession was the product of a free will is to be answered under the facts of each case, although no single fact is dispositive. *Id.* at 15. Examining the totality of the circumstances, which included Shields's repeated agreements that he was at the police station voluntarily, the court held that, even if Shields had been arrested illegally, his confession was still voluntary. *Id.* at 17.

In addition to the *Shields* case, Smart relies on *Friend v. State, supra,* wherein this court reversed a conviction on the basis that appellant Friend had been illegally arrested. That case is factually distinguishable from the present case, in that Friend's arrest was effectuated by Garland County officers, when those officers had only been asked to hold Friend until Sevier County officials could arrive to arrest him. In addition, the *Friend* case involved the improper use of a prosecutor's subpoena to obtain Friend's cooperation with questioning; the court held that the subpoena was illegally used "to subvert the requirements applicable to investigative stops." *Friend,* 315 Ark. at 152. No such concerns are implicated in the instant case, and Smart's attempts to analogize his situation to that in *Friend* are unavailing.

Likewise, Smart's reliance on *Shields* is misplaced, as it is apparent that his confession was not the result of an illegal arrest or other improper police activity. Smart appeared at the police station on his own volition. He initialed no less than four *Miranda* forms; on the second one, when he indicated that he though he might need an attorney, Ephlin immediately terminated the interview. Although two officers were present during the interview, there was no evidence that they displayed weapons, acted in a threatening or coercive manner in any respect, or indicated in any way that Smart could not leave. In fact, during Smart's confession, Detective Beall asked Smart, "I have never told you that you

couldn't leave here . . . uh, is that correct?" Smart replied, "Yes, sir." The officers fed Smart, and they gave him a place to lie down and nap. Although the officers conceded that they did not inform Smart that he was free to leave, Smart himself never testified that he tried to leave or that he believed that he would not have been able to leave the police station if he had tried.

As the State points out, the only act by the police that actively interfered with Smart's freedom was when the officers handcuffed Smart and placed him in the back seat of the police car for the drive from Manila to Jonesboro. However, Smart who had had previous encounters with law enforcement officers, voluntarily agreed to go to Jonesboro for the polygraph test. Ephlin testified that the only reason he handcuffed Smart was because Ephlin did not know at the time whether Smart had been involved in a brutal murder. Further, Smart was uncuffed as soon as they got to Jonesboro; Detective Beall testified that Smart was not wearing handcuffs when he arrived inside the State Police Headquarters. This was a temporary and reasonable precaution on the part of the officers. In addition, Smart was again advised of his *Miranda* rights prior to speaking to Beall and giving his confession some three hours after the handcuffs were removed. Coercive police activity is a necessary component of an involuntary statement, and there must be an essential link between the coercive behavior of the police and the resulting confession of the accused for suppression to occur. *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001). Given the totality of the circumstances, it is apparent that the trial court did not err in denying Smart's motion to suppress.

For his second point on appeal, Smart argues that the trial court erred in admitting crime scene and autopsy photographs, and he asserts that these photos were inflammatory and more prejudicial than probative. Smart specifically questions the admissibility of State's Exhibits 17, 18, and 19, displaying the body at the crime scene, and State's Exhibits 37 through 53, which were photographs taken by the medical examiner during the course of the autopsy on Murphy.

The controlling rule of evidence is Ark. R. Evid. 403, which states that 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 presenta-

tion of cumulative evidence." The admissibility of photographs lies in the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. *Mosby v. State*, 350 Ark. 90, 85 S.W.3d 500 (2002); *Hamilton v. State*, 348 Ark. 532, 74 S.W.3d 615 (2002).

This court has repeatedly stated that when photographs are helpful to explain testimony, they are ordinarily admissible. *Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001); *Williams v. State*, 322 Ark. 38, 907 S.W.2d 120 (1995). Further, the mere fact that a photograph is inflammatory or is cumulative is not, standing alone, sufficient reason to exclude it. *Weger v. State*, 315 Ark. 555, 869 S.W.2d 688 (1994). Even the most gruesome photographs may be admissible if they assist the trier of fact by shedding light on some issue, proving a necessary element of the case, enabling a witness to testify more effectively, corroborating testimony, or enabling jurors to better understand the testimony. *Barnes*, *supra*. Other acceptable purposes are to show the condition of the victim's body, the probable type or location of the injuries, and the position in which the body was discovered. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000); *Sanders v. State*, 340 Ark. 163, 8 S.W.3d 520 (2000). Pictures may also be helpful to the jury by showing the nature and extent of wounds and the savagery of the attack on the victim. *Bradford v. State*, 306 Ark. 590, 815 S.W.2d 947 (1991).

The trial court must exercise some discretion in its decision-making regarding the admissibility of photographs. *Mosby*, *supra*. Stated differently, the trial court cannot simply give *carte blanche* to the admission of any and all photographs of the crime scene and victim offered by the prosecutor, as that would be a failure to exercise discretion. *Id.* (citing *Berry v. State*, 290 Ark. 223, 718 S.W.2d 447 (1986)).

Here, the trial court reviewed eleven photographs of the crime scene, but permitted the State to introduce only three of them, opining that they were "probably . . . the lesser offensive of the eleven that you've shown me." The court noted that the three photos that were admitted into evidence "depict the body with a weapon, [and] they also display and depict the crime scene and the location of the weapons, and therefore, are probative to that issue, and even though they aren't the prettiest things to look at,

I've seen worse." Clearly, the trial court exercised its discretion in determining which pictures should be admitted.

Smart also argues that the photographs were cumulative to the crime scene videotape that the State also introduced. However, this court has held that videotapes can give the jury a different perspective of the crime scene, and in that way, they can be helpful to a jury's understanding of the case. *Hamilton v. State*, 348 Ark. 532, 74 S.W.3d 615 (2002). In *Hamilton*, this court stated that, "[c]ertainly, the crime scene was bloody and gruesome, but whether the prosecutor overstepped his bounds in the submission of cumulative depictions is a matter that lies within the trial court's discretion." *Hamilton*, 348 Ark. at 541.

Further, Smart contends that the autopsy photographs were gruesome and unfairly prejudicial. The State introduced seventeen photos from the autopsy; these pictures showed various wounds on Murphy's body, including numerous shots of the back of his head both before and after the medical examiner shaved his hair to better examine the extent of the crushing blows to the back of Murphy's skull. Other photos showed the stab wounds to Murphy's torso and back, and one defensive-type cutting wound on his wrist. Dr. Frank Peretti, the medical examiner, described the cluster of stab wounds on Murphy's chest as coming from two different implements and as being consistent with "a lack of struggle on the victim's part. The person is unconscious or in the process of dying." As photographs may be utilized to demonstrate the "savagery of the attack on the victim," *see Bradford, supra*, and to corroborate the medical examiner's testimony, *see Mosby, supra*, we hold the trial court did not abuse its discretion in admitting these pictures.

Finally, Smart argues that the fact of Murphy's murder and the cause of his death were undisputed, and that it was prejudicial to parade gruesome photographs before the jury. A defendant, however, cannot prevent the admission of a photograph merely by conceding the facts portrayed therein. *Sanders v. State, supra*. Therefore, this argument is also without merit.

Smart's final argument is that the trial court erred in denying his motion for new trial. The decision whether to grant or deny a new trial lies within the sound discretion of the trial court, and this court will reverse that decision only if there is

a manifest abuse of discretion. *Henderson v. State*, 349 Ark. 701, 80 S.W.3d 374 (2002). A trial court's factual determinations on a motion for a new trial will not be reversed unless clearly erroneous, and the issue of witness credibility is for the trial judge to weigh and assess. *Id.*

Smart filed his motion for new trial after a Mrs. Sue Yarbrough advised his attorney that she might have additional information about the case. Yarbrough alleged that she had seen Murphy's body lying on the floor of his trailer at 6:30 a.m. on Friday, October 27, nearly twenty-four hours before police officers found his body. In his motion, Smart argued that the medical examiner had placed the time of death between 6:00 p.m. on Thursday night, October 26, 2000, and early Saturday morning on October 28, 2000. Yarbrough's evidence, he claimed, placed the time of death prior to early Friday morning, instead of Friday night, which, he argued, would have had a bearing on his defense and the jury's conviction of him.

Following a hearing, the trial court denied Smart's motion, noting first that Yarbrough's testimony about where she had seen the body conflicted with the trial testimony of the investigating officers, who had found Murphy at the opposite end of the trailer. In addition, the court stated that Yarbrough's testimony did not conflict with the range for the time of death given by the medical examiner. Finally, pointing out that Yarbrough described no physical injuries and claimed to have seen no evidence of blood or trauma, and that she had kept silent for over a year and a half after Murphy's murder, the court concluded that it did not find her a credible witness.

The trial court did not abuse its discretion in refusing to consider this "newly discovered" evidence as requiring a new trial. We have long held that newly discovered evidence is one of the least favored grounds to justify a new trial. *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997); *Bennett v. State*, 307 Ark. 400, 821 S.W.2d 13 (1991); *Williams v. State*, 252 Ark. 1289, 482 S.W.2d 810 (1972). Here, Yarbrough testified that she did not see any blood on Murphy, even though crime scene photographs clearly showed the presence of blood covering Murphy. In addition, Yarbrough claimed to have seen Murphy's body at the opposite end of the house from where the police found his body. Lastly, Yarbrough never offered her story until her daughter, who attended

Smart's trial, told Yarbrough that she thought Smart was innocent. Clearly, in view of these inconsistencies, the trial court's determination that Yarbrough was not credible was well-founded, and accordingly, we conclude the trial court's ruling denying Smart's motion for new trial did not amount to an abuse of discretion.

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

Affirmed.

Scipio JOHNSON and Bessie Johnson *v.*
UNION PACIFIC RAILROAD; Bonds Fertilizer, Inc.;
and Bonds Brothers, Inc.

02-602 104 S.W.3d 745

Supreme Court of Arkansas
Opinion delivered April 17, 2003

[Petition for rehearing denied May 15, 2003.]

Parker Law Firm, Ltd. by: *Tim S. Parker*, for appellants.

William H. Sutton, *Scott Tucker* and *Joseph P. McKay*, for appellee Union Pacific Railroad Company.

Barber, McCaskill, Jones & Hale, P.A., by: *John S. Cherry, Jr.* and *D. Keith Fortner*, for appellees Bonds Fertilizer, Inc. and Bonds Brothers, Inc.

DONALD L. CORBIN, Justice. This case arises from an accident in which a train collided with a truck near Tamo, Arkansas, on June 28, 1995. Appellant Scipio Johnson was a passenger in the truck and was seriously injured when he was thrown from the vehicle upon impact. He and his wife, Bessie Johnson, filed suit in the Jefferson County Circuit Court against Appellees Union Pacific Railroad, Bonds Fertilizer, Inc., and Bonds Brothers, Inc., alleging negligence and a loss of consortium. The trial court granted summary judgment to Bonds Fertilizer and Bond Brothers.[1] The trial court granted partial summary judgment to Union Pacific, on the issue of inadequate warning devices. Following a jury trial against the railroad on the remaining issue of negligence, the jury returned a verdict in favor of Union Pacific. For reversal, Appellants argue that the trial court erred by (1) finding that the claim against Bonds Fertilizer was barred based on the exclusive-remedy of the Workers' Compensation Act; and (2) refusing to find that Union Pacific was collaterally estopped from raising the defense of federal preemption on the claim of inadequate warning devices. The latter point is one of first impression, while the former raises a significant issue needing further development or clarification of the law. Our jurisdiction is thus pursuant to Ark. Sup.

[1] Bonds Brothers is not a party to this appeal.

Ct. R. 1-2(b)(1) and (5). We reverse and remand on the first point and affirm on the second point.

I. Summary Judgment to Bonds Fertilizer

For his first point on appeal, Johnson[2] argues that the trial court erred in granting summary judgment to Bonds Fertilizer, based on the finding that it was Johnson's employer at the time of the accident and had paid workers' compensation benefits to him. Johnson contends that on the date of the accident, he was working for Bonds Brothers Partnership Trust ("the Farm"), not for Bonds Fertilizer. He admits, however, that he was employed by both entities. He maintains that despite his concurrent employment, he was performing work exclusively for the Farm at the time of the accident and immediately prior to the accident. Thus, he contends that he may proceed in circuit court against Bonds Fertilizer.

The record reflects that, on the date of the accident, Johnson was an employee of both the Farm and Bonds Fertilizer. Both companies, along with Bonds Brothers, were either owned or controlled by Kenny Bonds and Brian Bonds. Kenny and Brian each owned fifty percent of Bonds Brothers. Bonds Brothers is the sole shareholder of Bonds Fertilizer. The Farm is a partnership comprised of Kenny Bonds Farms, Brian A. Bonds Trust, and Bonds Brothers. When Johnson performed work for either the Farm or Bonds Fertilizer, he reported to the same supervisor, Allan Maxey. Some weeks, Johnson would perform tasks for both employers, but he would receive only one paycheck, from the company that he did the most work for that week. The week before the accident and the week of the accident, Johnson was paid by Bonds Fertilizer.

On the morning of the accident, Johnson was performing work for the Farm, because one of the Farm's employees was out sick. That afternoon, Johnson was supposed to deliver a load of fertilizer that was coming in at 3:00 p.m. for Bonds Fertilizer. In the meantime, around 1:00 p.m., Maxey instructed Johnson to pick up a tractor for the Farm and begin laying irrigation pipe. Maxey instructed Johnson to ride with Frances Birmingham, an

---

[2] For clarity and ease of writing, we hereafter refer to Appellants collectively as "Johnson."

employee of Bonds Fertilizer. Alyston Luster, an employee of the Farm, also rode with them. The truck they were riding in was owned by Bonds Brothers, and it had a 1,000-gallon water tank hooked to the back.

When they approached the railroad crossing at Clemmons Road, Birmingham applied the brakes and slowed the truck to one or two miles per hour. She did not come to a complete stop. According to their depositions, both Birmingham and Johnson looked both ways to see if a train was coming. Neither of them saw or heard a train. Birmingham then began driving the truck across the track, when Johnson hollered for her to "step on it." The train collided with the bed of the truck, throwing all three passengers from the vehicle. Johnson and Birmingham received serious injuries from the collision, but Luster's injuries were fatal.

Following the accident, Kenny Bonds reported Johnson's accident to the insurance carrier for Bonds Fertilizer. The insurance carrier approved the claim and paid approximately $61,000 in medical and temporary total disability benefits to or on behalf of Johnson. Johnson accepted these benefits for over nine months, from July 1995 to April 1996. Subsequently, in February 1998, Johnson made a claim for additional benefits, listing as his employer: "Bonds Fertilizer, Inc. or Bonds Brothers Farms, Inc." That claim was later withdrawn by Johnson, in favor of the civil suit.

Based on these facts, the trial court granted summary judgment to Bonds Fertilizer. The trial court found that Bonds Fertilizer was Johnson's employer at the time of the accident. The trial court also found that because Johnson had received workers' compensation benefits and had made no attempt to repay those benefits, his exclusive remedy against the company was under the Workers' Compensation Act.

Johnson urges us to reverse the grant of summary judgment. However, before we may reach the merits of his argument, we must first address the argument made by Bonds Fertilizer that the trial court lacked jurisdiction to determine which employer Johnson was working for at the time of the accident. Bonds argues that the exclusive jurisdiction to determine this issue belongs to the Arkansas Workers' Compensation Commission. We agree.

In *VanWagoner v. Beverly Enters.*, 334 Ark. 12, 13, 970 S.W.2d 810, 811 (1998), this court held that "the commission has exclusive, original jurisdiction to determine the fact issues establishing its jurisdiction." There, the appellant had filed suit against her employer in circuit court. On motion of her employer, the circuit court dismissed with prejudice the tort action on the ground that it was barred by the exclusive-remedy provision of the Act. The appeal was certified to us from the Arkansas Court of Appeals, to decide whether the Commission or the circuit court should determine the applicability of the Workers' Compensation Act. This court held that such determination belonged exclusively to the Commission:

> *We believe that the better rule is* to recognize the administrative law rule of primary jurisdiction and *to allow the Workers' Compensation Commission to decide whether an employee's injuries are covered by the Workers' Compensation Act.*
>
> . . . .
>
> *We hold* that the exclusive remedy of an employee or her representative on account of injury or death arising out of and in the course of her employment is a claim for compensation under § 11-9-105, and *that the commission has exclusive, original jurisdiction to determine the facts that establish jurisdiction, unless the facts are so one-sided that the issue is no longer one of fact but one of law, such as an intentional tort. See Angle v. Alexander*, 328 Ark. 714, 719, 945 S.W.2d 933 (1997) (citing *Miller v. Ensco, Inc.*, 286 Ark. 458, 461, 692 S.W.2d 615 (1985) (explaining that, before an employee is free to bring a tort action for damages against an employer, the facts must show that the employer had a "desire" to bring about the consequences of the acts, or that the acts were premeditated with the specific intent to injure the employee). In so holding, we overrule all prior decisions to the extent that they are inconsistent with this opinion.

Id. at 15-16, 970 S.W.2d at 812 (emphasis added). In adopting this rule, this court pointed out that the Commission has vast expertise in this area, and that the goals of uniformity, speed, and simplicity would best be achieved by granting the Commission the exclusive, original jurisdiction to determine the applicability of the Act.

Two years later, in *WENCO Franchise Mngm't, Inc. v. Chamness*, 341 Ark. 86, 13 S.W.3d 903 (2000) (*per curiam*), this court reiterated the holding in *VanWagoner*. There, the appellee injured her back when she slipped and fell at the Wendy's restaurant

where she worked. Her injury was accepted as compensable, and she received benefits. When she later sought additional benefits, her employer responded by arguing that she was not performing employment services at the time of her accident. A hearing was scheduled before the Workers' Compensation Commission, but was later canceled by the appellee. Thereafter, the appellee filed a negligence suit against her employer in circuit court. The employer filed a motion for summary judgment on the ground that the appellee's exclusive remedy was under the Act and that only the Commission had the authority to determine jurisdiction in the matter. The circuit court denied summary judgment, and the employer petitioned for a writ of prohibition. This court granted the writ based on the holding in *Van Wagoner* and held:

> In the present case, there is no dispute that Chamness was employed by WENCO at the time of the injury or that the injury occurred on WENCO's premises. Nor is it disputed that Chamness has already received workers' compensation benefits for her injury. Furthermore, it is not alleged by Chamness that her injury resulted from an intentional tort by WENCO. Accordingly, the Commission has exclusive authority to determine the facts that establish jurisdiction in this matter.

Id. at 88, 13 S.W.3d at 904.

Here, it is not disputed that Johnson's injuries occurred while he was performing employment services. The only issue is whether he was performing those services for Bonds Fertilizer or for the Farm. All of the evidence submitted below demonstrates that Johnson was employed by both the fertilizer company and the farm, and that he would receive a pay check from the employer that he performed the most work for during the week. The week before the accident, Johnson was paid by the fertilizer company. Likewise, the week of the accident, he was paid by the fertilizer company. The evidence also showed that Johnson's supervisor was the same, regardless of whether he was working for the fertilizer company or the farm.

On the morning of the accident, Johnson had been operating a tractor for the farm. He was filling in for a farm employee who was out sick. When he returned from lunch, his supervisor told him that he would not have a fertilizer shipment to deliver until 3:00 p.m. Johnson was then instructed to go with Birmingham to

pick up a tractor at one of the farming locations and begin laying irrigation pipe for the farm. Johnson was on his way to pick up the tractor when the accident occurred.

Johnson received workers' compensation benefits from Bonds Fertilizer's insurance carrier. The benefits were paid over a period of nine months following the accident. Thereafter, Johnson sought additional benefits from the Commission. In his application for those additional benefits, Johnson listed Bonds Fertilizer or the Farm as his employer.

Viewing these facts under the holdings in *Van Wagoner* and *Chamness*, we conclude that the Commission had the exclusive, original jurisdiction to determine whether Johnson's injuries were covered by the Act. The evidence adduced below is not so one-sided to demonstrate, as a matter of law, which employer Johnson was working for at the time of the accident. Thus, it is an issue of fact for the Commission to resolve. Accordingly, we reverse the trial court's grant of summary judgment to Bonds Fertilizer, as the trial court lacked jurisdiction to determine the applicability of the Act to Johnson's claim. We thus remand this matter to the trial court with leave for Johnson to pursue a determination before the Commission.[3]

II. Partial Summary Judgment to Union Pacific

For his second point on appeal, Johnson argues that the trial court erred in granting partial summary judgment to Union Pacific on the issue of inadequate warning devices. In the complaint, Johnson alleged that the railroad crossing where the accident occurred did not have adequate warning devices. It was undisputed that the crossing was only equipped with passive warning devices in the form of "crossbucks." There were no flashing lights or gates at this crossing. Union Pacific sought summary judgment on this claim, on the ground that the crossbucks were installed with federal funds according to procedures set out in federal law. Union Pacific asserted that federal law had removed the

[3] Our holding that the trial court lacked jurisdiction to determine the applicability of the Workers' Compensation Act to Johnson's claim against Bonds Fertilizer does not affect the trial court's, and consequently this court's, jurisdiction to determine Johnson's separate claims against Union Pacific, as those claims are not covered under the Act.

decision-making authority from the railroad and placed it in the hands of the state and federal government, and that, therefore, the railroad could not be held liable based on the alleged inadequacy of the warning devices.

In response, Johnson asserted that the federal-preemption defense was barred under the doctrine of collateral estoppel, because Union Pacific had unsuccessfully litigated this issue in the prior suit brought by Frances Birmingham in the federal district court. Johnson argued that the federal court's ruling precluded Union Pacific from raising the issue in state court, as the previous ruling was based on the same accident and the same crossing devices.

The trial court disagreed with Johnson's theory and granted partial summary judgment to Union Pacific. The trial court found that collateral estoppel did not apply, because the previous determination in federal court was not essential to the judgment in that case. The trial court explained that the jury in that prior case was presented with all the evidence, including that regarding the adequacy of the warning devices, and still found that Union Pacific was not negligent. The trial court also found that Johnson was attempting to use collateral estoppel offensively without mutuality of the parties. For the reasons set out below, we affirm.

■ ■ Collateral estoppel, also known as issue preclusion, bars relitigation of issues of law or fact previously litigated by a party. *Palmer v. Arkansas Council on Econ. Educ.*, 344 Ark. 461, 40 S.W.3d 784 (2001); *Zinger v. Terrell*, 336 Ark. 423, 985 S.W.2d 737 (1999). The elements of collateral estoppel are: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *Id.* The doctrine is applicable to preclude relitigation of issues in state court that were previously litigated in federal court. *Palmer*, 344 Ark. 461, 40 S.W.3d 784. Unlike *res judicata*, or claim preclusion, collateral estoppel does not require mutuality of parties before the doctrine is applicable. *Fisher v. Jones*, 311 Ark. 450, 844 S.W.2d 954 (1993).

Ordinarily, collateral estoppel is relied upon by a defendant to preclude a plaintiff from relitigating an issue that has previously

been decided adversely to the plaintiff. In the case at bar, however, the doctrine is being relied upon by the plaintiff to preclude a defendant from relitigating a defense. This court has not heretofore specifically approved of the offensive use of collateral estoppel to prevent a defendant from relitigating an issue.[4] Thus, this case is one of first impression in Arkansas.

In *Fisher*, 311 Ark. 450, 456, 844 S.W.2d 954, 958, this court determined that the concept of mutuality of parties was not necessary to raise the issue of defensive collateral estoppel. This court distinguished the defensive use of collateral estoppel from its offensive use, observing that the offensive use "is more controversial" than the defensive use of the doctrine. This court noted, however, that the Supreme Court had approved the offensive use of collateral estoppel in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979).

In *Parklane Hosiery*, the Court defined offensive collateral estoppel as occurring "when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." *Id.* at 326 n.4. The Court concluded that trial courts should be given broad discretion in determining when offensive collateral estoppel applies. This conclusion was based on the Court's determinations that the offensive use of collateral estoppel does not promote judicial economy in the same way that defensive estoppel does, and that its use may be unfair to a defendant. By way of illustration only, the Court observed that the offensive use of collateral estoppel may be unfair (1) where the defendant in the first action is sued for small or nominal damages and thus may not have had great incentive to defend vigorously; (2) where the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favor of the defendant; and (3) where the second action affords the defendant procedural opportunities

[4] Contrary to Johnson's argument, this court's holding in *Zinger*, 336 Ark. 423, 985 S.W.2d 737, did not approve of the offensive use of collateral estoppel. Rather, that case merely carved out a narrow exception to the long-standing law that a judgment in a criminal case is neither a bar to a subsequent civil proceeding founded on the same facts nor proof of anything except its rendition. The exception recognized in *Zinger* was that a prior criminal conviction for *murder* acts as a bar to relitigating the same issue for the same defendant in civil court. Beyond that, this court did not address the issue of collateral estoppel for other criminal convictions.

unavailable in the first action that could cause a different result. The Court then held:

> We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. *The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.*

Id. at 331 (emphasis added) (footnote omitted).

We agree with the Court's holding that the offensive use of collateral estoppel should be available only in limited cases, and that the trial court should be given broad discretion to determine if it should be applied. We further agree that mutuality of the parties is not necessary to invoke the doctrine, as it is, by its very definition, an attempt by a plaintiff to preclude a defendant from litigating an issue that the defendant has previously litigated unsuccessfully in an action with *another* party.

We hereby adopt the test promulgated by the Court. Using this test, we cannot say that the trial court abused its discretion in denying the use of the doctrine against Union Pacific, in an attempt to preclude it from raising the defense of federal preemption to Johnson's claim of inadequate warning devices. In the first place, Johnson easily could have joined in the first litigation against Union Pacific brought by Birmingham in federal court.[5]

In the second place, we agree that the offensive use of collateral estoppel in this case would be unfair to the defendant. The trial court pointed out in its order that since the federal district court ruled against Union Pacific on the issue of federal preemption, this court issued the opinion of *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997), which held that

[5] Indeed, the record reflects that Johnson initially filed this suit in federal court, but it was eventually dismissed for lack of diversity jurisdiction when he joined Bonds Fertilizer and Bonds Brothers.

federal funding is the touchstone of preemption in the area of railroad warning devices, because such funding indicates that the warning devices have been deemed adequate by federal regulators. In so holding, this court relied on the Eighth Circuit's holding in *Elrod v. Burlington N. R.R. Co.*, 68 F.3d 241 (1995), which applied the Supreme Court's holding in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993). The holding in *Sharp* conflicts with the earlier holding of the federal district court, which rejected the specific holding in *Elrod*. As such, the application of the offensive use of collateral estoppel against this defendant would be unfair.

Moreover, we are persuaded by Union Pacific's assertion that one of the specific factors provided by the Court in *Parklane Hosiery* is present in this case, namely that Union Pacific did not have the incentive to fully adjudicate the federal's courts ruling. It is undisputed that the Birmingham case was fully submitted to the federal jury, including the allegation that the warning devices were inadequate. It is also undisputed that the jury found that Union Pacific was not liable for Birmingham's injuries. Birmingham appealed to the Eighth Circuit Court of Appeals, and Union Pacific cross-appealed the district court's ruling on the federal-preemption issue. After Birmingham filed her appeal brief, Union Pacific withdrew its cross-appeal. According to Union Pacific, it withdrew its cross-appeal because it was convinced that the appellate court would affirm on direct appeal and would then decline to reach the cross-appeal on the ground of mootness. Thus, Union Pacific no longer had any incentive to pursue the issue on appeal.

In sum, we reverse the grant of summary judgment to Bonds Fertilizer and remand this matter to the trial court with leave for Johnson to seek a determination from the Commission as to whether he was performing employment services for Bonds Fertilizer or the Farm on the date of the accident. However, we affirm the grant of partial summary judgment to Union Pacific, as we conclude that the trial court did not abuse its discretion in determining that the doctrine of collateral estoppel was not applicable in this case.

Affirmed in part; reversed and remanded in part.

Becky ISLAND *v.* BUENA VISTA RESORT
and George Bogdanov

02-713 103 S.W.3d 671

Supreme Court of Arkansas
Opinion delivered April 17, 2003

[redacted]

Bachelor & Newell, by: *Angela R. Echols*, for appellant.

Farrar, Reis, Rowe, Nicolosi, Williams & Strause, by: *Bryan J. Reis*, for appellees.

RAY THORNTON, Justice. On September 6, 2000, appellant, Becky Island, filed a complaint against appellees, Buena Vista Resort and George Bogdanov. In her complaint, appellant asserted that she was an employee of Buena Vista Resort and that Bogdanov was the owner of Buena Vista Resort [BVR]. The complaint further alleged that during her employment with Buena Vista Resort, Bogdanov approached her and propositioned her for sex. The complaint also alleged that

Bogdanov had made lewd comments to appellant on several occasions. Finally, the complaint alleged that when appellant rejected Bogdanov's sexual advances, she was treated poorly, and eventually terminated from her job.

Based on the factual allegations, appellant asserted three causes of actions. First, she alleged that appellee Bogdanov's behavior violated the Arkansas Civil Rights Act. Next, she argued that appellees' actions were outrageous and caused her to suffer severe emotional distress. Finally, she asserted that she was wrongfully discharged in violation of the public policy of the State of Arkansas.

On January 30, 2002, appellees filed a motion seeking summary judgment. An affidavit from Bogdanov was attached to their motion. In his affidavit, Bogdanov stated that the reason appellant was terminated was because he was going to give her job to his son. He also denied that he had solicited appellant for sex or treated her differently during her employment. In support of their motion for summary judgment, appellees also attached appellant's claim for unemployment benefits in which appellant stated that she was separated from her job because "[Bogdanov] brought [his] son back to run [the] business." Finally, appellees attached appellant's deposition testimony to their motion for summary judgment.

Appellees also filed a brief in support of their motion for summary judgment. In their brief, they argued that appellant admitted that she was terminated for reasons other than rebuffing Bogdanov's sexual advances. They asserted that appellant admitted that she was terminated: (1) because Bogdanov's son was going to take her job; or (2) because her friend allegedly took some pears from Bogdanov's pear tree.

Additionally, appellees argued that appellant's claim under the Arkansas Civil Rights Act "must fail." They argued that "the Act protects persons against discrimination based on their status, it establishes certain protected classes, specifically, race, religion, national origin, gender, and disability. However, as has been shown, the termination of the plaintiff had nothing to do with her gender, but instead to a gender-neutral reason."

Appellees also asserted that they were entitled to summary judgment on appellant's "tort-of-outrage" cause of action. They

argued that Bogdanov's behavior did not rise to the level of outrageous and that appellant did not suffer severe emotional distress.

On February 19, 2002, appellant responded to appellees' motion for summary judgment. Appellant asserted that there were outstanding factual issues and that therefore summary judgment was not proper. Specifically, she argued that the jury should be permitted to determine the reason for her termination. She also asserted that she had established: (1) a violation of the Arkansas Civil Rights Act; (2) a cause of action for the tort of outrage; and (3) a cause of action for wrongful discharge. Attached to her response were copies of her deposition, Bogdanov's deposition, an affidavit from Mary Caldwell, and appellees' answers to interrogatories.

In a brief in support of her response to appellees' motion for summary judgment, appellant argued that there were outstanding factual disputes that must be resolved by a jury. First, she argued that a jury must determine whether Bogdanov's behavior constituted sexual harassment in violation of the Arkansas Civil Rights Act. Next, she argued that the jury should determine whether appellant was terminated for rebuffing Bogdanov's sexual advances. Finally, she argued that a jury should determine whether Bogdanov's actions supported a claim for outrage.

In a response to appellant's response, appellees argued that sexual harassment is not covered by the Arkansas Civil Rights Act and that the trial court could not look to federal Title VII cases when considering appellant's cause of action under that Act. Appellant countered this assertion.

On March 5, 2002, a hearing was held on appellees' motion for summary judgment. On April 16, 2002, the trial court issued its findings of fact and conclusions of law. The trial court found that there were no genuine issues of fact, and granted appellees' motion for summary judgment. The trial court also found as a matter of law that appellant was terminated because Bogdanov wanted to rehire his son. Next, the trial court concluded that because appellant's termination was not based on her gender, she failed to establish a cause of action pursuant to the Arkansas Civil Rights Act. Additionally, the trial court found that appellees were entitled to summary judgment on the wrongful-termination cause of action because appellant was an at-will employee, and as such,

could be terminated at any time. Finally, the trial court found that appellees' actions did not support a claim of outrage.

It is from this order that appellant appeals. We conclude that there are unresolved questions of fact relating to appellant's civil-rights claim and wrongful-termination claim, and remand the matter for development of those issues.

In *Palmer v. Council on Economic Education*, 344 Ark. 461, 40 S.W.3d 784 (2001), we outlined the rules governing motions for summary judgment. We wrote:

> [W]e 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.
>
> 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. Furthermore, the moving party may present pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, to support the burden of showing entitlement to summary judgment as a matter of law.

Id. (Citing Crockett v. Essex Home. Inc., 341 Ark. 558, 19 S.W.3d 585 (2000)). Additionally, in *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000), we noted:

> [W]e will not engage in a "sufficiency of the evidence" determination. We have ceased referring to summary judgment as a drastic remedy. We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we only approve the granting of the motion when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admission on file is such that the nonmoving party is not entitled to a day in court, i.e., when there is not any genuine remaining issue

> of fact and the moving party is entitled to judgment as a matter of law. *Id.* However, when there is no material dispute as to the facts, the court will determine whether "reasonable minds" could draw "reasonable" inconsistent hypotheses to render summary judgment inappropriate. In other words, when the facts are not at issue but possible inferences therefrom are, the court will consider whether those inferences can be reasonably drawn from the undisputed facts and whether reasonable minds might differ on those hypotheses.

Flentje, supra.

Guided by our rules governing the granting of summary judgment, we turn to appellant's first point on appeal. Appellant argues that the trial court erred when it determined that the Arkansas Civil Rights Act does not provide protection from workplace sexual harassment as a matter of law. The Arkansas Civil Rights Act, originally enacted in 1993, and codified at Ark. Code Ann. 16-123-101 *et seq.*, provides citizens of this State legal redress for civil-rights violations of State constitutional or statutory provisions, hate offenses, and discrimination offenses.

[redacted]. We have not had an opportunity to determine whether workplace sexual harassment is covered under the Arkansas Civil Rights Act. However, the express language of the Act appears to forbid such behavior. Specifically, Ark. Code Ann. § 16-123-107 (Supp. 2001) 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.

Id. This language may be interpreted as prohibiting discrimination such as workplace sexual harassment. However, because the Arkansas Civil Rights Act does not include language specifically prohibiting "workplace sexual harassment," we look to the federal courts for guidance. We have explained that our state courts may look to federal decisions for persuasive authority when considering claims under the Arkansas Civil Rights Act. *See Faulkner v. Arkansas Children's Hospital*, 347 Ark. 941, 69 S.W.3d 393 (2002);

Rudd v. Pulaski County Special School District, 341 Ark. 794, 20 S.W.3d 310 (2000); *Flentje, supra.*

Additionally, we note that the Arkansas Civil Rights Act expressly instructs us to look to federal civil-rights law when interpreting the Act. Specifically, Ark. Code Ann. § 16-123-105 (Supp. 2001) states:

> (c) 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.

Because we have not had an opportunity to consider this issue, and because the Arkansas Civil Rights Act instructs us to look to federal civil-rights law when interpreting the Act, we look now to Title VII and federal cases interpreting Title VII for guidance on sexual-harassment claims brought pursuant to the Arkansas Civil Rights Act. The federal courts have recognized a cause of action for sexual harassment under the following Title VII language:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

In *Henderson v. Simmons Foods Inc.*, 217 F.3d 612 (8th Cir. 2000), the Eighth Circuit Court of Appeals reviewed a sexual-harassment claim filed pursuant to the Arkansas Civil Rights Act. The Court of Appeals noted "claims premised under the Arkansas Civil Rights Act of 1993 are analyzed in the same manner as Title VII claims. *See* Ark. Code Ann. § 16-123-103(c)." *Henderson, supra.* Based upon its interpretation of our law, the Court of Appeals applied Title VII case law to Ms. Henderson's claim and determined that her employer had violated the Arkansas Civil Rights Act.

There are two distinct sexual-harassment claims which may be brought pursuant to Title VII. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Smith v. Foote's Dixie Dandy, Inc.*, 941 F. Supp. 807 (E.D. Ark. 1995). A worker may claim that she was subjected to sexual harassment due to a hostile work environment or a worker may claim that she was subjected to sexual harassment based on *quid pro quo*.

The plaintiff in *Henderson, supra*, argued that she suffered sexual harassment due to exposure to a hostile work environment. The Court of Appeals explained that "Title VII forbids sexual harassment in the workplace and imposes liability upon employers who tolerate a hostile work environment." There are five elements that must be present to establish a hostile work environment sexual-harassment claim pursuant to Title VII. *Henderson, supra.* Specifically,

> [A] plaintiff asserting a hostile work environment claim must show (1) membership in a protected group or class, (2) unwelcome sexual harassment (3) based upon gender (4) resulting in an effect on a term, condition, or privilege of employment, and (5) that the employer knew or should have known about the harassment and failed to take proper remedial action. *See Staton v. Maries County*, 868 F.2d 996, 998 (8th Cir. 1989). In addition, the plaintiff must show that the sexual harassment created an environment that was both objectively and subjectively abusive. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

Henderson, supra.

In *Smith v. Foote's Dixie Dandy, Inc., supra*, a case from the Arkansas Eastern District Federal Court in which a sexual-harassment claim was brought pursuant to the Arkansas Civil Rights Act and Title VII, the District Court explained:

> For a plaintiff [t]o make a *prima facie* case of *quid pro quo* harassment, [she] must show that (1) she was a member of a protected class; (2) she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment was based on sex; and (4) her submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment.

Id. (*Citing Cram v. Lamson & Sessions Co.*, 49 F.3d 466 (8th Cir. 1995) (internal citations omitted).

After reviewing the foregoing case law, we are persuaded that the trial court erred in determining that the Arkansas Civil Rights Act is not applicable to workplace sexual harassment.

Next, we must consider whether an issue of fact remains unresolved as to whether appellant was subjected to workplace sexual harassment. In the case now before us, appellant alleged in her complaint that "defendants' [Bogdanov's] behavior violated the plaintiff's rights in the workplace which are protected under the Arkansas Civil Rights Act." In support of this claim, appellant offered evidence of numerous facts. Appellant alleged that Bogdanov, who was her supervisor and owner of the business, offered to suspend her rent if she would have sex with him once a week. Appellant further alleged that Bogdanov asked if he could touch her breasts. She asserted that Bogdanov would also tell appellant about his sex life in "graphic detail" and that Bogdanov offered to purchase a car for her in exchange for sexual favors. Appellant also alleged that Bogdanov would frequently ask her to meet him at a hotel to engage in sexual activities. Appellant further alleged that Bogdanov made crude sexual comments to her while she was working. Finally, appellant alleged that when she firmly rebuffed Bogdanov, he treated her with disdain and she was terminated shortly thereafter.

In an affidavit attached to appellees' motion for summary judgment, appellee Bogdanov responded to appellant's allegations. He stated that he "never solicited sex from [appellant]. I never did anything more than comment favorably on her appearance."

In response to Bogdanov's denial, appellant offered Bogdanov's deposition. The following questions and answers from the deposition are relevant:

> Q: [appellant's attorney] Did you ever offer her [appellant] money for sex?
>
> A. [Bogdanov] I don't remember that I say that.
>
> Q. Is it possible that you did?
>
> A: I don't think, because I'm not a person that can have money.

* * *

Q: Did you ever ask her to have sex with you?

A: I don't remember.

* * *

Q: What I'm asking you Mr. Bogdanov is if Ms. Island testifies to the fact that you did ask her to have sex with you, are you able to dispute that or will you dispute that?

A: I don't remember say that.

* * *

Q: Did you ever have conversations with her about your sex life with your wife?

A: I don't remember.

In addition to the deposition testimony, appellant offered the affidavit of Mary Caldwell, a former employee of Buena Vista Resort, in support of her sexual-harassment claim. In her affidavit, Ms. Caldwell stated:

> Mr. Bogdanov began making some inappropriate sexual comments to me. Then, after a while, he took his actions a step further and began trying to touch and/or kiss me. Mr. Bogdanov offered me money to have sexual relations with him. This occurred on numerous occasions. He repeatedly asked me for sexual favors, and I always told him no. After I would reject him, however, he would become very angry with me. After a while, however, he would begin talking to me again and would start his sexual propositions all over again. It was an endless cycle.
>
> Mr. Bogdanov made comments about my body, including my breasts. He even made sexual comments about him and his wife's sexual relationship. Mr. Bogdanov would sit in the office and tell inappropriate nasty jokes.
>
> * * *
>
> Mr. Bogdanov tried to kiss me on more than one occasion, and I had to tell him no, which resulted in him becoming very angry with me. After I bought my new vehicle, a Toyota 4-Runner, Mr. Bogdanov offered to pay for it if I would have sex with him every week. I declined.
>
> * * *
>
> Other employees told [me] that Mr. Bogdanov acted in the same manner towards them. It was a very bad environment to work in,

> and the worst part was that there was no one to report his behavior to. Since he was the owner, there was no way to stop the harassment.

After reviewing the foregoing depositions and affidavits, we conclude that there is a genuine issue of material fact which remains to be resolved. Specifically, we conclude that the issue of whether Bogdanov's actions constituted sexual harassment in violation of the Arkansas Civil Rights Act raises questions of fact. His actions must be evaluated and a question of fact remains whether appellant was subjected to sexual harassment because she was working in a hostile working environment. There are also disputed facts that must be resolved before determining whether appellant was subjected to sexual harassment by offers of *quid pro quo*. Because we conclude that there are unresolved factual issues, we reverse the trial court and remand this case for further development of those issues.

Before leaving this point, we note that appellees argue that because they are able to give a non-gender-based reason for appellant's termination, she is precluded from pursuing a sexual-harassment claim under the Arkansas Civil Rights Act. Appellees' contention is misplaced. A review of the elements that must be established to present a valid sexual-harassment claim do not require the termination of the harassed employee. In fact, an employee who is the subject of sexual harassment sometimes remains an employee after the harassment. A lack of termination, or a non-gender-based reason for the employee's termination, does not extinguish a harassed employee's cause of action. Accordingly, we conclude that the possible existence of a non-gender-based reason for appellant's termination is not determinative of her sexual-harassment claim.

In her second point on appeal, appellant argues that the trial court erred in granting appellees summary judgment as a matter of law on appellant's claim for wrongful discharge. Specifically, she argues that although she was an employee-at-will, her termination for an alleged refusal to engage in sex for compensation violated public policy, and as such, constituted wrongful discharge.

We have repeatedly held that when an employee's contract of employment is for an indefinite term, either party may terminate the relationship without cause or at will. *Sterling Drug,*

Inc. v. Oxford, 294 Ark. 239, 743 S.W.2d 380 (1988). However, we have also noted that an at-will employee cannot be terminated if he or she is fired in violation of a well-established public policy of the State, but such public policy must be outlined in our statutes. *Palmer, supra.* Finally, we have explained that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the State. *Sterling Drug, supra.*

Considering the foregoing rules of law, we turn now to the case *sub judice.* In this case, appellant argues that summary judgment was not proper because there was a genuine issue of fact as to the reason for her termination. In her complaint, appellant alleged that "the defendants wrongfully discharged the plaintiff in violation of the public policy of Arkansas." In support of her contention, appellant asserted that "during the first week of September of 1999, the plaintiff had finally had enough [of unwanted sexual advances] and yelled at him [Bogdanov] to never speak dirty to her again. The defendant was caught off guard and said something in a foreign language and walked off. On September 9, 1999, the plaintiff was terminated from employment." The complaint further explains that prior to confronting appellant in September of 1999, Bogdanov had sexually propositioned her on several occasions. She alleged that Bogdanov offered to give her money to purchase a car and that Bogdanov offered to suspend her rent in exchange for sexual favors.

In an affidavit attached to their motion for summary judgment, Bogdanov stated that "I told the plaintiff that she was being terminated so that Sosh could return and run the business." Appellees also attached a notice from the Employment Security Department to their motion for summary judgment. In this notice, appellant states that she was terminated because "[appellee] brought [his] son back to run the business."

In appellant's deposition, which was attached to appellees' motion for summary judgment, she testified that appellee told her that she was being terminated so that Bogdanov's son Sosh could take her job. However, in her deposition, she also testified about the day that she confronted Bogdanov and stated that shortly thereafter she was terminated.

After reviewing the evidence, we conclude that there is a material question of fact that must be resolved. Specifically, we conclude that a factual issue of whether appellant was terminated in retaliation for rebuffing Bogdanov's sexual advances or whether she was terminated so that Bogdanov's son could take appellant's job remains to be resolved.

We further conclude that the public policy of the State of Arkansas prohibits the termination of at-will employees based on retaliation for rejecting solicitations to engage in sex in exchange for compensation. This position was fully discussed in *Lucas v. Brown & Root*, 736 F.2d 1202 (8th Cir. 1984), a case which we cited in *Sterling Drug, Inc., supra.* In *Lucas*, the Eighth Circuit Court of Appeals was asked to review plaintiff's wrongful-discharge claim which had been dismissed pursuant to Arkansas law. Ms. Lucas alleged that her supervisor had sexually propositioned her, and that when she rejected him, her employment was wrongfully terminated. Ms. Lucas's claim was brought pursuant to a breach-of-contract claim. After reviewing Ms. Lucas's claim, the Court of Appeals acknowledged our long-standing doctrine of employment at will. The Court of Appeals also explained that we recognized several exceptions to the basic rule that an employee at will can be terminated for any reason. The Eighth Circuit stated:

> The decisions of the Supreme Court of Arkansas establish two propositions: (1) that employees whose contracts are for no fixed term may ordinarily be discharged, just as they may ordinarily quit, for any reason or for no reason; and (2) that there are exceptions to this rule, coming into play when the reason alleged to be the basis for a discharge is so repugnant to the general good as to deserve the label "against public policy."

Id. After reviewing the public-policy exception to the employment-at-will doctrine, the Court of Appeals concluded that it was against the public policy of the State of Arkansas to terminate an employee for refusing to submit to sexual advances. The Court of Appeals continued:

> On this appeal we sit as just another court of the State of Arkansas, applying not our own private views of public policy (though no judge ever completely leaves them behind, because no person can), but the public policy of Arkansas as it has in the past been declared by the Supreme Court of the State and as we think it

> will be declared by that Court in the future. What we know of the shared moral values of the people of Arkansas and the considerable clues to be found in positive law point alike to the conclusion that this complaint does state a claim. Prostitution is a crime denounced by statute. It is defined as follows:
>
> > A person commits prostitution if in return for, or in expectation of a fee, he engages in or agrees or offers to engage in sexual activity with any other person.
>
> Ark. Stat. Ann. §§ 41-3002(1) (Supp. 1983). It is at once apparent that the shoe fits. A woman invited to trade herself for a job is in effect being asked to become a prostitute. If this were a criminal prosecution, it might be argued that a job is not a "fee" within the meaning of this statute, and a court, applying the maxim that criminal statutes are to be strictly construed, might agree, holding that "fee" means only money, and not other things of value. But in this civil action no such narrow interpretation is required or appropriate. A wage-paying job is logically and morally indistinguishable from the payment of cash. Indeed, it necessarily involves the payment of cash.

Lucas, supra. Having concluded that the alleged wrongful termination violated public policy, the Court of Appeals held:

> Plaintiff should not be penalized for refusing to do what the law forbids. And if she can prove that this is in fact what happened, and that her employer is responsible for it, she can recover damages for breach of contract. For it is an implied term of every contract of employment that neither party be required to do what the law forbids.

Id. See also Sterling Drug, supra (discussing *Lucas* and its holding).

We find the reasoning in *Lucas* very persuasive, and have no hesitancy in following the Eighth Circuit's lead in holding that the public policy of the State of Arkansas is violated when an at-will employee is terminated for rejecting a solicitation to engage in prostitution. Accordingly, without expressing an opinion as to the reason for appellant's termination, we hold that if she was terminated for refusing Bogdanov's sexual propositions, appellant has a valid cause of action for wrongful termination.

In her third point on appeal, appellant argues that the trial court erred in granting appellees summary judgment on her tort-of-outrage claim. We have recognized a cause of action

for the tort of outrage in an employment setting. *See M.B.M. Co., Inc. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980). We have explained that liability [for the tort of outrage] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Palmer, supra.* (*Citing the Restatement (Second) of Torts* § 46 Cmt. d (1965)).

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. *Faulkner v. Arkansas Children's Hosp.*, 347 Ark. 941, 69 S.W.3d 393 (2002).

In the case now before us, appellant's allegations of outrage stem from appellee Bogdanov's sexual advances. As previously discussed, appellant's complaint alleged that Bogdanov engaged in the following behavior: (1) offering to suspend appellant's rent and/or to give appellant money for the purchase of a new automobile in exchange for sex; (2) asking to touch appellant's breasts; (3) telling appellant about his sexual relationship with his wife in "graphic detail;" (4) making "sexual comments" to appellant about her body; (5) asking appellant to find women to have sex with him; and (6) asking appellant to meet him at hotels to engage in sexual activities. In her complaint, appellant also alleged that "as a result of the defendant's behavior [she] did suffer severe emotional distress."

In their answer to appellant's complaint, appellees denied all of appellant's allegations. Additionally, in his affidavit attached to appellees' motion for summary judgment, appellee Bogdanov stated "the allegations against me by the plaintiff are untrue. I never solicited sex from her. I never did anything more than comment favorably on her appearance."

In her deposition testimony, appellant reiterated all allegations of Bogdanov's unwanted sexual advances and stated that based on

her termination, she was "depressed." In appellee Bogdanov's deposition testimony, he denied some of appellant's allegations and stated that he could not remember whether he had engaged in any of her other allegations. Finally, an affidavit offered by Mary Caldwell corroborated appellant's allegations of Bogdanov's improper sexual advances towards employees of Buena Vista Resort.

After reviewing the evidence, the trial court found:

> Considering the allegations of the plaintiff as true, the alleged emotional distress of the plaintiff was not severe so as to support a claim of outrage. The plaintiff did not state or allege any peculiar susceptibility to emotional distress on her part, and the effect on the plaintiff from the alleged conduct of the defendant, according to her deposition testimony was inconsequential. In particular, the plaintiff testified that the defendant sometimes treated her poorly for a short period of time after an incident, but otherwise the relationship was unaffected.

While it is clear that the allegations of Bogdanov's behavior are egregious, it appears that appellant has failed to offer proof that she suffered damages or emotional distress so severe that no reasonable person could be expected to endure it.

We have concluded that the factually disputed issue whether appellant was fired for refusal to engage in sex for compensation gives rise to a claim for wrongful discharge that will withstand a motion for summary judgment, and that appellant's showing of sexual harassment prohibited by the Arkansas Civil Rights Act was sufficient to withstand a motion for summary judgment. However, appellant does not show, by affidavit or other proof, that she has suffered damages or emotional distress so severe that no reasonable person could endure it. In fact, it appears that she did endure the alleged harassment for several years before she firmly rejected his alleged advances and yelled at him "to never speak dirty to [me] again." We conclude that appellant has not offered proof showing that as a result of Bogdanov's behavior she suffered that level of damages or emotional distress sufficient to sustain an action for the tort of outrage. Accordingly, we affirm the trial court on this issue.

In appellant's final point on appeal, she argues that the trial court "clearly erred when it accepted as true all of the facts

set forth by Mr. Bogdanov and BVR, and totally ignored the facts set forth by Ms. Island." This argument appears to be repeating arguments raised in appellant's previous points on appeal. Having concluded that summary judgment was not proper on two of appellant's causes of action, we agree with appellant's contention. Specifically, we hold that because there are unresolved fact questions the trial court erred when it granted appellees' motion for summary judgment.

We conclude that allowing appellant her day in court for the consideration of factual issues relating to her allegations of a violation of our civil-rights act, and a violation of our public policy against wrongful discharge for refusing to breach a statutory prohibition against prostitution is required to resolve the disputed facts remaining in this case. Therefore, we remand this case to the trial court for development of those issues.

Affirmed in part; reversed and remanded in part.

CORBIN, J., not participating.

Gregory FISHER *v.* STATE of Arkansas

CR 03-323 104 S.W.3d 744

Supreme Court of Arkansas
Opinion delivered April 17, 2003

Charles E. Waldman, for appellant.

No response.

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

The appellant's attorney shall file within thirty days from the date of this per curiam a motion and affidavit in this case accepting full responsibility for not timely filing the transcript, and upon filing same, the motion will be granted and a copy of the opinion will be forwarded to the Committee on Professional Conduct.

The present motion for rule on the clerk is denied.

Paul Eugene HANLIN *v.* STATE of Arkansas

CR 03-344 104 S.W.3d 744

Supreme Court of Arkansas
Opinion delivered April 17, 2003

The Lisk Firm, by: *Lynn D. Lisk*, for appellant.

No response.

PER CURIAM. Appellant, Paul Eugene Hanlin, by and through his attorney, Lynn Lisk, has filed a motion for a rule on the clerk. His attorney, Lynn Lisk, 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.

Richard L. HAMILTON *v.* Teddy D. JONES et al.

02-749 102 S.W.3d 479

Supreme Court of Arkansas
Opinion delivered April 24, 2003

S. Butler Bernard, Jr., for appellant.

No response.

PER CURIAM. Former court reporter Iris Brooks filed a motion for clarification concerning the writ of *certiorari* issued in our *per curiam* order of April 10, 2003.

On January 16, 2003, we held a show-cause hearing so that Ms. Brooks could explain to the court why she should not be held

in contempt for failure to complete the record by the scheduled date. On January 23, 2003, we issued a contempt order wherein we directed Ms. Brooks to pay a reduced fine of $100.00 and referred the matter to the Arkansas Board of Certified Court Reporter Examiners. *See Hamilton v. Jones*, 351 Ark. 561, 95 S.W.3d 809 (2003).

On March 4, 2003, attorney, S. Butler Bernard, Jr., filed a petition with this court, requesting that we direct Ms. Brooks to complete the record and set a date for its completion. In an order granting the writ of *certiorari*, issued on April 10, 2003, we directed Ms. Brooks to complete the record within thirty days of the issuance of the order. However, on April 5, 2003, a few days prior to the issuance of the order, Ms. Brooks's court reporter's license was revoked by the Arkansas Board of Certified Court Reporter Examiners, and she was directed to deliver "all court records and tapes now in her possession" to Circuit Judge Victor Hill for delivery to the new court reporter, William Kisselberg. Ms. Brooks reports in her motion that she delivered "any and all verbatim records produced by [her] and all physical exhibits received or proffered in evidence in any court hearing, trial, or proceeding" to Judge Hill, and it is her understanding that all materials have been given to Mr. Kisselberg.

In response to our April 10, 2003, *per curiam* order, Ms. Brooks filed a motion for clarification, as she is no longer licensed to work as a court reporter and cannot perform those duties as we directed by the April 10, 2003 *per curiam* order. Under the circumstances, we revise our writ of *certiorari*, and now direct Mr. Kisselberg to complete the record within sixty days. Upon the filing of the record with our court clerk, the court clerk shall set a new briefing schedule.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]